A

NEW ABRIDGMENT

OF THE

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By MATTHEW BACON,
Of the MIDDLE TEMPLE, Esq;

THE FIFTH EDITION, CORRECTED;
WITH
Additional NOTES and REFERENCES of and to
MODERN DETERMINATIONS.

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OF THE

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WITH THEIR

DIVISIONS.

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(A) Of the Nature and ſeveral Kinds of Writs of Habeas Corpus.

WHEREVER a Perſon is reſtrained of his Liberty by being confined in a common Goal, or by a private Perſon, whether it be for a Criminal or Civil Cauſe, he may regularly by *Habeas Corpus* have his Body and Cauſe removed to ſome ſuperior Juriſdiction, which hath Authority to examine the Legality of ſuch

Vaugh. 136. *Buſhel's* Caſe. And that it is at this Day the moſt uſual Remedy to be relieved againſt a wrongful Impriſonment.

ſuch Commitment, and on the Return thereof either Bail, Diſcharge or Remand the Priſoner.

* Page 2

* The *Habeas Corpus ad Subjiciendum* is that which iſſues in Criminal Caſes, and is deemed (*a*) a Prerogative Writ, which the King may iſſue to any Place, as he has a Right to be informed of the State and Condition of the Priſoner, and for what Reaſons he is confined. It is alſo in regard to the Subject deemed his Writ of (*b*) Right, that is, ſuch a one as he is intitled to (*c*) *ex debito Juſtitiæ*, and is in Nature of a Writ of Error to examine the Legality of the Commitment; and therefore commands the Day, the Caption, and Cauſe of Detention to be returned.

2 Inſt. 55. 4 Inſt. 182. (*a*) Cro. Jac. 543. 2 Rol. Abr. 69. (*b*) That it is an ancient and legal Writ. Cro. Car. 466. But it is no original Writ. Carter 221. *per* Vaughan. (*c*) 4 Inſt. 290. Iſſued in Vacation, and returnable *immediate* before a Judge at his Chambers; does not expire by the coming in of the Term; but Defendant may be brought into Court upon the old Writ. Bur. Rep. 480, 542, 606.

The *Habeas Corpus ad faciendum & recipiendum* iſſues (*d*) only in Civil Caſes, and lies where a Perſon is ſued, and in Gaol, in ſome inferior Juriſdiction, and is willing to have the Cauſe determined in ſome ſuperior Court, which hath Juriſdiction over the Matter; in this Caſe the Body is to be removed by *Habeas Corpus*, but the Proceedings muſt be removed by *Certiorari* *.

For this *vide infra*. (*d*) If upon this Writ a Civil Action, and alſo a Matter of Crime be returned; as if a Perſon be arreſted for Debt, and alſo charged with a Warrant of a Juſtice of Peace for Felony. 1. If it appear to the Judge or Court, that the Arreſt for Debt, or other Civil Action, is fraudulent, they may remand him. 2. If it be found Real, they may commit him to the King's Bench with his Cauſes, though they are Matters of Crime; for that Court hath Conuſance as well of the Crime as of the Civil Action; but then in the Term the Court may take his Appearance or Bail to the Civil Action, and remand him, if they ſee Cauſe, as to the Crime to be proceeded on below; but upon the Writ *ad faciendum & recipiendum*, there ought not ſingly a Matter of Crime to be returned, for that belongs to the *Habeas Corpus ad Subjiciendum*. 2 Hal. Hiſt. P. C. 145. & *vide* 6 Mod. 133.

* See *infra*, 6. As to the *Habeas Corpus cum Cauſa*, *vide* 2 H. 5. St. 1. c. 2. 45 Eliz. c. 5. ſ. 2. and 21 Jac. 1. c. 23. ſ. 2. See the Practice in Harriſon's Practice of the King's Bench, 343, &c. *&c. vide poſt*, 15. n.

Dyer 197. a. 249. pl. 84. 296, 307. Mod. 235. Styl. Pract. Regiſt. 330.

There is likewiſe a Writ of *Habeas Corpus ad reſpondendum*, where a Perſon is confined in a Gaol for a Cauſe of Action accruing within ſome inferior Court; and a third Perſon hath alſo a Cauſe of Action againſt him; in which Caſe he may have this Writ in order to charge him in ſome ſuperior Court; for inferior Courts being tied down to Cauſes riſing within their own Juriſdiction, the Party would be without Remedy, unleſs allowed to ſue him in another Court; (*e*) but it ſeems, that regularly a Perſon confined in *B. R.* cannot be removed to the *C. B.* by this Writ, nor *vice verſa*; for in theſe Caſes there can be no Defect of Juſtice, as theſe Courts have (*f*) Conuſance as well of Local as Tranſitory Actions.

There

(*e*) If one in Priſon in the Counter be removed into the King's Bench by *Habeas Corpus*, and intending to go over to the *Fleet*, procures him ſome Friend to bring a *Habeas Corpus* to remove him thither, he ſhall not be removed thither till he has anſwered to the Cauſe in *B. R.* for he ſhall not compel the Plaintiff to follow after a prolling Defendant; and ſo *vice verſa* of the *Common Pleas*, each Court ſhall retain the Defendant where he is firſt attached, and after he has anſwered there, he may be carried any where. Salk. 350. pl. 1. (*f*) And therefore this Writ lies not to a County Palatine. Salk. 354. pl. 17.—nor to the Cinque Ports, unleſs the Action be local, ſo that they cannot have Conuſance of it. Mod. 20. 8 Mod. 22. 12 Mod. 666 †.

† See the Stat. 31 Car. 2. c. 2. ſ. 11. and ſee *infra*, 4, 6, 7, & 10. If a Defendant is in Cuſtody at the Suit of the Crown, he cannot be turned over on an *Habeas Corpus* to another Priſon, at the Inſtance of a private Perſon for Debt, if he alledges a Pardon by Act of Parliament, it muſt be by Suggeſtion on the Record, that the Crown may traverſe. Andr. 274.—A Priſoner in the *Fleet* for Contempt in the *Exchequer*, in not paying a Debt to the Crown, may be brought into *B. R.* by *Habeas Corpus*, and ſurrendered to the Marſhal, in diſcharge of Bail, in another Cauſe, and he cannot be remanded

There are alſo beſides theſe (*g*) other Writs of *Habeas Corpus*, as a *Habeas Corpus ad deliberandum & recipiendum*, which lies (*h*) to remove a * Perſon to the proper Place or County, where he committed ſome Criminal Offence.

* Page 3

(*g*) There is alſo a Writ of *Habeas Corpus ad ſatisfaciendum* after a Judgment; and on this Writ the Attorney for the Plaintiff muſt indorſe the Number-Roll of the Judgment on the Back of the Writ. Styl Regiſt. 331.——*Habeas Corpus* upon a *Cepi*, where the Party is taken and in Execution in the Court below.——So upon an Attachment out of Chancery, and a *Cepi Corpus* returned by the Sheriff, the next Step is a *Habeas Corpus*; for the Sheriff having executed the Command of the Writ of Attachment by taking the Body, he cannot carry him out of the County without the King's Writ.——There is alſo a Writ of *Habeas Corpus ad Teſtificand'*, which is to remove a Perſon in Confinement in order to give his Teſtimony in ſome Court of Juſtice; for which *vide* Styl. 119, 126, 230. 3 Keb. 51. Comb. 17, 48. † (*h*) A Perſon committing a Crime in *Barbadoes*, and apprehended here, may be ſent thither by *Habeas Corpus* and tried. 3 Keb. 560, 566, 568. *Warner*'s Caſe.——Alſo ſince the *Habeas Corpus* Act, a Perſon committing a criminal Offence in *Ireland* being here, may be ſent to *Ireland* and tried there, 2 Vent. 314. Col. *Lundy*'s Caſe. 2 Stra. 848. Barnard. *K. B.* 225. Fitzgib. 111. pl. 12. 14 Vin. Abr. 569. pl. 7.——Alſo Juſtices of Gaol-Delivery may ſend Priſoners by *Habeas Corpus* to the Sheriff of another County, and a Precept to the Sheriff of that other County to receive them, namely for a Felony committed in that County, though that County be out of the Circuit of the Juſtice that ſends them. 2 *Hale*'s Hiſt. P. C. 37. That if any *Habeas Corpus* come to receive a Priſoner from another Goal, the Goaler to take Notice of the Offence for which he ſtood committed at the other Gaol, and to inform the Court, that if he ſhall happen to be acquitted or have his Clergy, he may yet be remanded to the former Gaol, if there be Cauſe. Kelynge 4.——And that if any *Habeas Corpus* come to the Gaolers to remove a Priſoner, that with the Priſoner they alſo certify the Cauſe for which he ſtood there committed. Kelynge 4.

† *Habeas Corpus ad teſtificandum* lies to remove a Priſoner in Execution, to be a Witneſs; yet where it appears to be a Contrivance, the Court will not grant it; as if *A.* convicted of Bribery on the Oath of *B.* indicts him for Perjury on that very Oath, they will not grant it. *Rex* v. *Burbage*. T. 3 Geo. 3. 3 Bur. 1440.

(B) Of the Habeas Corpus ad Subjiciendum: And herein,

1. What Courts have Juriſdiction of granting it

IT is clear, that both by the Common Law, as alſo by the Statute *, the Courts of Chancery and King's Bench have Juriſdiction of awarding this Writ of *Habeas Corpus*, and that without any Privilege in the Perſon for whom it is awarded; but it ſeems, that by the Common Law the Court of King's Bench could only have awarded it in Term-time, but that the Chancery might have done it as well out as in Term, becauſe that Court is always open.

* 2 Inſt. 55. 4 Inſt. 190. 2 And. 297. 2 Jon. 13, 14, 17. * 31 Car. 2. c. 2.

If the *Habeas Corpus* iſſues out of Chancery, and on the Return thereof the Lord Chancellor finds that the Party was illegally reſtrained of his Liberty, he may diſcharge him, or if he finds it doubtful he may bail him; but then it muſt be to appear in the Court of King's Bench, for the Chancellor hath no Power to proceed in criminal Cauſes; or the Chancellor may commit the Party to the *Fleet*, and in Term-time may *Propriis manibus* deliver the Record into the King's Bench, together with the

2 Hal. Hiſt. P. C. 147. 2 Hawk. P. C. 114, 5.

manded to the *Fleet* on Motion; but an *Habeas Corpus* muſt be brought from the *Exchequer*; the Marſhal will return it there, and they may remand him to the *Fleet*. So, in Civil Cauſes, between Subjects, and in Criminal Cauſes at Suit of the Crown. 1 Wilſ. 248.—If a Defendant is to be charged in Execution on ſeveral Judgments, there muſt be an *Habeas Corpus* on every Judgment. 2 Barnes 179. There were different Plaintiffs.

the Body; and thereupon the Court of King's Bench may proceed to bail, diſcharge, or commit the Priſoner.

2 Hal. Hiſt. P. C. 147, 8. If the *Habeas Corpus*, and alſo a *Certiorari*, be granted returnable in Chancery, and the Cauſe and Body be returned there, they may be ſent into the King's Bench; if the Body only be returned with his Cauſes, by *Habeas Corpus* into the Chancery, and delivered over into the King's Bench, they may proceed to the Determination of the Return, and either by *Procedendo* remand him, or grant a *Certiorari* to certify the Record alſo, and thereupon commit or bail the Priſoner, as there ſhall be Cauſe.

2 Hal. Hiſt. P. C. 148. But the ſending an *Habeas Corpus ad faciendum & recipiendum* by the Chancellor for Perſons arreſted in Civil Cauſes, eſpecially being in Execution, is neither warrantable by Law nor ancient Uſage, and particularly forbidden by the Statute 2 *H.* 5. *ſtat.* 1. *cap.* 2. as to Perſons in Execution.

Dyer 175. b. pl. 26. 2 Inſt. 55. 3 Leon. 18. 4 Inſt. 70, 182, 290. Mod. 235. 2 Mod. 198. Vaugh. 155. Carter 221. 2 Vent. 22. Vaugh. 155. and ſeveral Precedents of Writs of *Habeas Corpus* of this Kind out of the Court of *C. B.* See *Wilkes*'s Caſe, in Digeſt of Law concerning Libels, 49, *&c.* with L. C. J. *Camden*'s Argument at large.

There are ſeveral ſtrong Opinions, that no *Habeas Corpus ad Subjiciendum* could by the Common Law iſſue out of the Courts of Exchequer or Common Pleas, unleſs it were in the Caſe of Privilege, becauſe theſe Courts are confined to Civil Cauſes merely; and therefore unleſs the Party were an Attorney, or intitled to the Privilege of the Court as an Officer, *&c.* or unleſs there had been a Suit commenced againſt him in thoſe Courts, they could not grant a *Habeas Corpus ad Subjiciendum*, though they might any other Writ of *Habeas Corpus*.

But notwithſtanding theſe Opinions it was holden in *Buſhel*'s Caſe, that the Court of Common Pleas may iſſue a *Habeas Corpus ad Subjiciendum*, and that if it appeared on the Return thereof that the Party was impriſoned and detained againſt Law, the Court might, though there was no Privilege, in the Caſe, diſcharge him; for that to remand him would be an Act of Injuſtice in the Court, and contrary to *Magna Charta*.

* Page 4 2 Hal. Hiſt. P. C. 144. * Alſo by the Statute of 16 *Car.* 1. *cap.* 10. they have an original Juriſdiction to bail, diſcharge, or commit, upon an *Habeas Corpus* for one committed by the Council-Table, as well as the King's Bench, and that although there be no Privilege for the Perſon committed.

2 Jon. 14, 17. Alſo by the *Habeas Corpus* Act, 31 *Car.* 2. *cap.* 2. any of the ſaid Courts in Term-time, and any Judge of either Bench, or Baron of the Exchequer, being of the Degree of the Coif, in the Vacation, may award a *Habeas Corpus* for *any Priſoner whatſoever*, and on the Return thereof diſcharge him, if it ſhall clearly appear that the Commitment was againſt Law, as being made by one who had no Juriſdiction of the Cauſe, or for a Matter for which no Man ought by Law to be puniſhed; or bail him, if it ſhall be doubtful whether the Commitment were legal or not; or remand him, according to the Nature and Circumſtances of the Caſe.

2. To what Places it may be granted.

2 Rol. Abr. 69. Cro. Jac. 543. It hath been already obſerved, that the Writ of *Habeas Corpus* is a Prerogative Writ, and that therefore by the Common Law it lies to any Part of the King's Dominions; for the King ought to have an Account why any of his Subjects are impriſoned, and therefore no Anſwer will ſatisfy the Writ, but to return the Cauſe with *Paratum habeo Corpus*, *&c.*

Palm. 54. Hence it was held, that this Writ lay to (*a*) *Calice* at the Time it was ſubject to the King of *England*. It

(*a*) Error of a Judgment in the King's Bench in *Ireland*; it was ſuggeſted, that the Plaintiff was in Execution upon the Judgment in *Ireland*; and the Court ſeemed to be of Opinion, that a *Habeas Corpus* might be ſent thither to

It hath been held, that this Writ lies to the *Marches of Wales*, as it does to all other Courts which derive their Authority from the King, as all the Courts exerciſing Juriſdiction within his Dominions do, and that it being a Prerogative Writ does not come within the Rule *Brevia Domini Regis non currunt*, &c. for that muſt be underſtood of Writs between Party and Party. 2 Rol. Abr. 69. *Wetherley* and *Wetherley*.

Alſo it hath been adjudged that (*b*) this Writ lies to the (*c*) Cinque Ports, to *Berwick*, although objected to have been Part of *Scotland*, and to the (*d*) County Palatine.

(*b*) But a *Habeas Corpus ad faciendum & recipiendum* does not lie to the Cinque Ports. Sid. 431. (*c*) Palm. 54, 5. 96. *Bourne*'s Caſe. Cro. Jac. 543. S. C. adjudged. 2 Rol. Abr. 69. (*d*) Latch 160. *Jobſon*'s Caſe. 3 Keb. 279.

Alſo by the *Habeas Corpus* Act, 31 *Car.* 2. *cap.* 2. *par.* 11. it is enacted and declared, "That an *Habeas Corpus*, according to the Intent and "true Meaning of the Act, may be directed and run into any County "Palatine, the Cinque Ports, or other privileged Places within the King-"dom of *England*, Dominion of *Wales*, or Town of *Berwick* upon *Tweed*, "and the Iſles of *Jerſey* or *Guernſey*; any Law, &c."

3. In what Caſes it is to be granted, and where it is the proper Remedy.

A *Habeas Corpus* is a Writ of Right, which the Subject may demand, and is the moſt uſual Remedy, by which a Man is reſtored again to his Liberty, if he hath been againſt Law deprived of it. Vaugh. 136. for impreſſed Men. Bur. Rep. 339, 340, 637. for a Wife. *id.* 542. For a young Lady, who had been decoyed away from her Father. *id.* 606. For a Priſoner of War. 2 Bur. Rep. 765.

* By the 31 *Car.* 2. *cap.* 2. *par.* 9. it is enacted, "That if any Subject * Page 5
"of this Realm ſhall be committed to any Priſon, or in Cuſtody of any "Officer or Officers whatſoever, for any criminal or ſuppoſed criminal Mat-"ter, that the ſaid Perſon ſhall not be removed from the ſaid Priſon and "Cuſtody into the Cuſtody of any other Officer or Officers, unleſs it be by "*Habeas Corpus*, or ſome other legal Writ; or where the Priſoner is deli-"vered to the Conſtable, or other inferior Officer, to carry ſuch Priſoner "to ſome common Goal; or where any Perſon is ſent by Order of any "Judge of Aſſize, or Juſtice of the Peace, to any common Workhouſe or "Houſe of Correction; or where the Priſoner is removed from one Priſon "or Place to another within the ſame County, in order to a Trial or Diſ-"charge by due Courſe of Law; or in caſe of ſudden Fire or Infection, "or other Neceſſity, upon pain, that he who makes out, ſigns or counter-"ſigns, or obeys or executes ſuch Warrants, ſhall forfeit to the Party "grieved One hundred Pounds for the firſt Offence, Two hundred Pounds "for the ſecond, &c."

If a Party be impriſoned againſt Law, though he is intitled to a *Habeas Corpus*, yet may he have an Action of falſe Impriſonment, in which he ſhall recover Damages in proportion to the Injury done him. Fitz. *corpus cum cauſa* 2. 9 H. 6. 44. a. 2 Inſt. 55. 10 H. 7. 17. 5 Co. 64. March 117. 11 Co. 98, 99.

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to remove him, as Writs Mandatory had been awarded to *Calais*, and now to *Jerſey*, *Guernſey*. Vent. 357. ‡——A *Habeas Corpus* granted to *Jerſey*. Sid. 386.

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‡ *Sed qu.* As to *Ireland*?

But.

Mod. 119. 3 Keb. 322, 358. But it was held in *Buſhel*'s Caſe, who together with the other Jurors appointed to try an Indictment for a Riot between the King and *Pen* and *Mead*, were fined at the *Old Bailey*, becauſe they found a Verdict *contra plenam evidentiam & directionem curiæ in Materia legis*; and for Non-payment of the Fine, divers of them being committed to Priſon, who brought their *Habeas Corpus* in *C. B.* and the Impriſonment (*a*) held illegal; in ſeveral Conferences with all the Judges, that yet no Action lay againſt the Commiſſioners, becauſe they acted as Judges, and Commiſſioners of *Oyer* and *Terminer* can no more be puniſhed for an erroneous Commitment, than they can be for an erroneous Judgment; and the higheſt Remedy the Party in this Caſe can have is a Writ of *Habeas Corpus*.

(*a*) Vaugh. 153. 2 Jon. 13. S.d. 273.

2 Lev. 128. If a Huſband confine his Wife, ſhe may have a *Habeas Corpus*; but the Judges on the Return of it cannot remove the Wife from her Huſband.

Lady *Leigh*'s Caſe, Mich. 26 Car. 2. in *B. R.* A Motion was made for a *Habeas Corpus* to the Lord *Leigh*, for having in Court the Body of his Wife; and the Caſe was, the Parties were married in 1669, and becauſe they were both within Age, no Settlement was made; in 1671, Lord *Leigh* perſuades his Wife to levy a Fine of ſome Lands of 900*l. per Ann.* whereof ſhe had the Inheritance, to him and his Heirs; and becauſe ſhe prayed to adviſe with her Friends, he confined her until her Mother had petitioned the King and Council; and there the Matter was referred to three Lords of the Council; and they made an Award, which the Lady *Leigh* was ready to perform; but the Lord *Leigh* brought to her an Inſtrument to be ſealed, upon which ſhe made the ſame Requeſt as before, that ſhe might adviſe with her Friends, but he refuſed to permit it, and preſently compelled his Wife to go with him to his Houſe in the Country, where he made her his Priſoner; and though by the barbarous Uſage of her Huſband ſhe fell ſick, yet he would not let her have Phyſicians or Servants to attend her, or to be viſited by her Friends; & *per Cur.* a *Habeas Corpus* was granted, for this is a Writ of Right, which the Subject may demand, and the King ought to have an Account of his Subject; and though it was objected that here was no Affidavit but of ſuch Complaint as the Lady *Leigh* had made in a Letter to her Mother, yet the *Habeas Corpus* ſhall go to put the Lady in a Condition to make Oath of this Matter herſelf, and to exhibit Articles againſt her Huſband; for here is ſufficient Matter to compel him to find Sureties of the Peace, and of his good Behaviour alſo; for this Treatment the Lady may ſue out a Divorce *propter ſævitiam*; and in a like Caſe between Sir *Philip Howard* and his Wife a *Habeas Corpus* was granted; and in this Caſe an Attachment may be granted * againſt my Lord *Leigh*, if he refuſes Obedience to the Writ, for being a Contempt, a Peer has no Privilege.

2 Lev. 128. 3 Keb. 433. S. C.

Bur. Rep. 632. Earl *Ferrer*'s Caſe.

* Page 6

4 Inſt. 290. If a Perſon be taken in the Manner within a Foreſt killing or chaſing Deer, &c. and the Officer upon Tender of ſufficient Sureties refuſes to bail him, he may have a *Habeas* out of the Courts at *Weſtminſter*, which Courts may bail him to appear at the next Eyre holden for the Foreſt; and this the rather, becauſe Juſtice-Seats are but ſeldom holden, and the Party, without this Remedy, might be obliged to continue a long Time in Confinement.

Vern 24. *Dominus Rex* v. *Sneller*; & *vide* Sid. 181. Keb. 683. If a Perſon be excommunicated, and the *Significavit* does not expreſs that the Cauſe of Excommunication is for any of the Offences within the Statute 5 *Eliz. cap.* 23. the Remedy expreſsly appointed upon that Statute is a *Habeas Corpus*, and upon the Return of it the Parties ſhall be diſcharged.

Salk. 359. pl. 4. *per Holt* C J. If the Chief Juſtice of the King's Bench commit one to the Marſhal by his Warrant, he ought not to be brought to the Bar by Rule, but by *Habeas Corpus*.

A Per-

A Perſon convicted of Horſe-ſtealing, and in Gaol at *St Albans*, was brought by *Habeas Corpus* and *Certiorari* to *B. R.* and the Court demanded of him what he could ſay why Execution ſhould not be done upon the Indictment; and becauſe he could not ſhew good Cauſe to ſtay the Execution, he was committed to the Marſhal, who was commanded to do Execution, and the next Day he was hanged. Cro. Car. 176.

If a Perſon be in Cuſtody, and alſo indicted for ſome Offence in the inferior Court, there muſt, beſide the *Habeas Corpus* to remove the Body, be a *Certiorari* to remove the Record; for as the *Certiorari* alone removes not the Body, ſo the *Habeas Corpus* alone removes not the Record itſelf, but only the Priſoner with the Cauſe of his Commitment; and therefore, altho' upon the *Habeas Corpus*, and the Return thereof, the Court can judge of the Sufficiency or Inſufficiency of the Return and Commitment, and bail or diſcharge, or remand the Priſoner, as the Caſe appears upon the Return; yet they cannot upon the bare Return of the *Habeas Corpus* give any Judgment, or proceed upon the Record of the Indictment, Order or Judgment, without the Record itſelf be removed by *Certiorari*; but the ſame ſtands in the ſame Force it did, though the Return ſhould be adjudged inſufficient, and the Party diſcharged thereupon of his Impriſonment; and the Court below may iſſue new Proceſs upon the Indictment. 2 Hal. Hiſt. 210, 211. Salk. 325. pl. 13. Comb. 2.

But it is otherwiſe in a *Habeas Corpus* in Civil Cauſes, which ſuſpends the Power of the inferior Court, ſo that if they proceed after, their Proceedings are *coram non judice* †. Salk. 352. pl. 13.

† A Man impreſſed under a Preſs-act, who is not in Cuſtody, (either as having abſconded, or as being promoted to be a Corporal,) cannot bring *Habeas Corpus*; but the Court will, on Motion, grant a Rule to the Commiſſioners for putting the Act in Execution, to ſhew Cauſe why he ſhould not be diſcharged. *Rex* v. *Dawes*, *Rex* v. *Keſſel*, T. 31 Geo. 2. 1 Bur. 636, 7.—If the Perſon confined is too weak to be brought into Court, they will make a Rule that certain Perſons ſhall have Acceſs to him. 2 Bur. 1099, 1115.—But will not give that Liberty unleſs to Perſons who have ſome Pretenſion to demand it. 3 Bur. 1362.

4. How far the Courts have a Diſcretionary Power in granting or denying it: And therein of the *Habeas Corpus* Act.

Notwithſtanding the Writ of *Habeas Corpus* be a Writ of Right, and what the Subject is intitled to, yet the Proviſion of the Law herein being in a great meaſure illuded by the Judges being only enabled to award it in Term-time, as alſo by an imagined Notion in the Judges that they had a diſcretionary Power of granting or refuſing it; but eſpecially by the Art and Contrivance of Officers, to whom it was directed, who uſed great Delays in making any Return to it. 4 Inſt. 290. 3 Bulſ. 27.

By the 31 *Car.* 2. *cap.* 2. commonly called the *Habeas Corpus* Act, reciting, "That great Delays had been uſed by Sheriffs, Gaolers, and other "* Officers, to whoſe Cuſtody the King's Subjects had been committed for "Criminal or ſuppoſed Criminal Matters, in making Return of Writs of "*Habeas Corpus*, by ſtanding out an *Alias* and *Pluries*, and ſometimes "more, and by other Shifts, to avoid their yielding Obedience to ſuch "Writs, contrary to their Duty and the known Laws of the Land, where-"by many Subjects have been detained in Priſon in ſuch Caſes, where by "Law they were bailable." * Page 7

Upon this Statute Mr. *Burn* obſerves two Things; 1. That although the Conſtable by his own Authority, without any Warrant of Commitment may carry an Offender to Goal; and this was the Method of ſecuring Priſoners before there were any Juſtices of the Peace; yet ſince the Inſtitution of that Magiſtrate it is better that they be carried before him, to be ſent by him to Gaol by Warrant of Commitment; otherwiſe they have a Right to be bailed upon this Act whatever the Offence may be. 2. That the Warrant of Commitment

There-

Thereupon it is enacted, " That whenſoever *any Perſon* ſhall bring *any* " *Habeas Corpus*, directed unto any Perſon whatſoever, for any Perſon in " his Cuſtody, and the ſaid Writ ſhall be ſerved on the ſaid Officer, or left " at the Gaol or Priſon with any of the Under-Officers, Under Keepers, or " Deputy of the ſaid Officers or Keepers, that the ſaid Officer or Officers, " his or their Under-Officers, Under-Keepers or Deputies, ſhall within " three Days after ſuch Service thereof; (unleſs the Commitment were for " Treaſon or Felony, plainly and ſpecially expreſſed in the Warrant of ‡ *Vide infra* 11. " Commitment) upon Payment or Tender of the Charges ‡ of bringing " the ſaid Priſoner to be aſcertained by the Judge or Court that awarded the " ſame, and endorſed on the ſaid Writ, not exceeding 12*d. per* Mile, and " on Security given by his own Bond to pay the Charges of carrying back " the Priſoner if he ſhould be remanded, and that he will not make any " Eſcape by the Way, make Return of ſuch a Writ, and bring or cauſe to " be brought the Body of the Party ſo committed or reſtrained unto or " before the Lord Chancellor, or the Lord Keeper, or the Judges or Ba- " rons of the Court from which the ſaid Writ ſhall iſſue, or ſuch other " Perſons before whom the ſaid Writ is made returnable, according to the " Command thereof; and ſhall then likewiſe certify the true Cauſes of his " Detainer or Impriſonment, unleſs the Commitment be in a Place beyond " twenty Miles Diſtance, *&c.* and if beyond the Diſtance of twenty, and " not above one Hundred Miles, then within the Space of ten Days; " and if beyond the Diſtance of one hundred Miles, then within the Space " of twenty Days."

And it is further enacted, *par.* 3. " That all ſuch Writs ſhall be marked " in this Manner, *Per ſtat'um triceſimo primo Caroli ſecundi Regis*, and ſhall " be ſigned by the Perſon that awards the ſame; and if any Perſon ſhall be " or ſtand committed or detained as aforeſaid for any Crime, unleſs for " Treaſon or Felony, plainly expreſſed in the Warrant of Commitment, in " the Vacation-time, it ſhall be lawful for ſuch Perſon ſo committed or de- " tained, (other than Perſons convict or in Execution by legal Proceſs) or " any one on his Behalf, to complain to the Lord Chancellor, or Lord " Keeper, or any Juſtice of either Bench, or Baron of the Exchequer, of " the Degree of the Coif; and the ſaid Lord Chancellor, *&c.* Juſtice or " Baron on View of the Copy of the Warrant of the Commitment, or " otherwiſe on Oath that it was denied, are authorized and required, on " Requeſt in Writing, (by ſuch Perſon, or any in his Behalf, atteſted and (*a*) One Wit- neſs with an Affidavit that the other is ſick, is ſufficient. Comb. 6. " ſubſcribed by (*a*) two Witneſſes who were preſent at the Delivery of the " ſame, to grant an *Habeas Corpus* under the Seal of the Court, whereof he " ſhall be one of the Judges, to be directed to the Officer in whoſe Cuſtody " the Party ſhall be returnable *immediatè* before the ſaid Lord Chancellor, " *&c.* Juſtice or Baron; and on Service thereof as aforeſaid, the Officer, *&c.* " in whoſe Cuſtody the Party is, ſhall, within the Times reſpectively before " limited, bring him before the ſaid Lord Chancellor, Juſtice or Baron, " before whom the ſaid Writ is returnable; and in caſe of his Abſence, " before any other of them, with the Return of ſuch Writ, and the true " Cauſes of the Commitment and Detainer; and thereupon, within two " Days after the Party ſhall be brought before them, the ſaid Lord Chan- " cellor, Juſtice or Baron, before whom the Priſoner ſhall be brought as " aforeſaid, ſhall diſcharge the ſaid Priſoner from his Impriſonment, taking " his Recognizance, with one or more Sureties, in any Sum, according to

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ment ought to ſet forth the Cauſe ſpecially, that is to ſay, not for Treaſon or Felony in general, but Treaſon *for counterfeiting the King's Coin*, or Felony *for ſtealing the Goods of ſuch an one to ſuch a Value*, and the like, that ſo the Court may judge thereupon whether or no the Offence is ſuch for which a Priſoner ought to be admitted to Bail. Burn. 64.

" their

* " their Diſcretions, having Regard to the Quality of the Priſoner, and * Page 8
" Nature of the Offence, for his Appearance in the King's Bench the
" Term following, or in ſuch other Court where the Offence is properly
" cognizable, as the Caſe ſhall require; and then ſhall certify the ſaid
" Writ, with the Return thereof, and the Recognizance into ſuch Court,
" unleſs it be made appear to the ſaid Lord Chancellor, &c. that the Party
" ſo committed is detained upon a legal Proceſs, Order or Warrant, out
" of ſome Court that hath Juriſdiction of Criminal Matters, or by ſome
" Warrant ſigned and ſealed with the Hand and Seal of any of the ſaid
" Juſtices or Barons, or ſome Juſtice or Juſtices of the Peace, for ſuch
" Matters or Offences, for the which by Law the Priſoner is not bail-
" able."

But it is provided, *par.* 4. " That if any Perſon ſhall have wilfully ne-
" glected, by the Space of two whole Terms after his Impriſonment, to
" pray a *Habeas Corpus* for his Enlargement, he ſhall not have a *Habeas*
" *Corpus* to be granted in Vacation-time in Purſuance of this Act.

And it is further enacted by the ſaid Statute, *par.* 6. " That no Perſon,
" who ſhall be ſet at large upon any *Habeas Corpus*, ſhall be again im-
" priſoned for the ſame Offence by any Perſon whatſoever, other than by
" the legal Order and Proceſs of ſuch Court, wherein he ſhall be bound by
" Recognizance to appear, or other Court having Juriſdiction of the Cauſe,
" on Pain of 500*l.*"

And it is further enacted, *par.* 7. " That if any Perſon, who ſhall be
" committed for Treaſon or Felony, plainly and ſpecially expreſſed in the
" Warrant of Commitment, upon his Prayer or Petition, in open Court,
" the *(a)* firſt Week of the *(b)* Term, or the firſt Days of the Seſſions of
" *Oyer* and *Terminer*, or General Gaol-Delivery, to be brought to his Trial,
" ſhall not be indicted ſometime in the next Term, Seſſions of *Oyer* and
" *Terminer*, or General-Gaol Delivery, after ſuch Commitment, the Juſtices
" of the ſaid Court ſhall, upon Motion in open Court, the laſt Day of
" the Term or Seſſions, ſet at Liberty the Priſoner upon Bail, unleſs it
" appear upon Oath that the Witneſſes for the King could not be pro-
" duced the ſame Term; and if ſuch Priſoner upon his Prayer, &c. ſhall
" not be indicted and tried the ſecond Term or Seſſions, he ſhall be diſ-
" charged from his Impriſonment."

(a) Need not enter his Prayer the firſt Week, if there be an Act of Parliament which ſuſpends the *Habeas Corpus* Act, and takes away the Power of bailing for a Time. Salk. 103. pl. 2. (b) That to this Purpoſe the grand Seſſions of *Wales* is in the Nature of a Term, ſo that the Party entring his Prayer there on the want of Proſecution for a Term, *B. R.* may bail him. Comb. 6.

Provided, *par.* 8. " That nothing in this Act ſhall extend to diſcharge
" out of Priſon any Perſon charged in Debt, or other Action, or with
" Proceſs in any Civil Cauſe, but that after he ſhall be diſcharged of his
" Impriſonment for ſuch his Criminal Offence, he ſhall be kept in Cuſtody
" according to Law for ſuch other Suit."

And it is further enacted, *par.* 10. " That it ſhall be lawful for any Pri-
" ſoner as aforeſaid, to move and obtain his *Habeas Corpus*, as well out of
" the Chancery or Exchequer, as the King's Bench or Common Pleas; and
" if the ſaid Lord Chancellor, or Lord Keeper, or any Judge or Judges,
" Baron or Barons, for the Time being, of the Degree of the Coif, of any
" of the Courts aforeſaid, in the *(c)* Vacation-time, upon view of the
" Copy of a Warrant of Commitment or Detainer, or on Oath made that
" ſuch Copy was denied, ſhall deny any Writ of *Habeas Corpus* by this
" Act required to be granted, being moved for as aforeſaid, they ſhall
" ſeverally forfeit to the Party grieved the Sum of 500*l.*"

(c) And therefore this Statute makes the Judges liable to an Action at the Suit of the Party grieved in one Caſe only, which is the Refuſing to award a *Habeas Corpus* in Vacation-time, but leaves it to their Diſcretion, in all other Caſes to purſue its Directions in the ſame Manner as they ought to execute all other Laws, without making them ſubject to the Action of the Party, or to any other expreſs Penalty or Forfeiture. 2 Hawk. P. C. 92.

It

*Page 9 * It is provided, *par.* 18. "That after the Aſſizes proclaimed for that "County where the Priſoner is detained, no Perſon ſhall be removed from "common Gaol upon any *Habeas Corpus* granted in Purſuance of this "Act, but upon ſuch *Habeas Corpus* ſhall be brought before the Judge of "Aſſize in open Court, who thereupon ſhall do what to Juſtice ſhall "appertain."

But it is provided, *par.* 19. "That after the Aſſizes are ended, any "Perſon detained may have his *Habeas Corpus*, according to the Direction "of this Act"

10 Mod 429. In the Conſtruction of this Statute it was held by two Judges, in the Abſence of one, and contrary to the Opinion of the other, that Perſons committed by Rule of Court are not intitled to the Benefit of this Act; and that none are intitled to make their Prayer but ſuch as are committed by a Warrant of a Juſtice of Peace, or Secretary of State, and not thoſe committed by Rule of Court, for that is not within the Meaning of the Act, which ſpeaks of a Commitment by Warrant †.

† It ſhall not be allowed to a Perſon committed for High-Treaſon by Rule of Court. Stra. 142. A Perſon committed for High-Treaſon done in *Scotland*, is not within the Act. *Rex* v. *Mackintoſh*. P. 6 Geo. Stra. 308.—A Perſon committed to the *Tower* for High-Treaſon, cannot make his Prayer at the *Old Bailey*, to be bailed or tried. *Rex* v. *Biſhop of Rocheſter*, Sept. 8 Geo. Fort. 101.—Nor at *Hicks's-Hall*. *Rex* v. *Ld. North and Grey*. M. S. 8 Geo. Fort. 103.—It ſhall not be allowed to a Priſoner at War, the Subject of a Neutral Power, taken in the Enemies Service, into which he was forced when taken Priſoner by them in an *Engliſh* Ship. *Rex* v. *Schiever*. P. 32 Geo. 2. 2 Bur. 765.

5 Of the Manner of ſuing it out, and Form of the Writ.

By the *(a)* 1 & 2 *Ph. & M. cap.* 13. "No Writ of *Habeas Corpus* or "*Certiorari* ſhall be granted to remove any Priſoner out of any Goal, or "to remove any Recognizance, except the ſame Writs be (*b*) ſigned with "the proper Hands of the Chief Juſtice, or in his Abſence, of one of the "Juſtices of the Court, out of which the ſame Writ ſhall be awarded or "made, upon Pain that he that writeth any ſuch Writs, not being ſigned "as is aforeſaid, to forfeit for every ſuch Writ 5 *l.*

(*a*) And by the 31 Car. 2. c. 2. *ſupra*, every *Habeas Corpus* purſuant to that Statute ſhall be marked in this Manner, *per ſtatutum triceſimo primo Caroli Secundi Regis*, and ſhall be ſigned by the Perſon that awards the ſame.—For the Form of the Writ *vide* 2 Inſt. 53, 4. (*b*) *Vide* Salk. 150. pl. 19.

Mich. 26. Car. 2. *Fox*'s Caſe. A *Habeas Corpus* was prayed to the Gaoler of the County Gaol, of *Worceſter*, to remove one *Fox* in *B. R.* to aſſign Errors in Perſon, upon the Record of his Conviction of a *Præmunire* for Recuſancy; but this was not granted till the Writ of Error was brought into Court under Seal, and the Record certified.

2 Mod. 306. Every *Habeas Corpus ad Subjiciendum* muſt in Term-time be awarded on Motion and Leave of the Court, but a *Habeas Corpus ad faciendum & recipiendum* is uſually granted without Motion, as it relates to a Civil Affair only.

Lev. 1. *Slater* and *Slater*. So where Debt was brought againſt Huſband and Wife on an Obligation ſealed by them both, and both being taken by *Capias*, it was moved for an *Habeas Corpus* to bring them into Court, to the Intent that the Huſband only might be committed in Cuſtody, and the Wife diſcharged; and it was held by the Court, that this *Habeas Corpus* for *removing the Bodies* might have been for them *without Motion*, but where the Party is committed for a *Crime*, there it ought to be *on Motion*.

6. To

6. To whom it is to be directed.

Wherever a Perſon is impriſoned by any Perſon whatſoever, whether he be one concerned in the Adminiſtration of Juſtice, as a Sheriff, Gaoler, *&c.* or a private Perſon, ſuch as a Doctor of Phyſick, who confines a Perſon under Pretence of curing him of Madneſs, *&c.* the *Habeas Corpus* muſt be directed to him. Godb. 44.

A *Habeas Corpus* was directed to the Chancellor of *Durham*, by which he was directed to make a Precept to the Sheriff to have the Body of * *J. S.* with the Cauſe of his Commitment, *coram Domino Rege apud Weſtm'*; the Chancellor returned, that he made a Precept to the Sheriff to have his Body before him, with the Cauſe of, *&c.* who accordingly returned the Cauſe and the Body before him, and ſets out the Cauſe, *& hæc eſt Cauſa detentionis*; *& per Hale* C. J. A *Habeas Corpus ad faciendum & recipiendum* directed in this Manner is good; *ſecus* of a *Habeas Corpus ad Subjiciendum*; for the King may ſend his Writ to whom he pleaſes, and he muſt have an Anſwer of his Priſoner wherever he be; there is a great deal of Difference between a *Habeas Corpus ad Subjiciendum* and other *Habeas Corpus*; for this is the Subject's Writ of Right, in which Caſe the County Palatine hath no Privilege; in 31 *E.* 1. a *Habeas Corpus ad Subjiciendum* was directed to the Biſhop of *Durham*, who returned, that he was a Count Palatine, and therefore was not bound to anſwer the Writ, for which he was fined 4000*l.* *Hill.* 17 *Car.* 1. a *Habeas Corpus* was directed to the Biſhop of *Durham* to return the Body of one *Rickoby*; and reſolved, that the Writ did well run thither: In this Caſe the Writ is directed to the Chancellor, to command the Sheriff to have his Body here; but he commands him to have the Body before himſelf, which is ill; again, the Chancellor doth not return the Body to us, for here is no *Cujus Corpus parat' habeo*; it is not enough for him to ſay, that the Sheriff returned the Body to him, but he ought to return it to us here; we have nothing before us, therefore he muſt be remanded, for he is brought up without a Warrant. * Page 10 Hil. 25 & 26 Car. 2. in *B. R.* 3 Keb. 279. S.C.

A *Habeas Corpus* directed in the Diſjunctive to the Sheriff or Gaoler is wrong; but where a Man is taken on a Warrant of the Sheriff, in Purſuance of a Writ to the Sheriff, the *Habeas Corpus* ought to be directed to the Sheriff, for the Party is in his Cuſtody, and the Writ itſelf muſt be returned; otherwiſe it is where one is committed to the Gaoler immediately, as in Caſes Criminal. Salk. 350. pl. 7. *per curiam.* Ld. Raym. 586, 618.

7. By whom it is to be returned.

This Writ muſt be returned by the very ſame Perſon to whom it is directed.

A *Habeas Corpus* was awarded to the Sheriff of—who before the Return leaves the Office, and a new Sheriff is made, who returns *Languidus*; this Return is not good, but it ought to be returned by them two, the firſt that he had the Body, and had delivered it to the new Sheriff, and the new Sheriff may then return *Languidus*†. Paſch. 26 Car. 2. *Peck* and *Creſſet.*

8. Of

† A Conſtable is an Officer within the Meaning of the Stat. 31 Car. 2. c. 2. and obliged to give a Copy of the Warrant of Commitment. Stra. 167.—If an *Habeas Corpus* is not returned, an Attachment, *niſi*, ſhall go, without Rule to return. Stra. 915.—On an *Habeas Corpus* granted by a Judge in Vacation, returnable *immediate*, before himſelf at his Chambers, the Party may be brought into Court in Term, 1 Bur. 460, 542.—Or if on an *Habeas Corpus* ſo returnable the Party is brought before him, he may, if he judges it adviſeable, adjourn the Return, and direct him to be brought into Court the firſt Day of Term.—*Rex* v. *Clarke*, T. 31 Geo. 2. 1 Bur. 606.—The Court will not grant an Attachment to accompany an *Habeas Corpus*. *Rex* v. *E. Ferrers*, T. 31 Geo 2. 1 Bur. 631.—If an *Habeas Corpus* is not obeyed, the Court will grant an Attachment even againſt a

8. Of the Manner of compelling a Return, and the Offence of a falſe Return.

F N. B. 68. 11 H. 4. 86. Mod. 195. 2 Lev. 128. 9. 5 Mod. 21. 12 Mod. 666.

The Method to compel a Return to a *Habeas Corpus* is by taking out an *Alias* and *Pluries*, which if diſobeyed, an Attachment iſſues of courſe; alſo the Court may make a Rule on the Officer to return his Writ, and, if diſobeyed, the Court may proceed againſt ſuch Diſobedience in the ſame Manner as they uſually do againſt the Diſobedience of any other Rule.

And by the 31 *Car.* 2. *cap.* 2. *par.* 2. it is enacted, "That if any Officer, "&c. ſhall neglect or refuſe to make Returns, as by the Act is directed, "or to bring the Body of the Priſoner, according to the Command of the "Writ, or ſhall not within ſix Hours after Demand deliver a true Copy "of the Commitment, &c. he ſhall forfeit for the firſt Offence 100 *l.* for "the ſecond Offence 200 *l.* and be made incapable to hold his Office.

*Page 11 Salk. 350. pl. 8.

* A *Habeas Corpus* went to the *Stannary* Court, to which an inſufficient Return was made, and therefore diſallowed; & *per Cur.* the Warden of the *Stannaries* muſt be amerced, and you may go to the Coroners and get it aſſeered, and eſtreat it, and an *Alias Habeas Corpus* muſt go for the Inſufficiency of the Return of the firſt, and upon that the Body and Cauſe muſt be removed up; if another Excuſe be returned, we will grant an Attachment.

2 Jon. 178. March 89. Keb. 272, 280. 2 Show. 172. pl. 165.

And as a Goaler, &c. is obliged to bring up the Priſoner at the Day prefixed by the Writ, it is no Excuſe for not obeying of a Writ of *Habeas Corpus ad Subjiciendum*, that the Priſoner did not tender the Fees due to the Goaler; nor yet is the Want of ſuch Tender an Excuſe for not obeying a Writ of *Habeas Corpus ad faciendum & recipiendum*; but if the Goaler bring up the Priſoner by Virtue of ſuch *Habeas Corpus*, the Court will not turn him over till the Gaoler be paid all his Fees.

6 Mod. 90. Salk. 349. pl. 5. (*a*) But no Action lies until the Return be filed. Salk. 352. pl. 13.

For a falſe Return there is regularly no Remedy againſt the Officer, but an (*a*) Action on the Caſe at the Suit of the Party grieved, and an Information or Indictment at the Suit of the King.

But it has been held, that if a Gaoler return one *Languidus* when the Party himſelf brings his *Habeas Corpus*, and is in good Health, an Attachment ſhall iſſue againſt him; *ſecus* if the *Habeas Corpus* was brought by another.

9. What Matters muſt be returned together with the Body of the Party.

Vaugh. 137.

As upon the Return of the Writ the Court is to judge, whether the Cauſe of the Commitment and Detainer be according to Law or againſt it; ſo the Officer or Party, in whoſe Cuſtody the Priſoner is, muſt, according to the Command of the Writ, certify on the Return thereof the Day, Cauſe of Caption and Detainer.

Peer; for he has not any Privilege againſt the Proceſs of *Weſtminſter-Hall*, to compel Obedience to an *Habeas Corpus*. *Id.* On good Cauſe ſhewn, as that the Perſon confined is a Lunatick, confined by her neareſt Relations, who are proceeding to get a Commiſſion of Lunacy, the Court will enlarge the Time to return the Writ. *Rex.* v. *Clarke*, M. 3 Geo. 3. 3 Bur. 1362.

A *Habeas*

A *Habeas Corpus* was directed to remove one *J. S.* to which no Return was made; then an *Alias* was granted, and it was returned *quod traditur in ballium ante adventum iſtius Brevis*; and the Truth of the Caſe was, that between the firſt and ſecond Writ the Party was bailed; *& per Cur.* after an *Habeas Corpus* delivered, the Party cannot be bailed; and if it happens otherwiſe, yet the Cauſe of the Commitment ought to be returned, though the Body cannot be brought into Court; and in this Caſe the Officer having on the firſt Writ of *Habeas Corpus* taken 5*l.* to have the Body in Court, and yet making no Return, the Court granted an Attachment againſt him. Hil. 25 & 26 Car. 2. in *B. R.* *Salmon* ver. *Slade.*

Where a Commitment is in Court to a proper Officer there preſent, there is no Warrant of Commitment; and therefore to a *Habeas Corpus* he cannot return a Warrant *in hæc verba*, but muſt return the Truth of the whole Matter, under Peril of an Action; but if he be committed to one that is not an Officer, there muſt be a Warrant in Writing, and where there is one it muſt be returned; for otherwiſe it would be in the Power of the Gaoler to alter the Caſe of the Priſoner, and make it either better or worſe than it is upon the Warrant; and if he may take upon him to return what he will, he makes himſelf Judge; whereas the Court ought to judge, and that upon the Warrant itſelf. Salk. 349. pl. 5.

If a Perſon in Cuſtody on an *Excommunicato capiendo* brings a *Habeas Corpus*, the Writ of *Excommunicato capiendo* itſelf muſt be returned, as well as the Sheriff's Warrant for taking him, becauſe the Warrant may be wrong when the Writ is right; and though the Warrant be wrong, yet if the Writ is right, the Party is rightfully in Cuſtody of the Sheriff. Salk. 350. pl. 7.

* Upon a *Habeas Corpus* directed to the Conſtable of *Windſor-Caſtle*, to remove the Body of one Mr. *Taylor* a Barriſter, at the Day of the Return of the Writ, a Soldier brought the Priſoner into Court, and the Writ, and the Warrant by which he was committed; but the Court held it no Manner of Return, for it ought to be entered in *Latin* †, and engroſſed in due Form. * Page 12 Paſch. 18 Car. 2. *Taylor*'s Caſe.

† Pleadings, Proceedings, &c. are now in Engliſh, by Virtue of 4 Geo. 2. c. 26.

10. Where the Return ſhall be ſaid to be certain and ſufficient to warrant the Commitment.

It is ſaid in general, that upon the Return of the *Habeas Corpus* the Cauſe of the Impriſonment ought to appear as ſpecifically and certainly to the Judges, before whom it is returned, as it did to the Court or Perſon authorized to commit. Vaugh. 137.

For if the Commitment be againſt Law, as being made by one who had no Juriſdiction of the Cauſe, or for a Matter for which by Law no Man ought to be puniſhed, the Court are to diſcharge him, and therefore the Certainty of the Commitment ought to appear; and the Commitment is liable to the ſame Objection where the Cauſe is ſo looſely ſet forth, that the Court cannot adjudge whether it were a reaſonable Ground of Impriſonment or not. But for this *vide* Head of *Commitment*, Head of *Bail* in Criminal Caſes, and Hal. Hiſt. P. C. 584.

Rudyard an Attorney of *C. B.* being committed to *Newgate* by the Lord Mayor and Sir *John Robinſon*, for refuſing to give Security for his good Behaviour, was brought by *Habeas Corpus* to the *C. B.* and it was returned as the Cauſe of his Commitment, that whereas he had been complained of to the Lord Mayor and Sir *John Robinſon* for ſeveral Miſdemeanors, particularly for inciting his Majeſty's Subjects to the Diſobedience of his Majeſty's Laws, more particularly of an Act of Parliament made in the 22d Year of his Reign, againſt ſeditious Conventicles; and whereas he had been examined before them for abetting ſuch as Skin. 676 pl. 2. 12 Co. 130, 1. Trin. 22 Car. in *C. B.* *Rudyard*'s Caſe.

abetted ſeditious Conventicles, contrary to the Statute 22 *Car. 2. cap.* 1. and upon his Examination they found Cauſe to ſuſpect him, therefore they requeſted Sureties of him for his good Behaviour, and for Refuſal committed him. *Wild* Juſtice, was of Opinion, that by abetting ſuch as frequented ſeditious Conventicles, muſt be intended abetting them in that Particular, and ſignifies as much as encouraging them to frequent ſuch Conventicles, and finding Cauſe to ſuſpect him, &c. (which cannot now be queſtioned, for the Return is admitted) they may well ſend him to Priſon, and therefore he ought to be remanded. But *Vaughan* C. J. *Tyrrell*, and *Archer*, were of a contrary Opinion: 1. Becauſe it does not appear but that he might abet the Frequenters of Conventicles in a Way which the Law allows, as by ſoliciting an Appeal for them, or the like. 2. To ſay that he was complained of, or that he was examined, is no Proof that he was guilty; and then to ſay that they had Cauſe to ſuſpect him, is too cautious; for who can tell what they may count a Cauſe of Suſpicion, and how can that ever be tried? At this Rate they would have Arbitrary Power, upon their own Allegation, to commit whom they pleaſed, whereas they cannot require Sureties for any Man's Behaviour, and conſequently not commit for Refuſal, unleſs the Juſtices have any Thing againſt him of their own Knowledge, or by Proofs of Witneſſes that tend to a Breach of the Peace; upon this Return *Archer* declared his Opinion to be, that he ſhould not be remanded, but give his own Recognizance to appear in Court the next Term, to anſwer any Thing that ſhould be alledged againſt him; but *Vaughan* and *Tyrrell* were for his abſolute Diſcharge; for ſeeing by the Return it did not appear there was any Cauſe for his Commitment, they thought they had no
* Page 13 * Reaſon to require a Recognizance of him. Thereupon *Wild* moved that he could not be diſcharged, there being but two for it. But *Archer* replied, that it had been ſeveral Times ruled, that where there were three Opinions, that was taken to be *per Cur'*. which had two of the Judges for it: And accordingly *Rudyard* was diſcharged. *Vaughan* and *Tyrrell* made another Objection to the Return, *viz.* that they ſhould have expreſſed the Sum in which they required him to give Security, (which they had not done) for they ſaid that thoſe Perſons that might be willing to be bound for him in 40*l.* might not be willing to be bound for him in 100*l.* &c. and therefore till he knew the Sum he could not know whom to provide. But as to this it was ſaid, that *Rudyard* had abſolutely refuſed to give any Security, and therefore it was to no Purpoſe to tell him of the Sum; if he had conſented to give Security, then the Juſtices ought to have told him the Sum *.

* A Return that the Defendant was committed for backbearing and carrying away a Deer, is good after Conviction, though it does not ſay *unlawfully*; but not before Conviction. Fort. 272. That before Delivery of the Writ he had delivered the Woman to her Huſband, and knows not where ſhe is; a good Return. Stra. 915.—That at the coming of the Writ, Defendant was not in the Keeper of the Priſon's Cuſtody, a good Return. Andr. 281.—That before the coming of the Writ, Defendant was diſcharged out of his Cuſtody by an Order of Seſſions, without ſaying what Seſſions, what Order, or that he was diſcharged by due Courſe of Law; good for the Purpoſe of Filing the Writ. *Ibid.* A Return that the *African* Company had retained the Defendant in their Service, and ſent him to the *Savey*, till he ſhould embark, is bad; and Defendant was diſcharged, and an Information ordered againſt the Colonel and the Keeper of the *Savey*. Stra. 404.—A Return that the Defendant was committed by an Order of two Juſtices of the Peace, for that he, being Overſeer of the Poor, had not accounted as by Statute directed, and had not accounted before them, bad; he might have accounted before others. Fort. 272.

11. Whe-

11. Whether the Party can ſuggeſt any Thing contrary to the Return.

It ſeems to be agreed, that no one can in any Caſe controvert the Truth of the Return to a *Habeas Corpus*, or plead or ſuggeſt any Matter repugnant to it: Yet it hath been holden, that a Man may confeſs and avoid ſuch a Return by admitting the Truth of the Matters contained in it, and ſuggeſting others not repugnant, which take off the Effect of them. Cro. Eliz. 821. 5 Co. 71. b. 2 Hawk. P.C. 113.

Upon a *Habeas Corpus* it was returned, that *Swallow*, a Citizen of *London*, was fined for Alderman, and was committed for his Fine by the Judgment of the Court in *London*. *Swallow* alledged, that he was an Officer of the Mint, and by an antient Charter of Privilege granted to the Minters or Moneyers he ought to be exempted. It was at firſt doubted whether he might not plead this to the Return, it being a Matter conſiſtent with it. Upon the Statute *W.* 2. it is held the Parties may come in and plead, and ſo upon 5 *Eliz.* but here there is a Difference; for he might have pleaded this in the Court below, but now that is paſt, and here is a Judgment and Execution. Another Day *Swallow* brought into Court a Writ of Privilege upon that Charter, and the Recorder prayed that it might not be allowed againſt the antient Cuſtoms of the City; for if ſuch a Way might exempt Men, they ſhould have little Benefit by Fines in ſuch Caſes: But *per Cur.* the Privilege ought to be allowed, for it is very antient, and it appears he has an Office of neceſſary Attendance elſewhere, which makes the Privilege reaſonable. The King may by his Charter exempt from Juries, if there be enough beſides, much more here; and if there be not ſufficient beſides, upon ſhewing of that, the Privilege ought to be ſuſpended; and *Swallow* may be diſcharged by this Court now as well as he could at firſt, or as if he had taken upon him the Aldermanſhip. This Court is ſupreme and mandatory in ſuch Caſes. And he was accordingly diſcharged. Paſch. 18 Car. 2. in *B. R. Swallow's Caſe*, Sid. 287. 2 Keb. 50, 54, &c.

Alſo the Court will ſometimes examine by Affidavit the Circumſtances of a Fact, on which a Priſoner brought before them by an *Habeas Corpus* hath been indicted, in order to inform themſelves, on Examination of the whole Matter, Whether it be reaſonable to bail him or not: And agreeably hereto *(a)*, where one *Jackſon*, who had been indicted for Piracy before the Seſſions of Admiralty on a malicious Proſecution, brought his *Habeas Corpus* in the ſaid Court, in order to be diſcharged or bailed, the Court examined the whole Circumſtances of the Fact by Affidavits; upon which it appeared that the Proſecutor himſelf, if any one, was guilty, and carried on the preſent Proſecution to ſkreen himſelf: And thereupon the Court, in conſideration of the Unreaſonableneſs of the Proſecution, and the Uncertainty of the Time when another Seſſions of Admiralty might be holden, admitted the ſaid *Jackſon* to Bail, and committed the Proſecutor till he ſhould find Bail to anſwer the Facts contained in the Affidavits. 5 Mod. 323, 454. 2 Jon. 222. *(a)* Trin. 4 Geo. 1.

* 12. Whether any Defect in the Return may be amended. * Page 14

It ſeems that before the Return is filed, any Defect in Form, or the Want of an Averment of a Matter of Fact may be amended; but this muſt be at the Peril of the Officer, in the ſame Manner as if the Return were originally what it is after the Amendment. Mod. 102, 103. Id. Raymond 580, 603. Stra. 339.

But after the Return is filed it becomes a Record of the Court, and cannot be amended. Mod. 102, 103.

So after a Rule to have the Return filed; as where a *Habeas Corpus*, *Alias & Pluries* was directed to Sir *Robert Viner*, Mayor of *London*, to have the Hil. 26 & 27 Car. 2. in

B. R. Emerton ver. Sir Rob. Viner, 2 Lev. 128. 3 Keb. 434, 447. S. C. 3 Mod. 164. S. C. cited.

the Body of *Bridget*, Daughter and Heir of Sir *Thomas Hyde*, deceaſed; and upon the *Pluries* he returned *quod tempore receptionis hujus Brevis nec unquam poſtea non fuit infra cuſtodiam meam*; and the Counſel of the Lord Mayor expounded this Return that ſhe was within the Houſe of the Lord Mayor, but not detained in Cuſtody *prout per Breve ſupponitur*; & *per Cur.* this is an inſufficient Return; for he ought to ſay not only *tempore receptionis Hujus Brevis, ſed alicujus*, upon Return of a *Pluries*. Then a Queſtion was if the Return could be amended; for though a Rule was made that the Return ſhould be filed, yet this was not actually done; but *per Cur.* this is filed by the Rule of the Court, and after cannot be amended; and this Return the Court held to be equivocal; for it is well enough known that ſhe is not detained *in Ferris*; but though ſhe hath the Liberty of the Houſe, if ſhe cannot go out of the Houſe, or not without a Keeper, ſhe is within his Cuſtody; and the Court ſhall adjudge what Sort of Cuſtody is intended by the Writ.

13. What is to be done with the Priſoner at the Return; and therein of bailing, diſcharging or remanding him.

5 Mod. 22. Style 16.

Upon the Return of the *Habeas Corpus* the Priſoner is regularly to be diſcharged, bailed or remanded; but if it be doubtful which the Court ought to do, it is ſaid that the Priſoner may be bailed to apper *de Die in Diem* till the Matter is determined.

(a) By the *Habeas Corpus* Act, 31 Car. 2. c. 2. par. 3. the Lord Chancellor, &c.

By the Petition of Right, or (a) 17 *Car.* 1. *cap.* 10. the Court muſt within three Days after the (b) Return of the *Habeas Corpus* either diſcharge, bail or remand the Priſoner. But it ſeems that a Commitment by the Court of King's Bench to the *Marſhalſea* is Remanding, being an Impriſonment within the Statute.

ſhall within two Days after the Return of the *Habeas Corpus* take Order, &c. and bail or remand the Priſoner. (b) That is, after the Return filed, for before then there is nothing before the Court. 5 Mod. 22.

Vent. 330. (c) As was done in *Rob. Peyton's* Caſe, who was remanded to the *Tower*. Vent. 346.

Alſo it hath been ruled, that the Court of King's Bench may, after the Return of the *Habeas Corpus* is filed, remand the Priſoner to the (c) ſame Gaol from whence he came, and order him to be brought up from Time to Time, till they ſhall have determined whether it is proper to bail, diſcharge or remand him abſolutely.

Salk. 348. pl. 2. 5 Mod. 19, 20.

And though in doubtful Caſes the Court is to bail or diſcharge the Party on the Return of the *Habeas Corpus*; yet if a Perſon be convicted, and the Conviction on the Return of the *Habeas Corpus* appears only defective in Point of Form, it is at the Election of the Court either to diſcharge the Party, or oblige him to bring his Writ of Error.

* Page 15

3 Keb. 526. 2 Lev. 128.

* If on the Return of the *Habeas Corpus* it appears that the Conteſt relates to the Right of Guardianſhip. Though the Court will not determine that Point, yet will it ſet the Infant at Liberty, ſo as to let him chuſe where he will go till that Matter is determined; or if there be any Danger of Abuſe, will order him into ſuch Hands as will take effectual Care of him †.

(C) Of

† On the Appearance of the Party, the Court will only ſee that he is not under any illegal Reſtraint; but in the Caſe of a young Lady, the Court will order the Tipſtaff to wait upon her Home to her Guardians. Stra. 444. A Child of nine Years old, delivered to her Uncle, her Teſtamentary Guardian. Stra. 579. N. B. ſhe was taken from the Guardian appointed by the Spiritual Court, and who was her near Relation, was not to have any Benefit by keeping her, had taken great Care of her, and with whom ſhe was willing to go. 2 Ld. Raym 1354. If a Boy of Thirteen is brought up by *Habeas Corpus* ſued by his Father, to have him delivered to him by his Aunt, the Court will deliver him from the Aunt, and let him go where he pleaſes, for they will not determine the Right of

(C) Of the Habeas Corpus ad faciendum & recipiendum.

THE *Habeas Corpus ad faciendum & recipiendum* is uſed only in Civil Cauſes, and lies for removing Suits out of an inferior to ſome ſuperior Court, at the Application of the Defendant, who may imagine himſelf injured by the Proceedings of ſuch inferior Court. Mod. 235. 2 Mod. 198.

This Writ ſuſpends the Power of the Court below; ſo that if they proceed after, the Proceedings are (*a*) void, and *coram non judice.* Salk. 352. pl. 13. (*a*) That after ſerving a Writ of *Habeas Corpus* it is Error to proceed after. Cro. Car. 261. *Ellis* v. *Johnſon.* 2 Jon. 209. S. P. adjudged. That if a *Habeas Corpus* be directed to an inferior Court, returnable two Days after the End of the Term, yet the inferior Court cannot proceed contrary to the Writ of *Habeas Corpus.* Mod. 195. 12 Mod. 666.

By this Writ the Proceedings in the inferior Court are at an End; for the Perſon of the Defendant being removed to the ſuperior Court, they have loſt their Juriſdiction over him, and all the Proceedings in the ſuperior Court are *de novo*, and (*b*) Bail *de novo* muſt be put in the ſuperior Court. Skin. 244 pl. 9. (*b*) That tho' the Sum be under 10 *l.* yet if in the inferior Court ſpecial Bail was requiſite, there ſhall be ſpecial Bail in the Court above. But for this *vide* Tit. *Bail*, Letter (B).

And although this Writ be a Writ of Right, yet where it is to abate a rightful Suit the Court may refuſe it; as where an Action of Debt was brought againſt a Feme Sole in the Palace Court, who, after Appearance and Plea pleaded, married, and then removed the Cauſe by *Habeas Corpus* to *B. R.* where ſhe pleaded her Coverture in Abatement; and the Court held, that if this Matter had been moved on the Return of the *Habeas Corpus*, they would have granted a *Procedendo*; but that now the Plea in Abatement muſt be held good; for the Proceedings are *de novo*, and the Court takes not Notice of the Proceedings below, or of what proceeded the *Habeas Corpus.* Salk. 8. pl. 20. *Hetherington* and *Reynolds.*

After an Interlocutory, and before final Judgment in an inferior Court, a *Habeas Corpus cum Cauſa* was brought; before the Return of the Writ the Defendant died, and a *Procedendo* was awarded; becauſe by the 8 & 9 *W.* 3. *cap.* 11. the Plaintiff may have a *Scire Facias* againſt the Executors, and Salk. 352. pl. 12.

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of Guardianſhip in a Summary Manner, and the Father has other Remedies to bring it in Queſtion. Stra. 982. But ſee *ſupra.*——A young Lady of full Age decoyed from her Father to be married to a mean Perſon, brought back by the Father's Means to his Houſe, and *Habeas Corpus* brought by one of the Decoyers, the Court will aſk, whether ſhe deſires to continue with her Father or to go elſewhere? If ſhe anſwers to continue with her Father, they will only ſay ſhe is at Liberty to go. 1 Bur. 606.—Where there is a Conviction the Court will not diſcharge on the Warrant of Commitment, without having the Conviction before them. Stra. 794——If Defendant is brought up by *Habeas Corpus*, from the Admiralty, there charged with embezzling Goods of the Ship; on Affidavit that he is indebted to Plaintiff on a Promiſſory-Note, he ſhall be turned over to the Marſhal of *B. R.* Stra. 936.——A Perſon committed by a Secretary of State, to the Cuſtody of a Meſſenger, on Suſpicion of High-Treaſon, and kept there two Years, ſhall be diſcharged without Bail, unleſs the Attorney General undertakes to proſecute directly. 1 *Wilſ.* 254.—*B. R.* cannot remand a Priſoner to the Cuſtody of the King's Meſſenger, but muſt commit him to the Marſhal of *B. R.* 1 Bur. 460.——If a ſane Perſon confined by her Huſband in a Mad-houſe, is brought up, and intends to demand the Peace, but has not Articles ready ſtampt, the Court will permit her to go with a Friend, he undertaking to produce her. 2 Bur. 1115.——On an *Habeas Corpus* ſued out by the Father of a Kept Miſtreſs, aged eighteen, directed to her Keeper, the Court declared ſhe might go where ſhe pleaſed, and that none ſhould meddle with her, *redeundo*; but would not in this Caſe ſend a Tipſtaff to protect her. 3 Bur. 1434. On an *Habeas Corpus* returnable before the Chief Juſtice, Commitment by another Judge is good, without Amendment of the Return. Barnes 20.

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2 Rol. Abr. 69. & *vide* Carth. 75.

proceed to Judgment, which he cannot have in another Court; and by this Means he would be deprived of the Effect of his Judgment, which would be unreaſonable.

If an Action be brought in *London* for calling a Woman a Whore, this cannot be removed by *Habeas Corpus*, becauſe the Words are not actionable elſewhere; and if allowed to be removed the Cuſtom would be deſtroyed.

[So where a *Feme Covert*, ſole Trader in *London*, is ſued in either of the City Courts.]

If a Priſoner, who is brought up from a County Goal, to be turned over to the King's Bench, will not pay the Sheriff the Charges of bringing him up, the Court will remand him. *Anon. P.* 6 *G.* 1. *Stra.* 308.

If One Shilling *per* Mile is tendered and refuſed, Attachment ſhall be granted. *Barnes* 377.

But the Goaler muſt obey the *Habeas Corpus*, though the Priſoner refuſes to pay his Fees, for he has his Remedy for them. *Hopman* v. *Barber. M.* 2 *G.* 2. *Stra.* 814.

If Plaintiff deliver Sheriff *Habeas Corpus* to remove Defendant in Execution on a *ca. ſa.* to *B. R.* Priſon, he cannot refuſe to obey till his Poundage is paid. *Semb. Sed. qu.* For it was argued in this Caſe, that he ſhould carry him to a Judge's Chambers; and *Foſter J.* ſaid, if he came before him, he would not turn him over till Poundage paid. *White* v. *Haugh. M.* 20 *G.* 2. *Stra.* 1262.

Habeas Corpus ſhall be allowed, though not delivered till after interlocutory Judgment ſigned below, and Notice of Writ of Inquiry given. *Cox* v. *Hart. H.* 32 *G.* 2. 2 *Bur.* 758.

It is the Practice to allow it, if delivered at any Time before the Jury ſworn, notwithſtanding 21 *J.* 1. *cap.* 23. *Ibid.*

If it is teſted in Term, it may be returnable *immediate* before the Chief Juſtice. *Betteſworth* v. *Bell. P.* 6 *G.* 3. 3 *Bur.* 1875.

Plaintiff may remove Defendant by this Writ, after he has declared againſt him in Cuſtody of the Sheriff. *Ibid.*

Defendant may be committed, though Return Day is paſt. *Barnes* 221.

C. B. cannot commit to the *Fleet* a Priſoner on a Juſtice's Warrant, for want of Sureties on Indictment for Baſtard; nor on *excommunicato capiendo* out of Chancery, returnable in *B. R.* nor for an Extent out of the Exchequer. *Barnes* 223.

But they may on Exchequer Proceſs on Recognizance forfeited at Seſſions. *Ibid.*

If Priſoner is removed by *Habeas Corpus* before Declaration delivered, Plaintiff muſt declare in the Court whither he is removed, if, after Declaration delivered, he proceeds where he declares. *Barnes* 384.

Priſoner in the *Fleet* by Proceſs of *C. B.* may be brought up by Rule, but if held by Execution of another Court, there muſt be *Habeas Corpus*. *Barnes* 385.

An Utter-barriſter of three Years ſtanding, muſt, at all Events, be preſent in every Inferior Court at the Trial; either as Judge or Aſſiſtant, or the Trial is void, and *Habeas Corpus* lies. *Fairley* v *M'Connel. H.* 31 *G.* 2. 1 *Bur.* 514.

In Action againſt two Partners, if one brings *Habeas Corpus*, and puts in Bail for himſelf only, Plaintiff ſhall have *procedendo*. *Fry* v. *Carey. T.* 8 *G.* 1. *Stra.* 527.

On a Return of a By-Law, the Court will not enter into the Validity of it, in order to grant *procedendo*, but Plaintiff muſt declare here, and Defendant may demur if he has Objections. *Ballard* v. *Bennet. Ballard* v. *Clement. P.* 32 *G.* 2. 2 *Bur.* 775.

After

After interlocutory Judgment, it is too late, and *procedendo* ſhall be awarded. *Barnes* 221.

So after Iſſue joined. *Barnes* 221.]

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* Heir and Anceſtor.

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(A) Of the Nature of the Relationſhip between Heir and Anceſtor. 16.
(B) Of the ſeveral Kinds of Heirs. 17.

And herein,

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2. Of the Heir General, or Heir at Common Law. 18.
3. Of the Special Heir, or Iſſue in Tail. 19.
4. Of the Cuſtomary Heir. 19.
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(C) Of what Conditions, Covenants, &c. of the Anceſtor's the Heir ſhall take Advantage. 20.
(D) What Conditions, Covenants, &c. ſhall extend to him ſo as to bind him. 22.
(E) What Actions he may commence and proſecute in Right of his Anceſtor. 23.
(F) Where the Heir ſhall be ſaid to be bound to anſwer his Anceſtor's Debts and Contracts. 25.
(G) How to be proceeded againſt where he is bound. 29.
(H) Where he ſhall be liable himſelf, and the Judgment general or ſpecial. 30.

And herein,

1. Where he ſhall be liable for his falſe Pleading. 30.
2. Where by his Promiſe to pay or diſcharge the Debt of his Anceſtor. 32.

(I) What

(I) What shall be Assets in his Hands. 32.

What Things shall go to the Heir, and not to the Executor, *vide* Tit. **Executors and Administrators.**

(A) Of the Nature of the Relationship between Heir and Ancestor.

Co. Lit. 7. b. 3 Co. 12. b. (*a*) But by the Civil Law *Hæres ex Testamento succedit in universum jus Testatoris*; so that by taking the whole Estate, whether it be real or personal, by the Will he is made Heir, and called only by that Name. Godolph. Orph. Leg. 119. (*b*) And therefore Heir and Ancestor are always applied to natural Persons, as Predecessor and Successor are to Bodies Politick and Corporate. Co. Lit. 78. b. (*c*) For a Man cannot be Heir to Goods or Chattels; for *Hæres dicitur ab Hæreditate.* Co. Lit. 8. a. *vel dicitur ab hærendo, quia Hæreditas sibi hæret.* Co. Lit. 7. b.

AN Heir, saith my Lord *Coke*, in the legal Understanding of the (*a*) Common Law, is he to whom Lands, Tenements or Hereditaments, by the Act of God and Right of (*b*) Blood do descend, of some Estate of (*c*) Inheritance.

*Page 17 (*d*) Co. Lit. 9. But there are Exceptions to the general Rule.

* The Word *Heir* in the Notion of it implies, that the Party hath all those legal (*d*) Qualifications which our Laws require in all Persons that represent or stand in the Place of another, and is of such Importance, that regularly without the Word *Heir* no Fee-simple can be created.

For these, and that an Heir at Law is to be favoured, *vide* Tit. *Descent*, & *vide* Tit. *Estate in Fee simple*, and Tit. *Devise*, & *infra*.

(B) Of the several Kinds of Heirs: And herein,

1. Of the Heir Apparent.

Co. Lit. 8. a.

HERE we must observe, that no Person can be Heir until the Death of his Ancestor, according to the Rule, *Nemo est Hæres Viventis*; yet in common Parlance he, who stands neareſt in Degree of Kindred to the Ancestor, is called, even in his Life-time, Heir Apparent.

3 Co. 37. *Ratcliff's* Case. Co. Lit. 75, 84. Dyer 189.

Also the Law takes Notice of an Heir Apparent so far as to allow the Father to bring an Action of Trespass for taking away his Son and Heir, *quare Filium & Hæredem rapuit*, the Father being Guardian by Nature to his Son where any Lands descend to him.

Vaugh. 180. Vent. 311, 334. Raym. 330. 2 Lev. 232. *Burchet* and *Durdant*. But for this *vide* Tit. *Devise*, Let. (L).

Also a Person may take by the Purchase or *Descripto Personæ* by the Name of Heir even in the Life-time of his Ancestor; as where a Man devised Lands to *A.* and his Heirs during the Life of *B.* in Trust for *B.* and after the Decease of *B.* to the Heirs Male of the Body of *B.* now living, it was held that by this Devise the Remainder was immediately vested in the Son, and that the Words *Heirs Male now living* in a Will, were a full Description of the Son, who then was the Heir Apparent of *B.* and known by the Devisor to be so.

Kelw. 84. Co. Lit. 265.

But the Son and Heir hath no Power over the Inheritance during the Life of the Ancestor: Therefore if a Son and Heir bargains and sells the Inherit-

Inheritance of his Father, this is void, becauſe he hath no Right to transfer; ſo if he *(a)* releaſes, the Law is the ſame.

(a) But it ſeems that if the Son releaſes with Warranty, he and his Heirs are for ever after barred by the Rebutter. Co. Lit. 265. a.

But if the Son makes a Feoffment of the Inheritance of his Father, this paſſes an Eſtate during the Son's Life; for it is a Diſſeiſin to the Father, and the Son after the Father's Death cannot avoid it: For no Man can alledge an Injury in any voluntary Act of his own. Co. Lit. 265. a.

Neither is there that Privity between the Heir Apparent and his Anceſtor, as to make a Fine levied by the Anceſtor a Bar within the 4 *H.* 7. *cap.* 24. as if the Heir Apparent be ſeiſed of Lands, and the Father levies a Fine and dies, it ſhall not bar the Heir; becauſe he does not claim or derive any Title to the Land from his Father, and therefore in that Reſpect ſhall have five Years to preſerve himſelf from the Fine: For the Privies underſtood and intended by the Act are thoſe who are privy not only in Blood, but likewiſe in Eſtate and Title to the Land of which the Fine was levied, that is, thoſe who muſt neceſſarily mention the Conuzor, and convey themſelves through him, before they can make out their Title to the Eſtate. 2 Inſt. 523. 3 Co. 89. a. Hob. 333.

* 2. Of the Heir General, or Heir at Common Law.

* Page 18

The Heir at Common Law is he who after his Father or Anceſtor's Death hath a Right to, and is introduced into all his Lands, Tenements, and Hereditaments

That he muſt be of the whole Blood, not a Baſtard, Alien ‡, *&c. vide* Tit. *Deſcents*, and Tit. *Coparceners.*

‡ Natural Subjects may inherit, and make their Title by Anceſtors born beyond Sea. 11 & 12 *W.* 3. c. 6. 25 Geo. 2. c. 39.

None but the Heir General, according to the Courſe of the Common Law, can be Heir to a Warranty, or ſue an Appeal of the Death of his Anceſtor. Co. Lit. 14. a. Cro. Jac. 217, 218. *Vide* Tit. *Appeal.* Letter (C).

If a Condition be annexed to Borough Engliſh or Gavelkind Lands, and the Condition is broken, the Heir at Common Law ſhall enter; for the Condition is a Thing of new Creation, and collateral to the Land: But when the eldeſt Son enters, the Heir or Heirs by Cuſtom ſhall enjoy the Land; for by Breach of the Condition they are reſtored to their antient Eſtate. Cro. Eliz. 204. Plow. 28. Co. Lit. 11, 12.

If a Man ſeiſed of Fee-ſimple Lands, as alſo of Lands of the Nature of Gavelkind and Borough Engliſh, acknowledges a Statute, and dies, the Heir at Law ſhall make the Special or Cuſtomary Heirs contribute in Proportion, becauſe all of them come in as Heirs to the Land deſcended, and are equally chargeable with the Debts of the Anceſtor. Hob. 25. Co. Lit. 376.

So if *A.* binds himſelf in a Recognizance or Statute, and after his Death ſome of his Lands deſcend to the Heir of the Part of the Father, and ſome to the Heir of the Part of the Mother, both Heirs ſhall be equally charged; and if the Conuzee loads one only, he ſhall have Contribution. 3 Co. 13. a. 2 Co. 25. b.

The Heir at Law is bound by his Anceſtor's *(b)* Alienations and Diſpoſitions,

(b) But if a Man covenants that after his Death his Heir at Law ſhall ſtand ſeiſed to the Uſe of his youngeſt Son, this is void. Hob. 313. *per Hobart.*

ſitions, as alſo by his Covenants and Conditions, as far as he hath Aſſets ‡.

‡ The Heir of *Ceſtui que Truſt*, ſhall be liable to the Value of the Lands. 29 Car. 2. c. 3. ſ. 10. But ſee *infra*, 27. n.

2 Vern. 215. Abr. Eq. 265. Alſo if the Anceſtor agrees to convey or ſell Lands, and receives Part of the Purchaſe-Money, but dies before a Conveyance is executed, and a Bill is brought againſt the Heir, he will be decreed to convey, and the Money ſhall go to the Executor, eſpecially if there are more Debts due than the Teſtator's perſonal Eſtate is ſufficient to pay.

Vide 1 Vern. 16. So if a Father conveys to a younger Son by a defective Conveyance, and dies, the Heir at Law in two Caſes ſhall be compelled to make it good. 1. Where there is a Covenant for further Aſſurance, binding the Heir; becauſe the Heir is bound by the Covenant. 2. Where there is a Proviſion made by the Father in his Life-time, for the Heir, or he hath ſuch Proviſion by Deſcent from the Father.

Alſo the Heir at Law is bound by a Decree obtained againſt the Anceſtor; which may be carried into Execution two Ways. *1ſt.* If the Decree is enrolled, the Party may ſue out a *Subpœna Scire Facias* againſt the Heir, to ſhew Cauſe againſt the Decree: But this is only after an Enrolment, and not before: And the Party muſt, at the Return of the *Subpœna*, ſhew Cauſe, if he have any, againſt the Decree.

2dly, The Plaintiff may bring his Bill of Revivor, to carry the Decree into Execution: And this is the ſureſt and ſafeſt Way; for where the Decree was obtained againſt the Anceſtor, and his Heir does not claim under that Title, but by virtue of another Title paramount, there the Decree can never be carried into Execution againſt him; as where an Eſtate is decreed againſt a Man, and his Heir inſiſts his Father had no Title thereto, or was only Tenant for Life thereof, the Decree in that Caſe can never be carried into Execution againſt him; he is at Liberty to controvert the Juſtice and Validity of that Decree; he may make a
*Page 19 * new Defence from what his Anceſtor did, and vary his Caſe as he ſhall be adviſed, and the Parties go into a new Examination of the Matter, and hear the Cauſe *de novo*, and the Court judge whether the Decree is right or not, and may affirm or reverſe it at their Pleaſure.

But where one Man obtains a Decree againſt another for a Real Eſtate, and the Party dies before the Plaintiff is put into Poſſeſſion, in that Caſe if the Heir at Law claims the Eſtate by Deſcent under his Anceſtor, or as Deviſee under him, he ſhall never controvert the Juſtice of the Decree tho' his Anceſtor ſhould have miſtaken his Defence; nor ſhall he be at Liberty to make a new Defence, or enter into new Proof, ſo as to overthrow the former Decree, eſpecially where it appears to the Court that the Decree hath been of an ancient Standing.

3. Of the ſpecial Heir, or Iſſue in Tail.

Lit. ſ. 613. The Iſſue in Tail claims *per (a) formam doni*, and as the Statute *de Donis* preſerves the Eſtate to him, his Anceſtor cannot Grant or Alien, nor make any (*b*) rightful Eſtate of Freehold to another, but for Term of his own Life.

(*a*) And therefore the Rule of *Poſſeſſio fratris* does not extend to Lands in Tail; for as to them a Man muſt claim as Heir *per Forman doni*. Co. Lit. 15. *vide* Tit. *Deſcents*, Letter (C). (*b*) How far he may diſcontinue, *vide* Tit. *Diſcontinuance*, Letter (B).—That by the 32 H. 8. c. 28. he may make Leaſes for three Lives, or 21 Years, to bind his Iſſue, but not thoſe in Reverſion or Remainder, *vide* Tit. *Leaſes and Terms for Years*.

If the Iſſue in Tail be attainted of Felony in the Life of his Father, and is pardoned, upon the Death of the Donee, the Donor cannot enter; for though the Diſability to take by Deſcent remains after the Pardon, yet the Donor cannot enter againſt his own Gift while there is any Iſſue in Being; and though the Iſſue cannot by reaſon of ſuch Diſability claim as Heir to the Donee, yet he may enter as a ſpecial Occupant, for the Gift is ſtill a good *Deſignatio Perſonæ*, who ſhall take upon the Death of the Donee; but then the Iſſue muſt take it ſubject to the Charges of his Father, becauſe he is to take it as the Tenant left it, and conſequently is to make good all Charges which he left upon it. Plowd. 557. 8 Co. 166. a.

4. Of the Cuſtomary Heir.

A Cuſtom in particular Places varying the Rules of Deſcent at Common Law is good; ſuch as the Cuſtom of Gavelkind, by which all the Sons ſhall inherit, and make but one Heir to their Anceſtor; but the general Cuſtom of Gavelkind Lands extends to Sons only †, but a ſpecial Cuſtom, that if one Brother dies without Iſſue, all his Brothers may inherit, is good. *Vide* Tit. *Deſcent*, Letter (D). Tit. *Borough Engliſh* and *Gavelkind*. Co. Lit. 140. a.

† According to *Somner*, fo. 7, Females, in default of Males, are capable of Succeſſion to Gavelkind-Land.—And when one Brother dieth without Iſſue, all the other Brethren may and do inherit, as doth their reſpective Iſſue too, in caſe of their Default, *jure repræſentationis*, but with this Reſtriction in the Nephew's Caſe ſucceeding with their Uncle, *viz.* that the Deſcent is then *in ſtirpes*, not *in capita*. *Vide Somner*, fo. 7, 8, &c.

But if a Remainder of Lands of the Nature of Gavelkind be limited to the right Heirs of *J. S.* the Heir at Common Law ſhall take it, and not the Heirs in Gavelkind; for this Remainder being newly created, cannot be reckoned within the Cuſtom. Co. Lit. 10. Hob. 31.

So the Cuſtom of Borough Engliſh, that the youngeſt Son only ſhall inherit, is good; But the youngeſt Brother ſhall not inherit, by Force of this Cuſtom, unleſs there ſhall be a particular Cuſtom to that Purpoſe alſo. Co. Lit. 210. 2 Lev. 138.

* 5. Of the *Hæres Factus*. * Page 20

* An *Hæres Factus* is only a Deviſee of Lands, being made ſo by the Will of the Teſtator, and has no other Right or Intereſt than the Will gives him. 3 Co. 42. a.

It has been held in Chancery, that ſuch an Heir ſhall have the Aid of the Perſonal Eſtate in diſcharging the Debts of the Teſtator. Vern. 36, 7.

But this muſt be underſtood of an *Hæres Factus* of the whole Eſtate, who ſhall have the Benefit of the Perſonal Eſtate, but a Deviſee of particular Lands ſhall not. Preced. Chan. 3.

[Action of Debt given againſt the Heir and *Deviſee*. 3 *W. & M. cap.* 14. *ſect.* 3. *Vide infra* 27]

(C) Of what Conditions, Covenants, &c. of the Anceſtor's the Heir ſhall take Advantage.

43 E. 3. 4. And. 55.

CONditions (*a*) and Covenants Real, or ſuch as are (*b*) annexed to Eſtates, ſhall deſcend to the Heir, and he alone ſhall take Advantage of them.

(*a*) That Conditions can only be reſerved to the Feoffor, Donor or Leſſor and their Heirs, but not to any Stranger. Lit. ſ. 447. Co. Lit. 214. (*b*) *Secus* of Covenants in Groſs. Palm. 558.—Alſo for a Breach in the Time of the Covenantee, the Action ſhall be brought by his Executor, though the Covenant was with him, his Heirs and Aſſigns only. Vent. 175. 2 Lev. 26. adjudged.

Rol. Abr. 470, 472.

And this not only where there are expreſs Words, but alſo where there are none; for the Law by Implication reſerves the Condition to the Heir of the Feoffor, *&c.* for being prejudiced by the Diſpoſition, it is but reaſonable that he ſhould take the ſame Advantages that his Anceſtor whom he repreſents might.

8 Co. 43. Co. Lit. 202. 336. b.

If a Man ſeiſed of Land in Right of his Wife, makes a Feoffment in Fee upon Condition, and dies, and after the Condition is broken, the Heir of the Huſband ſhall enter; for though no Right deſcended to him, yet the Title of Entry by Force of the Condition, which was created upon the Feoffment, and reſerved to the Feoffor and his Heirs, deſcended.

Co. Lit. 162. b.

The Heir ſhall take Advantage of a *Nomine Pœnæ*, for being incident to the Rent, it ſhall deſcend to the Heir, being a Security or Penalty to engage the Payment of the Rent; whoever therefore has a Right to the Rent, ought in Reaſon to have the Penalty which is to oblige the Tenant to pay it.

2 H. 4. 6. b. 5 Co. 18.

If an Abbot and Convent covenant to ſing for the Covenantee and his Heirs in ſuch a Chapel, his Heirs at all Times ſhall have a Writ of Covenant for the not doing thereof.

2 Lev. 92. *Laugher* ver. *Williams.* Skin. 305. S. C. cited.

If a Man leaſes for Years, and the Leſſee covenants with the Leſſor, his Executors and Adminiſtrators, to repair and leave it in good Repair at the End of the Term, and the Leſſor dies, *&c.* his Heir may have an Action upon this Covenant, for this is a Covenant which runs with the Land, and ſhall go to the Heir, though he is not named; and it appears, that it was intended to continue after the Death of the Leſſor, in as much as his Executors, *&c.* are named.

Salk. 141. pl. 8. Ld. Raym. 1125. *Vivian* ver. *Campion.*

The Plaintiff as Heir declared, that his Anceſtor *per Indenturam ſuam, cujus alterum partem Sigillo* of the Leſſee (omitting *Sigillat'*) *hic in curia profert*, did demiſe, that the Leſſee covenanted to repair from Time to Time, and to leave in Repair, and then ſhewed that his Anceſtor died *Anno* 10 *W.* 3. and for Breach aſſigned, *quod primo Apr. anno tertio Reginæ nunc, & per* 10 *Annos ante tunc*, the Premiſſes were out of Repair; after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, 1. That the Word *Sigillat'* was wanting; 2. That Part of the ten Years incurred in the Life of the Anceſtor, and that this was a hard Action; & *per Holt* C. J. the Want of *Sigillat'* is cured by the Verdict and Pleading over; 2. If the Premiſſes were out of Repair in the Time of the Anceſtor, and continued ſo in the Time of the Heir, it is a Damage to the Heir, and the Jury give as much in Damages as will put the Premiſſes in Repair; but hereby no Damages are given in reſpect of the Length of Time they continued in Decay, but in reſpect of what it will coſt at the Time of the Action brought to put the Premiſſes in Repair; therefore *per decem Annos* was frivolous: and he ſaid, that this is not a hard Action, and good Damages

*Page 21.

are

are always given in these Cases, because the Damages recovered ought to be applied to the Repair of the Premisses.

If *A* infeoffs *B.* upon Condition, that if the Heir of *A.* pays to *B.* &c. 20*s.* then he and his Heirs may re-enter; this is a good Condition, of which the Heir of *A.* may take Advantage, and yet *A* himself never can. Co. Lit. 214. b.

J. S. having Issue three Sons, *William* his eldest, *Nathaniel* his second, and *Daniel* his third; *William* died in the Life-time of his Father, leaving Issue only a Daughter; afterwards the Father devises the Estate in question to *Anne* his Wife for her Life, and after her Death to his Son *Daniel* and his Heirs; provided, that if *Nathaniel* do, within three Months after the Death of my Wife, pay to *Daniel*, his Executors or Administrators, the Sum of 500 *l.* then the said Lands shall come to my Son *Nathaniel* and his Heirs; the Wife lived several Years after, and during her Life *Nathaniel* died, leaving the Plaintiff his Heir; and the Wife afterwards dying, the Plaintiff brought his Bill within three Months after her Death, praying, that upon Payment of the 500*l.* he might have a Conveyance of the Estate; and the principal Point of the Case was, whether this 500*l.* being to be paid by *Nathaniel* within a limited Time, and he dying before that Time came, whether his Heir at Law could now, on Payment of the Money, make a Title to these Lands; for it was agreed that he was not Heir at Law to the Testator; and it was insisted upon that he could not; that this was a Condition precedent, and merely personal in *Nathaniel*, who had neither *Jus in re*, nor *ad rem*, and could neither have devised, or released, or extinguished this Condition; and being a bare Possibility, and he dying before it was performed, his Heir could not make it good; and though the Word *Heirs* be used in the Devise to *Nathaniel*, yet that is not designed to give them any Estate originally, but to denote the Quantity of Estate which *Nathaniel* was to take; and for this were cited the Cases in the (*a*) Margin. On the other Side it was insisted, that this was like the common Case in (*b*) *Co. Lit.* where a Feoffment is made on Condition that the Feoffor shall, before such a Day, &c. there, if the Feoffor die before the Day, his Heir may perform the Condition, for the Reasons there mentioned, and that it being so at Law, it should still be construed more liberally in Equity, where the Letter of a Condition is not always required to be strictly performed; and for this were cited the Cases (*c*) in the Margin, that the Possibility of performing this Condition was an Interest of Right, or *Scintilla juris*, which vested in *Nathaniel* himself, that he survived the Testator; and therefore this differed from *Bret* and *Rigden*'s Case, that consequently such Right, Possibility, or Interest, descended to his Heir, and might be performed by him, as before the Statute *De donis*, the Possibility of Reverter descended to the Heir of the Donor; and for this were also cited the Cases in the (*d*) Margin; the Cause being first heard by the Master of the Rolls, was thought by him a Matter * of great Difficulty, and therefore he appointed the Counsel to speak to it when the Court was full; afterwards it was decreed by my Lord Chancellor, with the Assistance of the Master of the Rolls, for the Plaintiff, on *Lit. Sect.* 334, 335. and my Lord Chancellor said, that though a Condition, in Strictness of Law, was not devisable, yet, since the Statute of Uses, the Devisee may take Benefit of it by an equitable Construction, &c. and that *Nathaniel* might have released or extinguished this Condition. Mich. 5 Geo. 1. between *Marks* and *Marks*, *in Canc.* Eq. Cas. Abr. 106. pl. 6. 10 Mod. 419. Stra. 129. S. C.

(*a*) 10 Co. *Lampet*'s Case. Plowd. *Brett* and *Rigden*.

(*b*) Co. Lit. 205, 219. b.

(*c*) 1 Chan. Cas. 89. 3 Chan. Ca. *Bertie* and *Falkland*.

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(*d*) 2 Sand. *Purfoy* and *Rogers*. Cro. Car. 358. Cro Jac. 591. 8 Co. *Math. Manning*'s Case.

(D) What

(D) What Conditions, Covenants, &c. ſhall extend to the Heir ſo as to bind him.

Rol. Abr. 421. (a) Shall be bound by Conditions in Law as well as expreſs Conditions. Co. Lit. 233. 8 Co. 44. Hard. 11. And though an Infant ſhall be bound to perform them; but for this *vide* Tit. *Infants*. (b) If the Anceſtor levies a Fine of ancient Demeſne Lands to the Prejudice of the Lord, an Action of Deceit lies againſt the Heir. Salk. 210. pl. 1. Ld. Raym. 177. 3 Salk. 35.

AS the Heir at Law is the proper and only Perſon who can take Advantage of Conditions, &c. annexed to the real Eſtate, ſo ſhall he be bound by *(a)* all ſuch Conditions, &c. which (*b*) run with the Land, whether ſuch Conditions were annexed to the Eſtate by the original Feoffor, Grantor, or his immediate Anceſtor.

Co. Lit. 163. b.

If a Gift be made in Tail, upon Condition that the Donee ſhall not diſcontinue, and the Donee hath Iſſue two Daughters, and one of them diſcontinues, the Donor ſhall enter and evict them both; becauſe it was the original Condition annexed to the whole Eſtate, that no Part of it ſhould be diſcontinued.

Vide Head of *Eſtates Tail.*

But here we muſt take Notice, that neither Tenant in Tail, nor his Iſſue, can be reſtrained from aliening by Fine and Recovery, though they may be reſtrained from aliening by Feoffment, or other tortious Act, which amounts to a Diſcontinuance.

Vent. 321. 3 Keb. 787. *Piers* and *Winn.*

So where one deviſed Lands to *A.* and the Heirs Male of his Body, provided, that, if he does attempt to alien, then immediately his Eſtate ſhall ceaſe, and *B.* ſhall enter; and *A.* makes a Feoffment in Fee, and thereupon *B.* enters; and it was adjudged againſt *B.* and that the Condition was void, becauſe *non conſtat* what ſhall be adjudged an Attempt, and how it ſhould be tried.

Dyer 316. 10 Co. 41. Vent. 199.

Alſo where a Condition is annexed to the Eſtate given to the Heir, and which goes in Abridgment and Reſtraint thereof, the ſame ſhall in ſome Caſes be conſtrued a Limitation; for if it were a Condition, no Body could take Advantage of it but the Heir himſelf.

Cro. Eliz. 204. *Wellock* and *Hammond.* 3 Co. 20, 21. 2 Leon. 114. S. C.

As if a Copyholder in Borough Engliſh ſurrenders to the Uſe of his Will, and after deviſes to his Wife for Life, Remainder to his eldeſt Son, paying 40 *s.* to each of his Brothers and Siſters within two Years after the Death of his Wife, &c. this is a Limitation, and not a Condition; for, if it ſhould be a Condition, it would extinguiſh in the Heir, and there would be no Remedy for the Money.

Cro. Eliz. 833, 919. Moor 644. pl. 891. Noy 51. *Haynſworth* and *Pretty*, adjudged. Vaugh. 271. 2 Mod 26. S. S. cited.

So where one ſeiſed of Lands in Fee, having Iſſue two Sons and a Daughter, deviſed to his youngeſt Son and Daughter 20*l.* a-piece, to be paid by his eldeſt Son, and deviſed his Lands to his eldeſt Son and his Heirs, upon Condition, that if he did not pay the ſaid Sums, that then the Land ſhould remain to his youngeſt Son and Daughter and their Heirs, and dies; the eldeſt Son enters, and does not pay the Money; and it was adjudged that the youngeſt Son and Daughter ſhould have the Land; for, 1. This Deviſe to the eldeſt Son and Heir, being no more than what the Law gave him without ſuch Deviſe, was void. 2. If this ſhould be a Condition, it would * be defeated by the Deſcent upon the eldeſt Son, who was to perform it; therefore, 3. It was held to be a Deviſe to the eldeſt Son only, or no longer than till he failed to pay the ſaid Sums, and then to the youngeſt Son and Daughter, which gives them the Land by way of Limitation, upon his failing to pay the ſaid Sums.

* Page 23

One

One deviſes Lands to *A.* his Heir at Law, and deviſes other Lands to *B.* in Fee, and if *A.* moleſt *B.* by Suit or otherwiſe, he ſhall loſe what is deviſed to him, and it ſhall go to *B.* and dies; *A.* enters into the Lands deviſed to *B.* and claims them; and it was held, 1. That this was a ſufficient Breach to give Title to *B.* 2. That if this ſhould be a Condition, it would by the Deſcent thereof to *A.* who was to perform it, and alſo to enter for the Breach thereof, be merged and defeated; therefore it was held to be a Limitation, which determined the Eſtate of *A.* and caſt the Poſſeſſion upon *B.* without Entry. 2 Mod. 7. *Shuttleworth* and *Barber.* Eq. Ca. Abr. 206. pl. 6. Comyns 72. pl. 45, 123, 145. pl. 86. 2 Ld. Raymond 829. 2 Vern. 519.

Stra. 129, 135. 2 Stra. 1086. Andr. 125, 135. Caſ. Temp. King *C.* and *Hardw.* C. J. 98, 99. 2 Barnard. *K. B.* 217. 2 Stra. 1128.

But wherever the Anceſtor makes a Conveyance or Diſpoſition on Condition, which goes in Reſtraint and Abridgment of the Eſtate of the Heir, he muſt have Notice of it; for having a good Title by Deſcent, he is not obliged to take Notice of ſuch Condition at his Peril, as (*a*) others muſt do. 8 Co. *Frances*'s Caſe.

(*a*) This Diverſity is agreed in the Caſe of *Fry* and *Porter.* Vent. 199. Mod. 86. Lev. 21. Raym. 236. 2 Keb. 756, 787, 814, 867. 2 Ch. Rep. 26. 2 Show. 316.

As where *A.* ſeiſed of Lands in Fee, and having Iſſue only one Daughter named *B.* by Leaſe and Releaſe conveys his Lands to the Uſe of himſelf for Life, and after his Death to the Uſe of *B.* in Tail, provided that ſhe married (with the Conſent of the Truſtees, or the major Part of them) ſome Perſon of the Family and Name of *Fitzgerald*, or who ſhould take upon him that Name immediately after the Marriage; but if not, then the Truſtees to raiſe a Portion out of the ſaid Lands for *B.* and the Lands to remain to *C.* Afterwards *A.* dies, and *B.* marries one who neither was nor took upon him the Name of *Fitzgerald*; and the only Point upon which Judgment was given was the want of Notice in *B.* of the Settlement, without which, being Heir at Law, and ſo having a Title by Deſcent, ſhe was not bound *ex officio*, to take Notice of the Condition. 3 Mod. 28. Lutw. 809. *Malleon* and *Fitzgerald.*

[The Heir of the Wife ſhall not be barred after the Death of his Father and Mother, by the Deed of his Father, where no Fine is levied. *Stat.* 6. *Ed.* 1. *cap.* 3.]

(E) What Actions he may commence and proſecute in Right of his Anceſtor.

IT is clear that the Heir may bring any Real Action, or Action *Droiturel*, in Right of his Anceſtor, but cannot regularly bring any Perſonal Action, becauſe he has nothing to do with the Aſſets or Perſonal Contracts of his Anceſtor. Co. L. 164.

Alſo if an erroneous Judgment be given againſt the Anceſtor, by which he loſeth the Lands, the Heir may bring (*a*) a Writ of Error. Rol. Abr. 747. Dyer 90. Godb. 337.

(*a*) That Error and Attaint always deſcend to ſuch Perſon, to whom the Land ſhould deſcend, as if no ſuch Recovery or falſe Oath had been. 1 Leon. 261.

And if one hath Lands on the Part of his Mother, and loſeth by erroneous Judgment, and dies, the Heir of the Part of the Mother ſhall have the Writ of Error. Leon. 261. 2 Sid. 56.

* Page 24 * So the younger Son, when intitled to the Land by the Cuſtom of Borough Engliſh, ſhall bring the Writ of Error, and not the Heir at Common Law; for this Remedy deſcends with the Land.

Owen 68. Leon. 261. 4 Leon. 5. adjudged; & *vide* Bridg. 79. Rol. Rep. 311.

Dyer 90. Leon. 261. Rol. Abr. 747. So if there be an erroneous Judgment againſt Tenant in Tail Female, the Iſſue Female, and not the Son, ſhall bring a Writ of Error.

Dyer 89. Cro. Eliz. 469. 3 Lev. 36. So if a Man ſettles Land to the Uſe of himſelf and the Heirs of his Body, the Remainder to his own Right Heirs, and dies, leaving Iſſue only a Daughter, who levies a Fine, and dies without Iſſue, and *J. S.* brings a Writ of Error as Couſin and Collateral Heir to the Daughter; yet he ſhall never reverſe the Fine, for there could no Right deſcend to him from the Daughter, becauſe ſhe had but an Eſtate-tail, which determined by her Death without Iſſue; and it does not appear that the Remainder in Fee was in the Daughter as Right Heir; wherefore *J. S.* ſhall not reverſe the Fine, *quia de non apparentibus & non exiſtentibus eadem eſt ratio*, eſpecially in a Court of Judicature, where the Judges can take Notice of nothing that does not come judicially before them, and appear in the Pleading.

Styl. 38, 39. *White* and *Thomas*, *per* Rol. If *J. S.* binds himſelf and his Heirs in a Bond, and thereupon Judgment is obtained againſt *J. S.* and *J. S.* makes his Will, and his Heir at Law Executor, and dies, leaving Lands which deſcend to his Heir, yet he ſhall not have a Writ of Error as Heir, for he is not privy to the Judgment; and when an Extent is made upon him, it is a Tertenant, but after the Lands are taken in Execution, he may have a Writ of Error.

11 H. 6. 15. 19 H. 6. 41. Co. Lit. 162. a. Alſo the Heir at Law may, in Right of his Anceſtor, maintain an Action of Debt for Rent reverſed on a Leaſe made by his Anceſtor, for the Rent is Part of the Lands, and incident to the Reverſion; but for Arrears of Rent incurred in the Life-time of the Anceſtor, neither the Heir nor (a) Executor could by the Common Law maintain any Action; for as to the Heir they were conſidered as Part of the Perſonal Eſtate, and as to the Executor, he could not repreſent his Teſtator as to any Contracts relating to the Freehold and Inheritance.

(a) But now by 32 H. 8. c. 37. an Executor may maintain an Action of Debt for ſuch Arrears; for which *vide* Tit. *Debt*, Letter (C).

Co. Lit. 18. b. for this *vide* Rol. Abr. 625. Noy 104. Godb. 200. Cro. Jac. 367. 2 Bulſt. 151. If a Nobleman, Knight, Eſquire, &c. be buried in a Church, and have his Coat of Arms, and Pennons with his Arms, and ſuch other Enſigns of Honour as belong to his Degree or Order, ſet up in the Church, or if a Grave-ſtone or Tomb be laid or made, &c. for a Monument of him; in this Caſe, albeit the Freehold of the Church be in the Parſon, and that theſe be annexed to the Freehold, yet cannot the Parſon, or any, take them or deface them, but he is ſubject to an Action by the Heir and his Heirs, in the Honour and Memory of whoſe Anceſtor they were ſet up.

*(F) Where the Heir ſhall be ſaid to be bound to anſwer his Anceſtor's Debts and Contracts. * Page 25

WHERE the Anceſtor binds himſelf and his Heirs in an Obligation, the Obligee may ſue the Heir (*a*) or Executor at his Election, and may have Execution of the Land deſcended to the Heir; for the Common Law having allowed the Action of Debt againſt the Heir, he could have no Benefit by the Action, unleſs he were permitted to have Execution of the Lands which deſcended to the Heir. Plow. 441. 3 Co. 12. a. Cro Jac. 450. (*a*) And. 7. Or the Adminiſtrator of the Anceſtor.

3 Lev. 189 adjudged on Demurrer.—May ſue the ſame Perſon, being both Heir and Executor; alſo may ſue the Executor for Part, and the Heir for the Reſidue; but if the Heir or Executor pay the Whole or Part, and afterwards the other is ſued, there ſhall be Relief in an *Audita Querela*. 3 Lev. 303-4-5.——Where the Heir, being likewiſe Adminiſtrator, and having real Aſſets by Deſcent, diſcharged a Bond Debt, in which he was bound, which he inſiſted was out of the Perſonal Eſtate; but the Court of Chancery would not admit of this Conſtruction, to the Defeating of the ſimple contract Creditors. Abr. Eq. 44.

But the Body of the Heir is protected, for it would be moſt unreaſonable to ſubject the Heir to the Payment of his Anceſtor's Debts, any farther than to the Value of the Aſſets deſcended. Dyer 81. pl. 62, 207. pl. 15. Moor, pl. 203. Co. Lit. 103, 290.

Alſo the Heir muſt be (*b*) expreſly named, otherwiſe he is not chargeable; and the Reaſon why the Heir is not chargeable in this Caſe, as the Executor is in caſe of a Bond entred into by the Teſtator, without being named, is this; by the Common Law only the Goods and Chattels of the Debtor, and the annual Profits of the Land as they aroſe, and not the Land itſelf, were liable to Execution for Debt or Damages, becauſe theſe being the Security the Creditor depended upon, they were liable in the Hands of his Repreſentative, or Executor, as well as in the Hands of the Debtor himſelf; and hence it was, that the Executor was bound to anſwer the Debt of the Teſtator, ſo far as he had Chattles or Aſſets, though he was not named in the Contract; but the Land was not liable to Execution, becauſe it was preſerved from the Perſonal Contracts and Engagements of the Tenant, that he might be the better able to anſwer the feudal Duties to the Lord, which were the Life and Support of the Government; and therefore the Land, not being originally liable to the Demand in the Hands of the Obligor, muſt be much leſs liable in the Hands of the Heir, who was not comprehended in the Contract. 2 Inſt. 19. Plow. 440. Hob. 60. & *vide* Tit. *Execution*, Letter (A). (*b*) And therefore no Action will lie againſt the Heir for the Eſcape of one in Execution ſuffered by the Anceſtor, nor for any Tort or Treſpaſs of his; alſo if the Anceſtor be

condemned in an Obligation and die, Execution ſhall be taken out by *Elegit*, and not of all the Lands deſcended. Dyer 271. a. pl. 25.——[But the Heir ſhall anſwer for the Eſcape of a Priſoner in Execution, on a Statute Merchant, by the *St. de Mercator*. 13 Ed. 1. ſtat. 3. & *vide infra*.]

But if *A.* hath granted, for him and his Heirs to *B.* and his Heirs, ſuch a Rent out of his Lands; in this Caſe the Heirs being comprehended in the Contract are bound to make good the Grant, ſo far as they have Aſſets by Deſcent from the Grantor; and this was allowed at Common Law, becauſe the Grantee of the Rent had the Land originally in View for his Security, and by the Grant itſelf having it in his Power to diſtrain the Land for the Rent, it was equal to the Heir whether the Land was to anſwer the Rent by Diſtreſs, or by an Execution upon a Judgment in a Writ of Annuity. Rol. Abr. 226. Poph. 87. Hob. 58. Dyer 344. b. Co. Lit. 144. b.

If the Anceſtor binds himſelf in a Statute, Recognizance, &c. the Heir is liable not only as Tertenant, but alſo as Heir, otherwiſe he could not have his Age; and cannot oblige a Purchaſor, whether for valuable Conſideration, 3 Co. 12. Sir *William Herbert*'s Caſe.

ſideration, or without, to contribute; but one Heir may oblige another to contribute; as if a Man ſeiſed of two Acres, the one deſcendible according
* Page 26 * to the Courſe of the Common Law, the other in *Borough Engliſh*, acknowledge a Statute, *&c.* the Heir at Law ſhall oblige the Heir in *Borough Engliſh* to contribute: So one Coparcenor ſhall oblige the other to contribute; or if the Conuzor hath Lands, ſome deſcendible to the Heirs of the Father, and ſome deſcendible on the Heirs of the Mother, the Heir on the Part of the Father ſhall compel the Heir on the Part of the Mother to contribute; *& ſic vice verſa.*

Co. Lit. 102. By the Common Law, if the Heir before an Action brought againſt him had aliened the Aſſets, the Obligee was without (*a*) any Remedy; but if he only aliened, pending the Writ, the Lands, which he had by Deſcent at the Time of the (*b*) Original purchaſed, had been liable.

(*a*) Upon a Motion for a new Trial, *Twiſden* ſaid, That in his Practice the Heir in an Action of Debt againſt him upon a Bond of his Anceſtor pleaded *Riens per Diſcent:* the Plaintiff knew the Defendant had levied a Fine, and at the Trial it was produced; but becauſe they had not a Deed to lead the Uſes, it was urged, that the Uſe was to the Conuzor and his Heirs, and ſo the Heir in by Deſcent; whereupon there was a Verdict againſt him; and being a juſt Debt, they could never after get a new Trial. Mod. 2. S. P. in *B. R.* Mich. 14 Geo. 2. *Smith v. Huggins.* (*b*) Or filing a Bill in *B. R.* which to this Purpoſe has been held as effectual as an original Writ. Carth. 245.

Carth. 245. *Gree* and *Oliver* adjudged; and *North*'s Opinion, Mod. 253. that he who firſt obtains Judgment ſhall be ſatisfied, denied to be Law.

In Conſequence of this Doctrine, that the Lien ſhall have Relation to the Time of the Original purchaſed, it hath been adjudged, that if there be two Creditors to *J. S.* whoſe Heir is bound, *viz. A.* and *B.* and *A.* files an Original in *C. B.* and hath Judgment thereon, *Trin. Term.* 2 *Jac.* 2. by Default, and thereupon a general *Elegit* iſſues againſt all the Lands of the Heir, and a Moiety thereof is delivered to *A.* and *B.* on a Bill filed in *B. R.* 1 *&* 2 *Jac.* 2. has a ſpecial Judgment againſt the Aſſets confeſſed by the Heir, *Trin. Term.* 3 *Jac.* 2. though *B.*'s Judgment be ſubſequent to *A.*'s, yet it appearing that his Bill or Original was filed before *A.*'s, the Judgment ſhall have Relation thereto, and therefore he muſt be firſt ſatisfied.

Carth. 246. *per Cur.*

So it ſeems in the above Caſe, that though *A*'s Judgment had been on an Original actually filed before *B.*'s, that *B.* muſt have been preferred, becauſe his Judgment was general againſt the Heir, and the Execution a general and common Execution by *Elegit*, and not againſt the Aſſets only by way of Extent; and therefore ſuch a general Judgment will not operate by way of Relation to the Original, but binds only as in common Caſes, from the Time of the Judgment given.

But to prevent the Wrong and Injury to Creditors by Alienation of the Lands deſcended, *&c.* by the (*c*) 3 *&* 4 *W. & M. cap.* 14. (*d*) it is enacted,

(*c*) A Bill brought in Chancery againſt the Heir and his Alienee, and the Creditor relieved, tho' it was objected, that the Statute being introductive of a new Law, the Relief on it ought to have been at Common Law. Abr. Eq. 149.

" That in all Caſes, where any Heir at Law ſhall be liable to pay the Debt " of his Anceſtor, in regard of any Lands, Tenements or Hereditaments " deſcending to him, and ſhall ſell, alien or make over the ſame before " any Action brought or Proceſs ſued out againſt him, that ſuch Heir at " Law ſhall be anſwerable for ſuch Debt or Debts in an Action or Actions " of Debt to the Value of the ſaid Land ſo by him ſold, aliened or made " over; in which Caſes all Creditors ſhall be preferred as in Actions againſt " Executors and Adminiſtrators, and ſuch Execution ſhall be taken out " upon any Judgment or Judgments ſo obtained againſt ſuch Heir, to the " value of the ſaid Land, as if the ſame were his own proper Debt or " Debts; ſaving that the Lands, Tenements and Hereditaments *bona fide* " aliened before the Action brought, ſhall not be liable to ſuch Execution.

(*d*) Made perpetual by 6 *&* 7 *W.* 3. c. 14.

" Provided, That where any Action of Debt upon any Specialty is " brought againſt any Heir, he may plead *Riens per Diſcent* at the Time " of the original Writ brought, or the Bill filed againſt him; any Thing

" herein

" herein contained to the contrary notwithſtanding: And the Plaintiff in " ſuch Action may reply, that he had Lands, Tenements or Hereditaments " from his Anceſtor before the original Writ brought, or the Bill filed: " * And if, upon Iſſue joined thereupon, it be found for the Plaintiff, the * Page 27 " Jury ſhall inquire of the Value of the Lands, Tenements or Hereditaments ſo deſcended, and thereupon Judgment ſhall be given, and Execution ſhall be awarded as aforeſaid: But if Judgment be given " againſt ſuch Heir, by Confeſſion of the Action without confeſſing the " Aſſets deſcended, or upon Demurrer, or *Nihil dicit*, it ſhall be for the " Debt and Damages, without any Writ to inquire of the Lands, Tenements or Hereditaments ſo deſcended."

Alſo if, before this Statute, the Anceſtor had deviſed away the Lands, a Creditor by Specialty had no Remedy either againſt the Heir or Deviſee. Abr. Eq. 149.

But now by the ſaid Statute 3 & 4 *W. & M. cap.* 14. reciting that ſeveral Perſons having by Bonds or other Specialties bound themſelves and their Heirs, and have afterwards by Will diſpoſed of their Lands, with an Intent to defraud their Creditors; it is enacted, " That all Wills and Teſta- " ments, Limitations, Diſpoſitions or Appointments of or concerning any " Manors, Meſſuages, Lands, Tenements, or Hereditaments, or of any " Rent, Profit, Term or Charge out of the ſame, whereof any Perſon or " Perſons at the Time of his, her, or their Deceaſe ſhall be ſeiſed in Fee- " ſimple, in Poſſeſſion, Reverſion or Remainder, or have Power or diſpoſe " of the ſame by his, her, or their laſt Wills or Teſtaments, ſhall be deemed " and taken (only as againſt ſuch Creditor or Creditors as aforeſaid, his, " her, and their Heirs, Succeſſors, Executors, Adminiſtrators and Aſſigns, " and every of them) to be fraudulent, and clearly, abſolutely, and utterly " void, fruſtrate, and of none Effect; (any Pretence, Colour, feigned or " preſumed Conſideration, or any other Matter or Thing to the contrary " notwithſtanding.")

" And for the Means that ſuch Creditors may be enabled to recover " their ſaid Debts, it is further enacted, That in the Caſes before men- " tioned every ſuch Creditor ſhall and may have and maintain his, her, and " their Action and Actions of Debt, upon his, her, and their ſaid Bonds " and Specialties, againſt the Heir and Heirs at Law of ſuch Obligor or " Obligors, and ſuch Deviſee and Deviſees jointly, by virtue of this Act; " and ſuch Deviſee or Deviſees ſhall be liable and chargeable for (*a*) a falſe " Plea by him or them pleaded, in the ſame Manner as any Heir ſhould " have been for any falſe Plea by him pleaded, or for not confeſſing the " Lands or Tenements to him deſcended." (*a*) *Vide* 29. Car. 2. c. 3. par. 10, 11. by which although the Heir of the *Ceſtui que Truſt* is made liable to anſwer, &c. yet by reaſon of any Kind of Plea, or other Matter, he ſhall not be chargeable to pay the Condemnation out of his own Eſtate.

" Provided, That where there hath been or ſhall be any Limitation or " Appointment, Deviſe or Diſpoſition of or concerning any Manors, Meſ- " ſuages, Lands, Tenements or Hereditaments for the Raiſing or Payment " of any real or juſt Debt or Debts, or any Portion or Portions, Sum or " Sums of Money for any Child or Children of any Perſon, other than " the Heir at Law, according to or in purſuance of any Marriage Con- " tract or Agreement in Writing *bona fide* made before ſuch Marriage, the " ſame, and every of them, ſhall be in full Force, and the ſame Manors, " Meſſuages, Lands, Tenements and Hereditaments ſhall and may be " holden and enjoyed by every ſuch Perſon or Perſons, his, her, and their " Heirs, Executors, Adminiſtrators and Aſſigns, for whom the ſaid Limi- " tation, Appointment, Deviſe or Diſpoſition was made, and by his, her, " and their Truſtee or Truſtees, his, her, and their Heirs, Executors, Ad-

" miniſtrators

" miniſtrators and Aſſigns, for ſuch Eſtate or Intereſt as ſhall be ſo limited " or appointed, deviſed or diſpoſed, until ſuch Debt or Debts, Portion or " Portions ſhall be raiſed, paid and ſatisfied; any Thing contained in this " Act to the contrary notwithſtanding."

And it is further enacted by the ſaid Statute, " That all and every De- " viſee and Deviſees made liable by this Act, ſhall be liable and charge- * Page 28 * " able in the ſame Manner as the Heir at Law, by force of this Act, not- " withſtanding the Lands, Tenements and Hereditaments to him or them " deviſed ſhall be aliened before the Action brought."

Abr. Eq. 149. *Parſlow* ver. *Weeden.*

In the Conſtruction of this Statute it hath been holden, that, though a Man is prevented thereby from defeating his Creditors by Will, yet any Settlement or Diſpoſition he ſhall make in his Life-time of his Lands, whether voluntary or not, will be good againſt Bond-Creditors; for that was not provided againſt by the Statute, which only took care to ſecure ſuch Creditors againſt any Impoſition, which might be ſuppoſed in a Man's laſt Sickneſs; but if he gave away his Eſtate in his Life-time, this prevented the Deſcent of ſo much to the Heir, and conſequently took away their Remedy againſt him, who was only liable in reſpect of the Lands deſcended; and as a Bond is no Lien whatſoever on Lands in the Hands of the Obligor, much leſs can it be ſo when they are given away to a Stranger.

Carth. 353. *Redſhaw* and *Heſter* adjudged. 5 Mod. 122. S. C. Comb. 344. S.C. adjudged, and that the Statute was made not to create, but to prevent Difficulties in pleading.

In Debt againſt an Heir, who pleaded *Riens per Diſcent* on the Day of the Bill, the Plaintiff replied ſpecially, that the Obligor (Father of the Defendant) died on ſuch a Day, and that the Defendant (after the Death of his Father) and before the Day of the Bill, *viz.* on ſuch a Day which was a Day after the Death of the Obligor, had Lands by Deſcent from his Father in Fee-ſimple, *unde prædict'* (the Plaintiff) *de debito prædicto ſatisfeciſſe potuit, viz. apud* H. *prædict' & hoc parat' eſt verificare, unde petit Judicium*, according to the above Statute. To this the Defendant made a frivolous Rejoinder; and thereupon the Plaintiff demurred. The Queſtion was, if the Replication was good in purſuance of the Statute; for it was objected that it was ill, becauſe the Plaintiff had put the Value of the Lands in Iſſue by theſe Words, *unde, &c. de debito prædicto ſatisfeciſſe potuit*, which ought to have been omitted, becauſe the Statute is expreſs, that after the Iſſue tried the Jury ſhall inquire of the Value; ſo that it is Matter of Inqueſt only *ex Officio*, and not to be the Point of the Iſſue; and by this Statute the Plaintiff is only to recover *pro tanto* againſt the Defendant with reſpect to the Value of ſuch aliened Aſſets, and is not to have a general Judgment againſt the Heir, as at Common Law upon a falſe Plea; *ſed per Cur.* upon Debate, this Replication was held good and as it ought to be, and that if *unde, &c. de debito prædicto ſatisfeciſſe potuit* had been left out, it might have been a good Cauſe of Objection; for the Statute doth not give Occaſion to alter any more of the Form of the Replication common in ſuch Caſes, but only as to the Time concerning Aſſets by Deſcent; and the Concluſion, which (before the Statute) was to the Country, muſt now be with an Averment only, becauſe the Defendants may have an Opportunity to anſwer the new Matter alledged in the Replication.

Trin 32. Car. 2. in *C. B.* between Baron *Weſton* and *Danby* adjudged.

It ſeems that neither before nor ſince this Statute the *(a)* Executor or Adminiſtrator of the Heir are liable; for the Perſon of the Heir is not chargeable, but with reſpect to the Land; and if, before the Statute, the Heir had aliened before Action brought, he ſhould not be charged for the Profits he received; which is evident from the Plea of *Riens per Diſcent* the Day of the Writ purchaſed; much leſs could his Executor *(b)*, nor can he

(a) But the Heir of an Heir is liable; but for this *vide* 2 Chan. Caſes 175. Vern. 400. and Dyer 344. a Precedent cited in the Book of Entries, where Debt was brought againſt the Executor of an Heir upon a Bond made by the Anceſtor, which is alſo mentioned. Plow. 441. 2 Leon. 11. 3 Leon. 70. *(b)* But *quære & vide* 2 Vern. 62. where it is ſaid, that if the Heir aliens the Land to prevent the Creditors of Satisfaction of their Debts, Equity will follow the Money into the Hands of the Heir or his Executor.

yet,

yet, unleſs ſome Statute make him ſo: For an Executor is but in Nature of a Truſtee for the Perſonalty, and not at all privy to the Inheritance.

If there be Judgment in Debt againſt two, and one dies, a *Scire facias* lies againſt the other alone, reciting the Death, and he cannot plead that the Heir of him that is dead has Aſſets by Deſcent, and demand * Judgment if he ought to be charged alone: For at (*a*) Common Law the Charge upon a Judgment being (*b*) perſonal ſurvived, and the Statute of *Weſtm.* 2. which gives the *Elegit* does not take away the Remedy of the Plaintiff at the Common Law, and therefore the Party may take out his Execution which way he pleaſes; for the Words of the Statute are, *fit in Electione*; But if he ſhould, after the Allowance of this Writ and Revival of the Judgment, take out an *Elegit* to charge the Land, the Party may have Remedy by (*c*) Suggeſtion, or elſe by *Audita Querela*.

Lev. 30. Raym. 26. Keb. 92. S. C. *Edſar* and *Smart*. * Page 29 (*a*) So adjudged. 1 E. 3. 13. pl. 41. 3 E. 3. pl. 37. & *vide* 29 Aſſiſe, pl. 37. 29. E. 3. 29. (*b*) For the Difference between a real and perſonal Execution, and that a perſonal Execution will ſurvive, though a real one will not, *vide* 3 Co. 14. Yelv. 209. Raym. 153. 2 Keb. 3. 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 3. 320. Show. 402. (*c*) For this *vide* F. N. B. 166. 44 E. 3. 10. Ld. Raym. 244. Comb. 441. 5 Mod. 338. Carth. 404.

If there be a Sequeſtration for a Perſonal Duty againſt the Anceſtor where the Heir is not bound, and the Defendant dies, there is an End of the Sequeſtration, and it cannot be revived againſt the Heir; becauſe neither the Heir nor the Lands are bound by ſuch Decree: But if the Decree were upon a Covenant that bound the Heir, and the Defendant died, ſuch Decree might be revived by *Subpœna Scire Facias* againſt the Heir to ſhew Cauſe againſt the Decree, if the Decree be inrolled of Record; or if not, by Bill of Revivor; and when revived againſt Heir and Executor, (which is the uſual and regular Way,) the Sequeſtration alſo will be revived on Motion, if, upon coming into Court, Cauſe is not ſhewn why the Decree ſhould not be revived: And in this Caſe it hath been reſolved, that the Decree ſhould have the ſame Authority to bind the Perſonal Aſſets as a Judgment at Law, and therefore ſhall go *pari paſſu* to be paid off and diſcharged; but the Lien of the Judgment upon Lands came in by the Statute, which only gives an *Elegit* for a Moiety of the Land in Satisfaction of the Debt, and therefore that could give no Authority to lay a Sequeſtration on the Real Eſtate for a mere Perſonal Duty, where the Heir is not bound in the Covenant.

Vern. 143. 3 Lev. 355. 2 Vern. 37, 88, 9.

(G) How to be proceeded againſt where he is bound.

IF the Heir be ſued upon a Bond or Covenant in which he is bound, it need not be ſhewn how he is Heir; for the Plaintiff is a Stranger, and it would be hard to compel him to ſet forth another's Pedigree: But where the Heir ſues, he muſt ſhew his Pedigree, and *Coment Hæres*; for it lies in his proper Knowledge.

Salk. 355. pl. 2. But for this *v.* Caſe of *Kellow* v. *Rowden*. Carth. 126. 3 Mod. 25. Show. 248. 3 Lev. 286. Vern. 180. *Croſſeing* ver. *Honor*.

It muſt be alledged, that the Heir was bound; and therefore, where a Bill was brought by the Obligee in a Bond againſt the Heir of the Obligor, alledging, that he, having Aſſets by Deſcent, ought to ſatisfy this Bond, the Defendant demurred, becauſe the Plaintiff had not expreſsly alledged, in the Bill, that the Heir was bound in the Bond; and though it was alledged that

that the Heir ought to pay the Debt, yet that was held inſufficient, and the Demurrer was allowed.

5 Co. 36. a. Plow. 440. Dyer 344. pl. 6. Jon. 87. Lev. 130. Cro. Eliz. 712. S. P. If an Action be brought againſt the Heir upon the Bond of his Anceſtor, and in which the Heir is bound, it muſt be in the (*a*) *Debet* and *Detinet*; becauſe he hath the Aſſets in his own Right, and therefore is to be ſued as if it were his own proper Bond.

and the Reaſon there given, becauſe he is bound by ſpecial Words in the Obligation, & *vide* 2 Leon. 11. 2 Brownl. 204, 5. Cro. Eliz. 350. Like Point. (*a*) But if in the *Detinet* only, it is good after Verdict, by the 16 and 17 Car. 2. c. 8. *Comber* and *Watten*, Lev. 224. adjudged. Sid. 342, 575. S. C.

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* Page 30 * (H) **Where he ſhall be liable himſelf, and the Judgment general or Special:** And herein,

1. Where he ſhall be liable for his falſe Pleading.

21 E. 3. 10. 40 E. 3. 14. Dyer 81. pl. 62. 149. pl. 80. Plow. 440. Benl. 157. 5 Co. 35. 2 Rol. Abr. 70. and the ſame Point admitted in all the modern Books. THE Heir at Law, though bound by his Anceſtor, ſhall yet, as hath been obſerved, be chargeable no further than he has Aſſets from ſuch Anceſtor, unleſs by falſe Pleading he make himſelf ſo: And therefore if an Action of Debt be brought againſt him, and he confeſſes the Action, and alſo ſets forth in Certainty what Aſſets he hath, he ſhall be charged no further, and neither his Goods, (*b*) Body, or other Lands ſhall be liable; but the Judgment in ſuch Caſe ſhall be ſpecial, to recover the Debt of the Lands deſcended.

(*b*) And therefore an Heir at Law is not to be held to ſpecial Bail, becauſe the Demand is not on the Perſon, but on the Aſſets, of the Deceaſed. 2 Jon. 82. & *vide* Tit. *Bail.* Letter (B).

Vide the Authorities *ſup.* and Rol. Abr. 269. Rol. Rep. 234. But if an Action (*c*) of Debt be brought againſt an Heir on the Obligation of his Anceſtor, in which he is bound, and he plead *Riens per Diſcent*, which is found againſt him, the Judgment ſhall be general † to recover the Debt, which he muſt pay out of his own Pocket for his falſe Plea.

(*c*) But there is a Diverſity between an Action of Debt and a *Scire Facias* againſt the Heir upon a Judgment had againſt his Anceſtor; for if in a *Scire Facias* the Heir plead a falſe Plea, and it is found againſt him, yet the Judgment ſhall be of the Lands deſcended only; for the Execution in ſuch Caſe ſhall be upon the firſt Judgment againſt the Anceſtor, and not upon the Judgment in the *Scire Facias*, *quod habeat Executionem*, becauſe ſuch Judgment did not alter nor inlarge the firſt Judgment. *Bewyer* v. *Rivett* adjudged. Paſ. 193. 3 Bulſt. 317. Jon. 87. Cro. Car. 296. Carth. 93. S. C. cited.

† And Execution of his own proper Lands and Goods, and againſt his Body by *Capias ad ſatisfaciendum*, like as for his own proper Debt, Plowd. Com. 440. a. 2 Rol. Abr. 70. l. 40. Dyer 149. a. 2 Leon. 11. *vide infra* 31.

Plow. 440. 2 Rol. Abr. 70. So if an Action of Debt be brought againſt the Heir, who confeſſes the Action, but does not ſet forth the Aſſets in Certainty, the Judgment ſhall be general; for he is charged in the *Debet* as well as *Detinet*, and Aſſets ſhall be preſumed.

Plow. 440. *Davis* and *Pepys* adjudged, and cited and agreed to be Law in ſeveral Books. So if an Action be brought againſt the Heir on the Bond of his Anceſtor, and there is Judgment againſt him by Default, *Non ſum Informatus*, *Nihil dicit*, &c. the Judgment againſt him ſhall be general, and he ſhall be charged *de Bonis propriis*.

Carth. 93. *Bradſhaw* and So where Debt was brought againſt an Heir, who pleaded in Bar that *J. S.* was jointly and ſeverally bound with his Anceſtor, and that he paid the

the Money; which being found againſt him, it was held, that the Judgment ſhould be general, and he for his falſe Plea chargeable *de Bonis propriis.* *Milbank* adjudged, and ſaid, that the Law was ſo ſettled in the Caſe *ſupra* of *Davis* and *Pepys*. Plow. 440. Com. 162. S. C. adjudged.

So where the Heir pleaded that his Anceſtor was ſeiſed in Fee of three Fourth-parts of ſuch and ſuch Tenements, and that he demiſed the ſame for 500 Years to *A.* who entered, and that the ſaid Reverſion deſcended, *& Riens ultra*, and that at the Time of the Action brought he had no Tenements in Fee-ſimple by Deſcent *præterquam* the ſaid Reverſion; and that afterwards there was a Bill in Chancery exhibited againſt him by the Anceſtor's Wife for Dower, and a Decree obtained againſt him for the * third Part of theſe Three-fourths for the Wife's Life; *& hoc, &c.* and in this Caſe a general Judgment was given againſt the Heir; and it was held by *Holt*, C. J. *1ſt*, That an Heir could not plead a Term for Years in delay of preſent Execution, but ought to confeſs Aſſets; and that the Common Law had no Regard for a Term for Years, and that there is no Miſchief in this Caſe; for though in Conſequence a *Levari Facias* may go, yet the Leſſee may maintain himſelf againſt an Ejectment by Virtue of his Leaſe. 2. As to the Decree in Chancery he held it plain that there was no Eſtate or Intereſt veſted in the Wife by that, ſo that the Plea in this Reſpect is nought and moſt apparently falſe. * Page 31 Salk. 354. pl. 1. Ld. Raym. 783. *Smith & Ux.* ver. *Angel Fareſt.* 40. S. C. 3 Salk. 178. pl. 1. 180. pl. 5. Comb. 162. Ld. Raym.

53. 728, 1391. Vern. 93, 188, 234, 282, 318, 419, 429, 471. 2 Vern. 61. Pre. Ch. 39, 232. 3 Wil. Rep. 9, 166, 217, 330, 341, 401. Stra. 665. 2 Stra. 179, 1028. 2 Barnard. *K. B.* 183. Caſ. Temp. *King C. & Hardw.* C. J. 165. See Andr. 110. 2 Stra. 1270.

And it is ſaid, that in theſe Caſes the Court cannot give a ſpecial Judgment without the Aſſent of the Plaintiff; as where Debt was brought againſt the Heir, who pleaded *Riens per Diſcent*, which was found for the Plaintiff; and there being Judgment to recover the Debt, Damages and Coſts of the Lands deſcended; and not knowing what Land deſcended, a Writ was awarded to inquire what Land deſcended; the Court held this Judgment erroneous, becauſe by Law the Judgment ought to be general †, which cannot be altered without the Plaintiff's Conſent, which did not appear here. 2 Rol. Abr. 71. *Allen* and *Holden* adjudged. Trin. 1651. † *Vide ante* 30. n.

So in an Action of Debt againſt an Heir, if he pleads *Riens per Diſcent*, which is found againſt him; and it is further found by the Jury, that he had certain Lands by Deſcent, upon which Judgment is given that the Plaintiff ſhall recover his Debt, Damages and Coſts of the Lands deſcended; this is an erroneous Judgment, becauſe it ought to have been general; alſo it is ſaid, that upon this Iſſue they could not inquire of the Aſſets deſcended. 2 Rol. Abr. 71. Paſch. 1652. *Snelgrave* and *Bolvile*.

But if in a Writ of Annuity the Plaintiff declares for the Arrearages, *&c.* againſt the Heir, upon the Grant of his Anceſtor, and the Heir pleads that it is not the Deed of his Anceſtor, which is found againſt him; in this Caſe the Judgment may be Special, without the Conſent of the Plaintiff; for being in the Caſe of an Annuity, which is always executory, it is at leaſt in the Election of the Plaintiff to have Execution of all the Lands deſcended; whereas on a general Judgment he can only have a Moiety of all the Heir's Land in Execution; alſo in this Caſe the Entering a Special Judgment is for the Heir's Advantage, and therefore he cannot aſſign it for Error. 2 Rol. Abr. 71. *Frank* ver. *Stukely*.

Alſo if upon Pleading *Riens per Diſcent* it be found againſt the Heir, or if he confeſſeth the Action without ſetting forth the Aſſets, or if there be a general Judgment; upon theſe, or upon a *Non ſum Informatus, Nihil dicit*, 2 Rol. Abr. 71.

dicit, &c. againſt him, the Execution may be general of a Moiety of all the Lands of the Heir.

2 Rol. Abr. 71. But if in an Action of Debt brought againſt the Heir, the Defendant acknowledges the Action, and ſhews in Certainty the Aſſets, upon which there is a Judgment that the Plaintiff ſhall recover, and that the Debt ſhall be recovered of the Aſſets deſcended, here the Plaintiff ſhall have Execution to levy the Debt of all the Land deſcended, and to have a Moiety only, as on an *Elegit*.

2 Rol. Abr. 71, 72. Alſo in Caſe of a general Judgment againſt the Heir, although the Plaintiff may have Execution by *Elegit* of a Moiety of all the Heir's Lands; yet may he alſo at his Election ſurmiſe that the Heir hath ſuch and ſuch Land by Deſcent, and pray Execution thereof; for were it otherwiſe, the Plaintiff might be a Loſer by this general Judgment, in which he is only intitled to a Moiety of the Land, in as much as the Heir might not have any other Lands, except thoſe deſcended.

* Page 32 * 2. Where by his Promiſe to pay or diſcharge the Debt of his Anceſtor.

Rol. Abr. 28. Lord *Gray*'s Caſe. 3 Leon. 67, 68. 4 Leon. 6. S. P. *per Curiam.* If a Man binds himſelf and his Heirs in an Obligation, and dies, and after the Obligee ſues the Heir upon the Obligation, who had no Aſſets deſcended to him; and the Heir ſays to him, that, if he will not ſue him, then he will pay him the Money; this is no Conſideration ſo as to maintain an Action, becauſe he was not chargeable (*a*) without Aſſets.

(*a*) But it is held, that in *Aſſumpſit* againſt an Executor on his Promiſe it is not neceſſary to alledge the Aſſets, and that Forbearance is a good Conſideration. *Vide* Tit. *Executors and Adminiſtrators*, Letter (M).—And *Note*, by the Statute of Frauds 29 Car. 2. c. 3. ſ. 4. the Promiſe muſt be in Writing.

Baker and *Fox*, 2 Sand. 136. Vent. 159. So in an *Aſſumpſit* againſt an Heir upon ſuch a Promiſe, it muſt be expreſly ſhewn that the Heir was bound, elſe it ſhall not be intended, though after a Verdict.

adjudged; *Hunt* and *Swain*, Sid. 248. Raym. 12. Lev. 165. Keb. 890. S. P. adjudged.——And *Keeling* ſaid, to charge an Executor upon his Promiſe you need not ſay Aſſets, (though without them he ſhall not be bound) becauſe he will intend Aſſets, but we cannot intend the Heir was bound, but in this Caſe muſt look upon him as a mere Stranger.

Sid. 31. Lev. 165. *& vid.* Yelv. 56. But in ſuch a Caſe where the Plaintiff declared, that the Defendant, in Conſideration the Plaintiff would deliver the Bond to him and diſcharge the Debt, promiſed, *&c.* it was held a good Declaration, and that it ſhould be intended he was liable, or at leaſt that the Diſcharge ſhould be made to him who was ſo.

(I) What ſhall be Aſſets in his Hands.

Vide Bro. Tit. *Aſſets.* Fit. Tit. *Aſſets.* Rol. Abr. 269. Tit. *Aſſets.* WHerever the Anceſtor binds himſelf and his Heirs, all his Lands of (*b*) Freehold, and which deſcend in (*c*) Fee-ſimple, are Aſſets by Deſcent, and ſhall be liable, as far as they extend, to anſwer the Anceſtor's Obligations.

A Re-

(*a*) But if a Copyhold deſcends to an Heir, this ſhall not be Aſſets, becauſe it is an Inheritance created by Cuſtom, and the Common Law directs the Deſcent; but not that it ſhall have any other collateral Qualities

A Reverſion after a Leaſe for Years made by the Anceſtor is preſent Aſſets, (*d*) ſo that the Heir cannot plead *Riens per Diſcent* in Delay of * Execution of the Rent and Reverſion, (*e*) though the Plaintiff cannot have Benefit of the Reverſion till the Leaſe be determined. * Page 33

Salk. 354. pl. 1. Fareſ. 42.

2 Mod. 50, 51. Ld. Raym. 53. 2 Ld. Raym. 783. Hern Plead. 320. (*d*) In Debt againſt the Heir if he pleads *Riens per Diſcent*, the Plaintiff may have Judgment preſently, and a *Scire Facias* when Aſſets deſcend. 8 Co. 134. in *Mary Sheply*'s Caſe, which Point is held to be Law; likewiſe in caſe of an Executor, in Hob. 199. Vent. 94, 5. Sid. 448. contrary to the Caſe of *Dorcheſter* and *Webb*. Cro. Car.——So in a *Warrantia Chartæ* againſt an Heir, who pleads *Riens per Diſcent*, or that the Plaintiff is not impleaded, the Plaintiff may pray Judgment preſently, F. N. B. 134. 8 Co. 134. Vent. 92. and Hob. 199. S. P. and that the ſame may be done in the Caſe of an Executor; but if the Plaintiff will proceed to prove Aſſets preſently, and that be found againſt him, he ſhall be barred for ever; and yet there was a Debt due, and that in Effect confeſſed. Hob. 199. (*e*) Where a Man obtains a Judgment againſt an Heir who has a Reverſion in Fee deſcended to him, the Judgment is only of Aſſets *quando acciderent*, and the Creditor cannot by a Bill in Equity compel the Heir to ſell the Reverſion, but muſt expect until it falls. 2 Vern. 134. *Fortrey* and *Fortrey*.

So a Reverſion expectant upon the Determination of an Eſtate for Life is *quaſi* Aſſets, and ought to be pleaded ſpecially by the Heir, and the Plaintiff in ſuch Caſe may take Judgment of it *cum acciderit*.

Carth. 129. *per Holt.*

But a Reverſion in Fee expectant upon an Eſtate-tail is not Aſſets, becauſe it lies in the Will of the Tenant in Tail to dock and bar it at his Pleaſure

6. Co. 58. Rol. Abr. 269.

2 Rol. Rep. 129. S. P. 3 Lev. 287. 3 Mod. 257. Carth. 129. S. P. agreed, and that it ſhall not charge the Heir upon the general Iſſue, *Riens per Diſcent*.—But after the Tail is ſpent, it is Aſſets. 3 Mod. 257.

If *A.* hath Iſſue *B.* and *C.* and conveys Lands to the Uſe of himſelf for Life, the Remainder to *B.* in Tail Male, the Remainder to his own right Heirs, and *A.* dies, and the Reverſion deſcends to *B.* his Son, and *B.* dies ſeiſed, and the Reverſion deſcends to his Son, who dies without Iſſue, ſo that the Tail is ſpent, and *C.* enters, theſe Lands ſhall be Aſſets to anſwer the Debt of his Father.

Carth. 127. 3 Lev. 286. 3 Mod. 253. S.C. *Kellow* ver. *Rowden.*

The Lands as hath been obſerved, muſt *deſcend* to the Heir; and therefore it was (*f*) formerly held, that if he took by Purchaſe, as if the Teſtator deviſed them to him paying ſo much, or if he deviſed Lands to one or two, and his Heir at Law jointly, that thoſe Lands were not Aſſets; but if he deviſed one Part to *A.* and another to *B.* another to his Heir at Law, this third Part was Aſſets.

Cro. Eliz. 431. 2 Mod. 286. (*f*) But now by 3 *W.* & *M.* c. 14. made perpetual by 2 Stra. 1270.

6 & 7 *W.* 3. c. 14. which *vide* the Deviſee as well as Heir is chargeable.

By the Statute of Frauds and Perjuries it is enacted, that if Lands come to the Heir by reaſon of a ſpecial Occupancy, they ſhall be chargeable in his Hands as Aſſets by Deſcent, as in Caſe of Lands in Fee-ſimple; and in caſe there be no ſpecial Occupant thereof, it ſhall go to the Executors or Adminiſtrators of the Party that had the Eſtate thereof by Virtue of the Grant, and ſhall be Aſſets in their Hands.

29 Car. 2. c. 3. that it was not Aſſets before, 10. Co. 98. a.

Alſo by the ſaid Statute, *par.* 10 & 11. where Lands are ſettled in Truſt, and deſcend in Fee to the Heir of *Ceſtuy que Truſt*, the ſame ſhall be Aſſets in the ſame Manner as Lands in Poſſeſſion, but he ſhall not, by reaſon of

Vide 2 Vern. 248.

Qualities which do not concern ſuch Deſcent, and which other Inheritances at Common Law have. 4 Co. 22. a.—But Lands by Deſcent in ancient Demeſne ſhall be Aſſets. 7 H. 4. 14. Bro. Tit. *Aſſets* 11.——So an Advowſon is Aſſets, and may be extended at the Rate of a Shilling for every Mark of the yearly Value of the Living. Co. Lit. 374. b. (*c*) Muſt be Lands in Fee-ſimple. 42 E. 3. 10. b.—For what ſhall be Aſſets to make a lineal Warranty a Bar to an Eſtate-tail, *vide* Co. Lit. 374. b. 2 Inſt. 293. Kelw. 104. b. 124. 2 Rol. Abr. 774.

any

any Plea or other Matter, be chargeable to pay the Condemnation out of his own Eſtate.

4 Chan. Ca. 148. An Equity of Redemption of an Inheritance is Aſſets, for the Heir having a Right in (*c*) Equity, that ought in Equity to be liable to ſatisfy a Bond Debt.

(*c*) But the Equity of Redemption of a Mortgage that is forfeited is not Aſſets at Law, for at Law there is no Redemption. 2 Vern. 61.—And there it is made a *Quære*, whether an Heir being Creditor by Bond or Judgment may not retain, the Reaſon being the ſame in the Caſe of an Heir as it is of an Executor, for neither can ſue himſelf.

Preced. Chan. 39. *Foſſet* and *Auſtin.* Tenant in Tail ſuffers a Recovery to let in a Mortgage of 500 Years, and then limits the Land to the old Uſes, and makes his Will, and deviſes all his Lands for the Payment of his Debts, the Redemption was limited to him, his Heirs and Aſſigns; and the Court though that the Equity of Redemption of this Mortgage ſhould be Aſſets to ſatisfy Creditors, or a ſubſequent Grantee of an Annuity.

6 Co. 58. A Right without any Eſtate in (*d*) Poſſeſſion, Reverſion, or Remainder, is not Aſſets till it be recovered and reduced into Poſſeſſion.

(*d*) If a Rent-ſeck deſcends to an Heir, it is not Aſſets till he hath gained Seiſin, 6 Co. 58. b.—But if Lands deſcend to an Heir, this is Aſſets before Entry, for he may enter when he will. 42 E. 3. 10. b. Rol. Abr. 269.

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Hereſy and Offences againſt Religion.

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Of the Offence of profeſſing or incouraging the Popiſh Religion, *vide* Tit. **Popiſh Recuſants.**
Of the Offence of holding an Office without conforming to the Eſtabliſhed Religion, *vide* Tit. **Office.**

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* (A) Of Hereſy: And herein, * Page 35

1. What it is.

HERESY (*a*) among Proteſtants is ſaid to be a falſe Opinion repugnant to ſome Point of Doctrine clearly revealed in Scripture, and either abſolutely eſſential to the Chriſtian Faith, or at leaſt of moſt high Importance. Hawk. P.C. 3. (*a*) That antiently under the general Name of Hereſy there have been comprehended three Sorts of Crimes; 1. Apoſtacy, when a Chriſtian did apoſtatize to Paganiſm or to Judaiſm. 2. Witchcraft. 3. Formal Hereſy, which ſeems to be an Apoſtacy from the Eſtabliſhed Religion; for which, and the ſeveral Ways of determining, puniſhing, and the Difference between the Civil and Imperial Laws, Popiſh Canons, and the Laws of *England* concerning Hereſy, *vide* a large Account in Hal. Hiſt. P. C. 383 to 410.

It ſeems (*b*) difficult preciſely to determine what Errors ſhall amount to Hereſy, and what not; but the Statute 1 *Eliz. cap.* 1. which erected the High Commiſſion Court, having reſtrained it to ſuch as are either determined by Scripture, or by one of the four firſt General Councils, or by ſome other Council, by expreſs Words of Scripture, or by Parliament, with Hawk. P.C. 3, 4. (*b*) And it is ſaid by my Lord *Hale*, that the Papal

with the Aſſent of the Convocation; theſe Rules are at preſent generally thought the beſt Directions concerning this Matter.

Canoniſts have by ample and general Terms extended Hereſy ſo far, and left ſo much in the Diſcretion of the Ordinary to determine it, that there is ſcarce any the ſmalleſt Deviation from them but may be reduced to Hereſy, according to the great Generality and Latitude of their Definitions and Deſcriptions; from whence he obſerves, how miſerable the Servitude of Chriſtians was under the Papal Hierarchy, who uſed ſo arbitrary and unlimited a Power to determine what they pleaſed to be Hereſy, and then, *omni appellatione poſtpoſita*, ſubjecting Mens Lives to their Sentence. Hal. Hiſt. P. C. 383, 389.

2. By whom it is cognizable.

Hal. Hiſt. P. C. 384.

According to the Common and Imperial Law, and generally by other Laws in Kingdoms and States where the Canon Law obtained, the Eccleſiaſtical Judge was the Judge of Hereſies, and hereby they obtained a large Juriſdiction touching them.

Bro. Tit. *Hereſy*. 2 Rol. Abr. 226.

Hence it is, that, by the Common Law with us, the Convocation of the Clergy, or Provincial Synod, might and frequently did proceed to the Sentencing of Hereticks, and, when convicted, left them to the Secular Power, whereupon the Writ of *Hæretico comburendo* † might iſſue.

† This Writ is taken away, by Sta. 29 Car. 2. c. 9.

F.N.B. 269. 12 Co. 56, 57. 3 Inſt. 40. Gibſ. Codex. 401. Hawk. P.C. 4. *State Trials*, Vol. II. 275.

Alſo it is agreed, that every Biſhop may convict Perſons of Hereſy within his own Dioceſe, and proceed by Church Cenſures againſt thoſe who ſhall be convicted; but it is ſaid, that no Spiritual Judge, who is not a Biſhop, hath this Power; and it has been (*c*) queſtioned, whether a Conviction before the Ordinary was a ſufficient Foundation whereon to ground the Writ *de Hæretio comburendo*, as it is agreed that a Conviction before the Convocation was.

(*c*) Lord C. J. *Hale* ſeems to be of Opinion, that if the Dioceſan convict a Man of Hereſy, and either upon his Refuſal to abjure, or upon a Relapſe, decree him to be delivered over to the Secular Power; and this being ſignified under the Seal of the Ordinary into the Chancery, the King might thereupon by ſpecial Warrant command a Writ *de Hæretico comburendo* to iſſue, though this were a Matter that lay in his Diſcretion to grant, ſuſpend or refuſe, as the Caſe may be circumſtanced. Hal. Hiſt. P. C. 392.

27 H. 8. 14. b. 5 Co. 58. Hob. 236.

But it ſeems agreed, that regularly the Temporal Courts have no Conuzance of Hereſy, either to determine what it is, or to puniſh the Heretick as ſuch, but only as a Diſturber of the Public Peace; and that therefore,

* Page 36 * if a Man be proceeded againſt as an Heretick in the Spiritual Court *pro ſalute animæ*, and think himſelf aggrieved, his proper Remedy is to bring his Appeal to a higher Eccleſiaſtical Court, and not to move for a Prohibition from a Temporal one.

3 Inſt. 42. Rol. Rep. 110. 2 Bulſ. 300.

Yet a Temporal Judge may incidentally take Knowledge, whether a Tenant be heretical or not; as where one was committed by Force of 2 *H.* 4. *cap.* 5. for ſaying, that he was not bound by the Law of God to pay Tithes to the Curate; another for ſaying, that though he was excommunicate before Men, yet he was not ſo before God; the Temporal Courts on an *Habeas Corpus* in the firſt Caſe, and an Action of falſe Impriſonment in the other, adjudged neither of the Points to be Hereſy within that Statute, for the King's Courts will examine all Things which are ordained by Statute.

5 Co. 58. And. 191. 3 Leon 199. 3 Lev. 314.

Alſo in a *Quare Impedit*, if the Biſhop plead that he refuſed the Clerk for Hereſy, it ſeems that he muſt ſet forth the particular Point, that it may appear to be heretical to the Court wherein the Action is brought, which having Conuzance of the original Cauſe, muſt by Conſequence have a Power to all incidental Matters neceſſary for the Determination of it, and without knowing the very Point alledged againſt the Clerk, will not be able to give

Directions

Directions concerning it to the Jury, who (if the Party be dead) are to try the Truth of the Allegation.

3. How puniſhed.

By the Common Law, one convicted of Hereſy, and refuſing to abjure it, or falling into it again after he had abjured it, might be burnt by Force of the Writ *Hæretico comburendo*; which iſſued out of Chancery upon a Certificate of ſuch Conviction; but he forfeited neither Lands nor Goods, becauſe the Proceedings againſt him were only *pro ſalute animæ*. F. N. B. 269. 3 Inſt. 43. *Doctor* and *Student*, lib. 2. c. 29. Hawk. P. C. 4, 5.

But at this Day the ſaid Writ *de Hæretico comburendo* is aboliſhed by 29 *Car.* 2. *cap.* 9. and all the old Statutes, that gave a Power to arreſt or impriſon Perſons for Hereſy, or introduced any Forfeiture on that Account, are repealed; yet, by the Common Law, an obſtinate Heretick, being excommunicate, is ſtill liable to be impriſoned by Force of the Writ *de excommunicato capiendo*, till he make Satisfaction to the Church. 12 Co. 44. Hawk. P. C. 5.

Alſo by the 9 & 10 *W.* 3. *cap.* 32. it is enacted, "That if any Perſon, "having been educated in or having made Profeſſion of the Chriſtian "Religion within this Realm, ſhall be convicted in any of the Courts of "*Weſtminſter*, or at the Aſſiſes, of denying any of the Perſons in the Holy "Trinity to be God, or maintaining that there are more Gods than one, "or of denying the Truth of the Chriſtian Religion, or the Divine Au"thority of the Holy Scriptures, he ſhall for the firſt Offence be adjudged "uncapable of any Office, and for the ſecond ſhall be diſabled to ſue any "Action, or to be a Guardian, Executor or Adminiſtrator, or to take by "any Legacy or Deed of Gift, or to bear any Office Civil or Military, or "Benefice Eccleſiaſtical for ever, and ſhall alſo ſuffer Impriſonment for "three Years, without Bail or Mainprize, from the Time of ſuch Con"viction."

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*(B) Of Witchcraft, and how puniſhed.

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Witchcraft, or *Sortilegium*, was by the ancient Laws of *England* (*a*) Eccleſiaſtical Conuzance, and upon Conviction thereof without Abjuration, or Relapſe after Abjuration, was puniſhable with Death by Writ *de Hæretico comburendo*. 3 Inſt. 44. Cro Eliz. 571. Hawk. P. C. 5. Hal. Hiſt. P. C. 383.

(*a*) Alſo it is ſaid, that Offenders of this Kind may be condemned to the Pillory, &c. upon an Indictment at Common Law. Hawk. P. C. 5.

Alſo by an Act of Parliament 1 *Jac.* 1. *cap.* 12. it was made Felony, without Benefit of Clergy, to uſe any Invocation or Conjuration of any evil Spirit, or to conſult or covenant with any evil Spirit, or to exerciſe any Witchcraft, Inchantment, Charm, or Sorcery, whereby any Perſon ſhall be killed, deſtroyed, conſumed or lamed in his Body, &c.

But by the 9 *Geo.* 2. *cap.* 5. the abovementioned Statute is repealed; and it is thereby enacted, "That no Proſecution, Suit, or Proceeding, "ſhall be commenced or carried on againſt any Perſon or Perſons for "Witchcraft, Sorcery, Inchantment or Conjuration, or for charging "another with any ſuch Offence in any Court whatſoever in *Great* "*Britain*."

But

But for the more effectual preventing and puniſhing of any Pretences to ſuch Arts or Powers as are before mentioned, whereby ignorant Perſons are frequently deluded and defrauded, it is enacted by the ſaid Statute, 9 *Geo.* 2. *cap.* 5. "That if any Perſon ſhall pretend to exerciſe or uſe any Kind of Witchcraft, Sorcery, Inchantment or Conjuration, or undertake to tell Fortunes, or pretend, from his or her Skill or Knowledge in any occult or crafty Science, to diſcover where or in what Manner any Goods or Chattels, ſuppoſed to have been ſtolen or loſt, may be found; every Perſon ſo offending, being thereof lawfully convicted on Indictment or Information in that Part of *Great Britain* called *England*, or on an Indictment or Libel in that Part of *Great Britain* called *Scotland*, ſhall for every ſuch Offence ſuffer Impriſonment by the Space of one whole Year, without Bail or Mainprize; and once in every Quarter of the ſaid Year, in ſome Market-Town of the proper County, upon the Market-Day there ſtand openly on the Pillory by the Space of one Hour, and alſo ſhall (if the Court, by which ſuch Judgment ſhall be given, ſhall think fit) be obliged to give Sureties for his or her good Behaviour, in ſuch Sum, and for ſuch Time, as the ſaid Court ſhall judge proper, according to the Circumſtances of the Offence; and in ſuch Caſe ſhall be further impriſoned until ſuch Sureties be given."

See 17 Geo. 2. c. 5. ſ. 1.

(C) Of Offences againſt Religion as puniſhable by the Common Law.

Although Offences againſt Religion are, ſtrictly ſpeaking, of Eccleſiaſtical Conuſance, yet where a Perſon, in Maintenance of his Errors, ſets up Conventicles, or raiſes Factions, which may tend to the Diſturbance of the publick Peace, or where the Errors are of ſuch a Nature as ſubvert all Religion or Morality, which are the Foundation of Government, they are puniſhable by the Temporal Judges with Fine and Impriſonment, and alſo ſuch corporal infamous Puniſhment as to the Court in Diſcretion ſhall ſeem meet, according to the Heinouſneſs of the Crime, *ne quid detrimenti Reſpublica capiat.*

Hawk. P. C. 6, 7.

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Vent. 293. 3 Keb. 607, 621.

Such as all Blaſphemies againſt God, as denying his Being or Providence, and all contumelious Reproaches of Jeſus Chriſt.

Hawk. P. C. 7.

Alſo all prophane Scoffing at the Holy Scriptures, or expoſing any Part thereof to Contempt or Ridicule.

Hawk. P. C. 7.

Impoſtors in Religion, as falſely pretending to extraordinary Commiſſions from God, and terrifying or abuſing the People with falſe Denunciations of Judgments, *&c.*

Sid. 168. Keb. 620. 2 Stat. 791.

All open Lewdneſs groſsly ſcandalous, ſuch as was that of thoſe Perſons who expoſed themſelves naked to the People in a Balcony in *Covent-Garden*, with moſt abominable Circumſtances.

Forteſc. Rep. pl. 95, 99. 2 Rol. Abr. 187. Hawk. P. C. 7.

Seditious Words in Derogation of the Eſtabliſhed Religion are (*a*) indictable, as tending to a Breach of the Peace; as theſe, your Religion is a new Religion, and Preaching is but Prattling, and Prayer once a Day is more edifying.

(*a*) But not before Juſtices of the Peace. Cro. Jac. 44.

(D) Of

(D) Of Offences by Statute against Religion. And herein,

1. Of the Offence of Prophaning the Lord's Day.

BY the 1 *Car.* 1. *cap.* 1. it is enacted, "That there ſhall be no Aſſembly of People out of their own Pariſhes on the Lord's Day for any "Sport whatſoever, nor any Bull-baiting, or Bear-baiting, Interludes, "common Plays, or other unlawful Exerciſes and Paſtimes uſed by any "Perſons in their own Pariſhes, on Pain that every Offender ſhall forfeit "3 *s.* 4 *d.* to the Uſe of the Poor, *&c.*

By the 29 *Car.* 2. *cap.* 7. it is enacted, "That all Perſons ſhall every "Lord's Day apply themſelves to the Obſervation of the ſame, by exerciſing themſelves in Duties of Piety and true Religion publickly and "privately, and that no Tradeſman, Artificer, Workman, Labourer, or "other Perſon whatſoever, ſhall do or exerciſe any worldly Labour, Buſineſs, or Work of their ordinary Callings, upon the Lord's Day, or "any Part thereof (Works of Neceſſity and Charity only excepted); and "that every Perſon being of the Age of fourteen Years, or upwards, offending in the Premiſſes, ſhall for every ſuch Offence forfeit the Sum of "5 *s.* and that no Perſon ſhall publickly cry, ſhew forth, or expoſe to Sale "any Wares, Merchandizes, Fruit, Herbs, Goods or Chattles whatſoever, "upon the Lord's Day, or any Part thereof, upon pain that every Perſon ſo offending ſhall forfeit the ſame Goods ſo cried, or ſhewed forth, "or expoſed to Sale †.

† Selling Meat on *Sunday*, no Offence at Common Law; therefore the Indictment muſt be *contra Formam, &c.* Stra. 702.

And it is further enacted, *par.* 2. "That no Drover, Horſe-Courſer, "Waggoner, Butcher, Higgler, their or any of their Servants, ſhall "come into his or their Inn or Lodging upon the Lord's Day, or any "Part thereof, upon pain that each and every ſuch Offender ſhall forfeit 20 *s.* for every ſuch Offence; and that no Perſon or Perſons ſhall "Uſe, Employ, or Travel upon the Lord's Day with any Boat, Wherry, "Lighter or Barge, except it be upon extraordinary Occaſion, to be "* allowed by ſome Juſtice of the Peace of the County, or Head Officer, "or ſome Juſtice of the Peace of the City, Borough, or Town Corporate "where the Fact ſhall be committed; upon pain that every Perſon ſo "offending ſhall forfeit and loſe the Sum of five Shillings for every ſuch "Offence; and that if any Perſon offending in any of the Premiſſes ſhall "be thereof convicted before any Juſtice of the Peace of the County, or "the chief Officer or Officers, or any Juſtice of the Peace of or within any "City, Borough, or Town Corporate, where the ſaid Offence ſhall be "committed, upon his or their View, or Confeſſion of the Party, or Proof "of any one or more Witneſſes by Oath, (which the ſaid Juſtice, chief "Officer or Officers, are by this Act authoriſed to adminiſter,) the ſaid "Juſtice or chief Officer or Officers ſhall give Warrant under his or their "Hand and Seal to the Conſtable or Churchwardens of the Pariſh or Pa-"riſhes, where ſuch Offence ſhall be committed, to ſeize the ſaid Goods "cried, ſhewed forth, or put to Sale as aforeſaid, and to ſell the ſame, and "to levy the ſaid other Forfeitures or Penalties by way of Diſtreſs and Sale "of the Goods of every ſuch Offender diſtrained, rendering to the ſaid "Offenders the Overplus of the Monies raiſed thereby; and in default of "ſuch

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But by 11 & 12 *W.* 3. c. 21. forty Watermen may be appointed by the Company of Watermen to ply on the River *Thames*.— And by the 9 Ann. c. 23. ſ. 20. Hackney-Coachmen and Chairmen are permitted to work within the Bills of

Mortality on *Sunday*.——[Mackarel may be ſold on a *Sunday*, 10 & 11 *W.* 3. c. 24. ſ. 14.]

" ſuch Diſtreſs, or in caſe of Inſufficiency or Inability of the ſaid Offender " to pay the ſaid Forfeitures or Penalties, that then the Party offending to " be ſet publickly in the Stocks by the Space of two Hours: And all and " ſingular the Forfeitures or Penalties aforeſaid ſhall be employed and " converted to the Uſe of the Poor of the Pariſh where the ſaid Offences " ſhall be committed; ſaving only that it ſhall and may be lawful to and " for any ſuch Juſtice, Mayor, or Head Officer or Officers, out of the " ſaid Forfeitures or Penalties, to reward any Perſon or Perſons, that " ſhall inform of any Offence againſt this Act, according to their Diſ- " cretions, ſo as ſuch Reward exceed not the third Part of the Forfeitures " or Penalties."

" Provided, That this Act ſhall not extend to the prohibiting of dreſſing " of Meat in Families, or dreſſing or ſelling of Meat in Inns, Cook's-Shops, " or Victualling-Houſes, for ſuch as otherwiſe cannot be provided, nor to " the Crying or Selling of Milk before Nine of the Clock in the Morning, " or after Four of the Clock in the Afternoon.

" Provided alſo, That no Perſon ſhall be impeached, proſecuted, or " moleſted for any Offence before mentioned in this Act, unleſs he or " they be proſecuted for the ſame within ten Days after the Offence com- " mitted."

Alſo it is enacted by the ſaid Statute, *par.* 6. " That no Perſon upon " the Lord's Day ſhall ſerve or execute, or cauſe to be ſerved or executed, " *(a)* any Writ, Proceſs, Warrant, Order, Judgment, or Decree, (ex- " cept in Caſes of Treaſon, Felony, or Breach of the Peace,) but that the " Service of every ſuch Writ, Proceſs, Warrant, Order, Judgment, or " Decree ſhall be *(b)* void to all Intents and Purpoſes whatſoever, and the " Perſon or Perſons ſo ſerving or executing the ſame ſhall be as liable to " the Suit of the Party grieved, and to anſwer Damages to him for doing " thereof, as if he or they had done the ſame without any Writ, Proceſs, " Warrant, Order, Judgment, or Decree at all."

(*a*) It hath been held that, notwithſtanding this Statute, a Perſon may be taken upon a Judge's Warrant for eſcaping out of Priſon on a *Sunday*. 5 Mod. 95. *Parker* ver. Sir *William Moor*. 2 Salk. 626. pl. 7. Ld. Raym. 37. S. C.—So a Citation may be ſued out of the Spiritual Court on a *Sunday*, notwithſtanding this Act. Carth. 504. *Alonſon* and *Brookbank*. 5 Mod. 449. S. C. But an Indictment cannot be taken on a *Sunday*. 2 Keb. 731. Vent. 107. 2 Sand. 290. (*b*) In Salk. 78. pl. 1. It is ſaid, that the Arreſt is void, ſo that the Party may have an Action of falſe Impriſonment for it.—And in 5 Mod. 95. it is ſaid, that the Court would not diſcharge the Party on Motion, but directed him to bring an Action of falſe Impriſonment.—And in 6 Mod. 95. it is ſaid by *Holt* C. J. that if the Court will relieve from ſuch an Arreſt, it muſt be by *Audita Querela*; for it being on a *Sunday*, is a Fact traverſable: But the other Judges held, that it could be done on Motion. 2 Ld. Raym. 1028. See 8 Mod. 21. 12 Mod. 273, 348, 606, 667. Stra. 387. Forteſc. 373.——[A Perſon may be arreſted on *Sunday*, on Lord Chancellor's Warrant, on an Order of Commitment for Contempt; for he is conſidered as in Cuſtody from the Time of making the Order, and the Warrant is directed to the Gaoler, and is in the Nature of an Eſcape Warrant. *Semb.* 1 *Atkins* 55.—A Perſon may ſurrender voluntarily on a *Sunday*. *Ibid.*——Proceſs on an Indictment and an Attachment for a Contempt, may be ſerved on a *Sunday*. *Ibid.*——A Man be taken on an Attachment for Non-performance of an Award, on a *Sunday*. *Ibid.*——A Writ of Inquiry executed on a *Sunday* is naught, and Advantage may be taken of it on a Writ of Error. Fort. 373.]

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* 2. Of the Offence of Swearing.

By the 13 *Car.* 2. *cap.* 9 all Perſons in the King's Pay at Sea for profane Oaths, *&c.* ſhall be puniſhed by Fine and Impriſonment, as the Court Martial ſhall think fit.

And by Stat. 19 *Geo.* 2. *cap.* 21. every Day Labourer, common Soldier, Sailor or Seaman convicted of profane Curſing or Swearing, forfeits one Shilling, and every other Perſon under the Degree of a Gentleman two Shillings, and every Perſon of or above that Degree, five Shillings, and for the ſecond Offence double, and for the third or more treble, to the Uſe of the Poor, to be levied by Diſtreſs; and in caſe the Party is unable

to

to pay to be ſet in the Stocks for the Space of an Hour for every ſingle Offence, and for any Number of Offences two Hours. Perſons unable to pay to be committed to the Houſe of Correction for ſix Days. The Juſtice neglecting his Duty in executing the Act forfeits five Pounds.

3. Of the Offence of Drunkenneſs.

By the Statutes 4 *Jac.* 1. *cap* 5. and 21 *Jac.* 1. *cap.* 7. all Perſons whatſoever convicted of Drunkenneſs by the View of a Juſtice, Oath of one Witneſs, or Party's Confeſſion, ſhall forfeit five Shillings to the Uſe of the Poor, to be levied by Diſtreſs and Sale of Goods; and for want of a Diſtreſs, Party to be ſet in the Stocks ſix Hours.

By the 13 *Car.* 2. *cap.* 9. Seamen are to be puniſhed by Fine, *&c.* as the Court Martial ſhall think fit.

4. Of the Offence of Reviling the Sacrament.

By the 1 *E.* 6. *cap.* 1. Reviling the Sacrament is an Offence for which the Party ſhall be impriſoned, fined, and ranſomed; and this Statute, which was repealed 1 *Mar. cap.* 2. is again revived by 1 *Eliz. cap.* 1. and is now in Force.

5. Of Offences againſt the Common Prayer.

By the 2 *&* 3 *E.* 6. *cap.* 1. and 6 *E.* 6. *cap.* 1. (which were repealed by 1 *M. Seſſ.* 2. *cap.* 2. and revived by 1 *Eliz. cap.* 2.) the Common Prayer-Book was firſt eſtabliſhed, under ſevere Penalties; but the ſame Penalties being repealed and enlarged by 1 *Eliz. cap.* 2. and 13 *&* 14 *Car.* 2. *cap.* 4. which enacts the Uſe of the ſame Common Prayer, with ſome Alterations, thoſe Statutes of *Ed.* 6. ſeem at this Day to be of little Uſe.

By the 1 *Eliz. cap.* 2. *par.* 4. "If any Parſon, Vicar, or other whatſoever Miniſter, that ought to ſay the ſaid Common Prayer, *&c.* ſhall refuſe to uſe it in ſuch Church, *&c.* or other Place where he ſhould uſe to miniſter the ſame, or, wilfully or obſtinately ſtanding in the ſame, uſe any other Form, or ſpeak any Thing in Derogation of the ſaid Book, or any Thing therein contained, he forfeits for the firſt Offence one Year's Profit of all his Spiritual Promotions, and ſhall ſuffer ſix Months Impriſonment, and for the ſecond Offence ſhall be deprived."

In the Conſtruction hereof it hath been reſolved,

That under the Words Parſon, Vicar, or other whatſoever Miniſter that ought or ſhould ſay the ſaid Common Prayer, *&c.* thoſe Clergymen, who have no Cure, are included as much as thoſe who have one, and that * they are puniſhable for uſing any other Form, *&c.* inaſmuch as by their Ordination they are obliged to officiate in the Offices of the Church, *&c.* and it is ſaid that they are ſufficiently ſhewn to be in Holy Orders by the Word *Clericus* in the Indictment. Dyer 203. pl. 73. *Page 41

That this Statute being only in the Affirmative, but alſo expreſly ſaving the Juriſdiction of the Eccleſiaſtical Courts, does not reſtrain them from proceeding againſt thoſe Offenders in their own Methods as Diſturbers of the Unity and Peace of the Church, and conſequently that ſuch Perſons may be deprived by the ſaid Court, according to the Eccleſiaſtical Law, for the firſt Offence. 5 Co. 5, 6. *Cawdry's* Caſe. Poph. 59. 2 Rol. Abr. 222.

And it is further enacted by 1 *Eliz. cap.* 2. *par.* 9. "That if any Perſon ſhall in Plays, Songs, or other open Words, ſpeak any Thing in Deroga-

" Derogation, Depraving or Deſpiſing of the ſaid Book, &c. or by open " Fact compel, or otherwiſe procure or maintain any Miniſter to ſay any " Common Prayer openly, &c. in other Form, or ſhall by any of the ſaid " Means let any Miniſter to ſay the ſaid Common Prayer, &c. he ſhall " forfeit one hundred Marks for the firſt Offence, and four hundred for " the ſecond, &c. (which if he pay not (a) within ſix Weeks after Con- " viction, he ſhall ſuffer ſix Months Impriſonment for the firſt Offence, " and twelve for the ſecond) and for the third Offence ſhall forfeit all his " Goods and Chattels, and ſhall ſuffer Impriſonment for Life."

(a) Whether if the Party die within ſix Weeks, the ſaid Forfeiture be not diſcharged; ſince by the Act of God the Election of paying it, or ſuffering Impriſonment in lieu of it, is taken away; *quære*, & *vide* Dyer 203, 231.

6. Of the Offence of teaching School without conforming to the Church.

By the 23 *Eliz. cap.* 1. *par.* 6 & 7. it is enacted, " That if any Perſon " or Perſons, Body Politic or Corporate, ſhall keep or maintain any " Schoolmaſter who ſhall not repair to Church according to the Form of " the ſaid Statute, or be allowed by the Biſhop or Ordinary of the Dioceſe, " (who ſhall not take any Thing for the ſaid Allowance) they ſhall forfeit " for every Month ten Pounds; and ſuch Schoolmaſter preſuming to teach " contrary to the ſaid Act, and being thereof convict, ſhall be diſabled to " be Teacher of Youth, and ſhall ſuffer Impriſonment without Bail or " Mainprize for one Year.

And by the 1 *Jac.* 1. *cap.* 4. *par.* 9. it is enacted, " That no Perſon ſhall " keep any School or be a Schoolmaſter out of the Univerſities or Col- " leges of this Realm, except it be in ſome publick or free Grammar " School, or in ſome ſuch Nobleman's or Noblewoman's, or Gentleman's " or Gentlewoman's Houſe, as are not Recuſants, or where the ſame School- " maſter ſhall be ſpecially licenſed thereunto by the Archbiſhop, Biſhop " or Guardian of the Spiritualties of that Dioceſe; upon pain that as well " the Schoolmaſter, as alſo the Party that ſhall retain or maintain any ſuch " Schoolmaſter contrary to the Meaning of the ſaid Statute, ſhall forfeit " each of them, for every Day ſo wittingly offending, forty Shillings."

And *note*; Theſe Statutes are ſtill in Force as to Perſons not within the Benefit of the Toleration Act; but as to ſuch Perſons they ſeem to be impliedly repealed by that Act, and 12 *Ann. cap.* 7. which obliged Schoolmaſters to ſubſcribe the Declaration concerning the Liturgy, and to have a Licence from the Biſhop, is repealed by 5 *Geo.* 1. *cap.* 4.

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7. Of the Offence in not coming to Church: And herein,

1. What Forfeitures of Money, Lands or Goods ſuch Offenders incur.

* By the 1 *Eliz. cap.* 2. it is enacted, " That all Perſons inhabiting in " any of the (b) King's Dominions, having no reaſonable Excuſe to be " abſent, ſhall endeavour to reſort to their Pariſh Church, &c. or on Let " thereof to ſome uſual Place where the Common Prayer, &c. ſhall be " uſed, upon every *Sunday* and Holiday, and then and there orderly abide " (c) during the Service, on pain of Puniſhment by the (d) Cenſures of " the Church, and Twelvepence for every Offence."

(b) An Indictment or Suit on this Statute need not ſhew that the Party was an Inhabitant of the King's Dominions, or that he had no reaſonable Excuſe to be abſent; but the Defendant, if he hath any Matter of this Kind in his Favour, muſt ſhew it himſelf. 2 Leon. 4. Godb. 148.—Nor need the Offence

By

By the 23 *Eliz. cap.* 1. *par.* 5. it is enacted, "That every Perſon above "the Age of ſixteen Years, who ſhall not repair to ſome Church, Chapel, "or uſual Place of Common Prayer, but forbear the ſame contrary to the "Tenor of the ſaid Statute of 1 *Eliz. cap.* 2. and being thereof lawfully "(*d*) convicted, ſhall forfeit to the King, for every (*e*) Month which he or "ſhe ſhall (*f*) ſo forbear, (*g*) twenty Pounds.

(*d*) This is no more than what the Law implies, and therefore there muſt be a Judgment on the Conviction to cauſe a Forfeiture. Dyer 160. pl. 40. 11 Co. 57. b. 59. b. Rol. Rep. 89, 233. 3 Bulſ. 87. Lutw. 162.—A Condemnation by Demurrer or *Nil dicit* is as much within the Statute as a Conviction by Verdict. 11 Co. 58. Rol. Rep. 89, 90. (*e*) Which is to be underſtood a Lunar Month, or 28 Days, according to the common Rule of Expounding Statutes which ſpeak generally of a Month, Yelv. 100. Cro. Eliz. 835. 2 Rol. Abr. 521. (*f*) One ſick for Part of the Time ſhall not be excuſed, if it be proved that he was a Recuſant before and after. Cro. Jac. 529. (*g*) This Forfeiture of twenty Pounds diſpenſes not with that of Twelve-pence given by 1 Eliz. c. 2.

By the (*b*) 28 *Eliz. cap.* 6. and 3 *Jac. cap.* 4. it is enacted, "That every "Offender being convicted of not coming to Church, contrary to the "Purport of the Statutes above-mentioned, ſhall pay twenty Pounds for "every Month after ſuch Conviction, until he ſhall conform himſelf, and "come to Church; and that if the Offender ſhall have made default of "Payment of the twenty Pounds both for every Month contained in the "Conviction, and alſo for every Month ſubſequent, during which he ſhall "not conform himſelf to the Church, the King ſhall ſeize, take and enjoy "all his Goods, and two Parts of his Hereditaments, Leaſes and Farms, "leaving the third Part only of the ſame Hereditaments, Leaſes and Farms "to and for the Maintenance and Relief of the ſame Offender, his Wife, "Children and Family, notwithſtanding any prior Conveyance thereof "made by ſuch Offender, with Power of Revocation, or to the Uſe of "himſelf or his Family: Alſo by the ſaid Statute of 3 *Jac.* 1. the King "may refuſe the Penalty of twenty Pounds a Month, though it be tender- "ed according to Law, and thereupon ſeize two Parts of all the Heredi- "taments, Leaſes and Farms which at the Time of ſuch Seizure ſhall be, "or afterwards ſhall come to any ſuch Offender, or to any other to his Uſe, "or in Truſt for him, or at his Diſpoſition, or whereby or in Conſidera- "tion whereof he or his Family ſhall be relieved, maintained or kept, "leaving unto him his chief Manſion-houſe as Part of his third Part."

(*b*) That this Statute is the 28th, and not the 29th, as it is ſometimes improperly called. 3 Lev. 333. Lut. 203. 2 Mod. 240. And. 294. 3 Keb. 742, 813. Ld. Raym. 77, 210, 343, 371, 382. 2 Ld. Raym. 1224. Vern. 113. 2 Vern. 711.

* In the Conſtruction of theſe Statutes it hath been holden, *Page 43

1. That the King by making his Election given him by 3 *Jac.* 1. *cap.* 4. to ſeize the Offender's Hereditaments, *&c.* waives the Benefit of the twenty Pounds a Month, and the Power of ſeizing the Offender's Goods. Jones 24. Cawley 171.

2. That Bonds, Recognizances, *&c.* taken in the Offender's own Name, or in the Names of others to his Uſe, come within the Words, *all his Goods, &c.* 12 Co. 1, 2. Leon. 98. Rol. Rep 7.

3. That no Copyhold Lands are within either of the Statutes, by reaſon of the Prejudice that would accrue thereby to the Lord of the Manor. Owen 37. Leon. 97.

4. That though it may be doubtful on the Statute 28 *Eliz. cap.* 6 whether Lands conveyed in Truſt by ſome Friend for the Recuſant may be Lane 105. Cawley 169.

Offence be alledged in the County where the Party was in Truth at the Time, becauſe a mere Non-feazance, and properly ſpeaking not committed any where. And. 139. Hob. 251. *& vide* Leon. 167. (*c*) A Miſbehaviour at Church, or Abſence from Morning or Evening Service, is equally puniſhable with a total Abſence; alſo he who is abſent from his own Pariſh Church ſhall be obliged to prove where he went to Church. *Vide* Rol. Rep. 93. Godbolt 148. Sid. 230. (*d*) If the Spiritual Court ground its Proceedings on this Statute, and refuſe to allow a reaſonable Excuſe, it ſhall be prohibited; but not where it proceeds merely on the Canons of the Church. 2 Rol. Rep. 438, 455. Bulſ. 159. Gibſ. Cod. 358.

ſeiſed,

12 Co. 1, 2. seized, yet it is clear that such Lands may be seized by 3 *Jac.* 1. *cap.* 4 which expressly provides, that the King, upon his waving the Forfeiture of twenty Pounds a Month, may seize two Parts of all the Hereditaments, *&c.* which shall come to any such Offenders, or to others to their Use or in Trust for them.

Lane 39. Hard. 466. 5. But that the King cannot seize Lands of which the Offender is seized in Trust for another, although the Statute hath made no express Provision for *Cestui que Trust.*

Cro. Eliz. 845. 2 Rol. Rep. 25. Palm. 41. Jones 24. Hawk.P.C. 15. 6. That the Profits of the Lands seized by the King by Force of 28 *Eliz. cap.* 6. for the Non-payment of the twenty Pounds a Month, ought not to be applied to the Satisfaction thereof, but that the Lands ought to remain in the King's Hands by way of Pledge, till the whole Forfeiture be paid some other Way: But this Construction of the Statute seeming over severe, it was provided by 3 *Jac.* 1. *cap.* 4. that the Profits of the said Lands should go towards the Satisfaction of the twenty Pounds.

2. In what Manner they are to be proceeded against for those Forfeitures.

As to the Forfeiture of Twelvepence, it is by the 1 *Eliz. cap.* 2. and 3 *J.* 1. *cap.* 4. enacted, "That the said Forfeiture of Twelvepence for "the Absence of a *Sunday* or Holiday may, on the Confession of the Party, "or Oath of one Witness, *&c.* be levied on the Goods of the Offender, "*&c.* by the Warrant of a Justice of Peace to the Churchwarden of the "Parish where the Party dwells, and employed to the Use of the Poor."

For the Exposition of these Clauses of these Statutes, *vide* Hawk. P.C. 16, 17.

As to the Forfeiture of twenty Pounds for a Month's Absence by the 23 *Eliz. cap.* 1. 28 *Eliz. cap.* 6 and 3 *Jac.* 1. *cap.* 4. "The same may "be recovered by Indictment, not only in the Court of King's Bench, but "also before Justices of Oyer, Assise, Gaol-Delivery, and Quarter-Sessions "of the Peace: And by the 3 *Jac.* 1. *cap.* 4. *par.* 7. it is enacted, That "upon an Indictment at the Assises, Goal-Delivery, or General-Sessions of "the Peace, Proclamation shall be made, that the Offender render himself "to the Sheriff before the next Assises, Goal-Delivery, or Sessions; and "that if he shall not then appear, of Record, upon such Default recorded, "the same shall be a Conviction in Law, as if a Trial by Verdict on the "Indictment had been recorded: And by the said Statute every such "Conviction shall be certified into the Exchequer.

By the 35 *Eliz. cap.* 1. *par.* 10. it is enacted, "That all and every the "said Pains, Duties, Forfeitures and Payments shall and may be recovered "and levied to her Majesty's Use, by Action of Debt, Bill, Plaint, In-"formation, or otherwise, in any of the Courts commonly called the "King's Bench, Common Pleas or Exchequer, in such Sort and in all "Respects, as by the ordinary Course of the Common Laws of this Realm "any other Debt due by any such Person in any other Case should or
Page 44 " may be recovered or levied, wherein no Essoin, Protection or Wager of "Law shall be admitted or allowed.

By the 28 *Eliz. cap.* 6. and 3 *Jac.* 1. *cap.* 4. "Every such Offender, "being once convicted, shall for every Month after such Conviction, "without any other Indictment or Conviction, pay into the Exchequer "twice in the Year, *viz.* in every *Easter* and *Michaelmas* Term, as much "as shall then remain unpaid, after the Rate of Twenty Pounds for every "Month after a Conviction; and that for a Default herein, the King may "seize all the Goods, and two Parts of the Hereditaments of such an "Offender, *&c.*"

3. *What*

3. *What other Inconveniencies they are ſubject to.*

By the 1 *Jac.* 1. *cap.* 4 *par.* 8. it is enacted, "That no Recuſant con-
" vict ſhall practiſe either the Common or Civil Law, or Phyſick, or uſe
" the Trade of an Apothecary, or be Judge or Miniſter of any Court, or
" bear any Office in Camp, Troop, or Company of Soldiers, or in any
" Ship or Fortreſs, but ſhall be utterly diſabled for the ſame, and forfeit
" for every ſuch Offence 100*l.*"

And it is further enacted, *par* 22. "That ſuch Recuſants as ſhall be
" convicted at the Time of the Death of the Teſtator, or at the Time of
" granting of any Adminiſtration, ſhall be diſabled to be Executors or
" Adminiſtrators, and that no ſuch Perſons ſhall be Guardians to any
" Child."

And by the 23 *Eliz. cap.* 1. it is enacted, "That every Perſon, for-
" bearing the Church twelve Months, ſhall on Certificate thereof into the
" King's Bench, by the Ordinary, a Juſtice of Aſſiſe and Gaol-Delivery,
" or a Juſtice of Peace of the County where ſuch Offender ſhall dwell or
" be, be bound with two ſufficient Sureties in the Sum of two hundred
" Pounds, at the leaſt, to the good Behaviour, and ſo continue bound
" until ſuch Offender ſhall conform himſelf, *&c.*"

4. *By what Means they may be diſcharged.*

By the 23 *Eliz. cap.* 1. *par.* 10. it is enacted, "That every Perſon
" guilty of the abovementioned Offences, who ſhall, before he be there-
" of indicted, or at his Arraignment or Trial before Judgment, ſub-
" mit and conform himſelf before the Biſhop of the Dioceſe where he ſhall
" be reſident, or before the Juſtices where he ſhall be indicted, arraigned
" or tried, (having not before made like Submiſſion at any his Trial, being
" indicted for his firſt like Offence) ſhall, upon his Recognition of ſuch
" Submiſſion, in open Aſſiſes or Seſſions of the County where ſuch Perſon
" ſhall be reſident, be diſcharged of all and every the ſaid Offences againſt
" the ſaid Statute, *&c.*

And by the 28 *Eliz. cap.* 6. *par.* 6. "that whenſoever any ſuch Offen-
" der ſhall make Submiſſion, and become conformable according to the
" Form limited by the abovementioned Statute of 23 *Eliz. cap.* 1.—or
" ſhall fortune to die, that then no Forfeiture of 20*l.* for any Month, or
" Seizure of the Lands of the ſame Offender, from and after ſuch Sub-
" miſſion and Conformity, or Death, and full Satisfaction of all the Ar-
" rearages of twenty Pounds Monthly, before ſuch Seizure due or payable,
" ſhall enſue, or be continued againſt ſuch Offender, ſo long as the ſame
" Perſon ſhall continue in coming to divine Service, according to the Intent
" of the ſaid Statute."

By the 1 *J.* 1. *cap.* 4. it is enacted, "That Recuſant conforming him- * Page 45
" ſelf according to the Meaning of the abovementioned Statutes, *&c.*
" ſhall, during ſuch Conformity, be (*a*) diſcharged of all Penalties which
" he might otherwiſe ſuſtain by reaſon of his Recuſancy.

(*a*) And may plead his Conformity to a Suit either by the Informer or King, and even after Judgment may have an *Audita Querela* againſt the Informer; alſo he may plead it after a Judgment for the King, before Execution awarded; but after Execution hath been awarded for the King, or the Profits of his Lands on a Seizure have been actually taken to the King's Uſe, he hath no other Remedy but by Petition to the King. Raym. 391. 2 Jon. 187. Mod. 213.

If

If the Heir of a Recuſant be a Conformiſt, he is diſcharged by 1 *J.* 1. *cap.* 4. as to all Penalties happening by reaſon of his Anceſtor's Recuſancy, unleſs two Parts of his Lands were ſeiſed by the King in his Anceſtor's Life, in which Caſe they ſhall continue in the King's Hands till the whole Debt be levied.

5. *How a Perſon is puniſhable for ſuffering ſuch Abſence in others.*

By the 1 *Jac.* 1. *cap.* 4. "Whoever ſhall keep in his Service, Fee or "Livery, or willingly maintain, *&c.* in his Houſe, any Servant, Sojourner "or Stranger, (except a Parent wanting, without Fraud, other Habitation "or Maintenance, and except a Ward, *&c.*) who ſhall forbear going to "Church, *&c.* for a Month, ſhall for every ſuch Month forfeit 10*l.*"

8. Of Offences againſt the Eſtabliſhed Church by Proteſtant Diſſenters.

By 31 *Eliz. cap.* 1. "Obſtinate Nonconformiſts were compellable to "abjure the Realm, and were alſo ſubject to other Penalties; and Diſſen-"ters were farther reſtrained by 17 *Car.* 2. *cap.* 2. and 22 *Car.* 2. *cap.* 1. "but at this Day, by 1 *W. & M. cap.* 18. all Perſons diſſenting from the "Church (except Papiſts, and thoſe who ſhall in Preaching or Writing "deny the Doctrine of the Trinity) are exempted from all Penal Laws "relating to Religion; except 25 *Car.* 2. *cap.* 2. (by which all Officers of "Truſt are bound to receive the Sacrament according to the Uſage of the "Church of *England*, and alſo to take the Oaths of Allegiance and Su-"premacy, and the Teſt; and alſo, except 30 *Car.* 2. *cap.* 1. by which "the Members of both Houſes of Parliament, and all the King's ſworn "Servants, are bound to make a Declaration againſt Tranſubſtantiation, "and the Invocation of Saints, and the Sacrifice of the Maſs); provided "ſuch Diſſenters take the Oaths of Allegiance and Supremacy, and make "the ſaid Declaration againſt Tranſubſtantiation, *&c.* and come to ſome "Congregation for Religious Worſhip in ſome Place regiſtered, either in "the Biſhop's Court, or at Seſſions, the Doors whereof ſhall neither be "locked, barred nor bolted."

Alſo by the Statute 1 *W. & M. cap.* 18. "Diſſenting Teachers are "tolerated, if they take the ſaid Oaths, *&c.* at the General or Quarter "Seſſions, to be held for the Place where ſuch Perſons live, and ſubſcribe "the Thirty-nine Articles of the Church of *England*, except thoſe few "ſcrupulous ones concerning Church Government and Infant Baptiſm; "and by 10 *Ann. cap.* 2. they may qualify themſelves as well during a "Proſecution upon any Penal Statute as before, and being qualified in one "County may officiate in another, upon producing a Certificate, and "taking the ſaid Oaths, *&c.* if required."

Vide Salk. 572.

* Page 46 * And by the Statute 1 *W. & M. cap.* 18. "Thoſe who ſcruple the "taking of any Oath are within the like Indulgence, provided they ſub-"ſcribe the aforeſaid Declaration, and alſo a Declaration of Fidelity to "the King, and againſt the depoſing Doctrine and Papal Supremacy, and "alſo profeſs their Faith in God the Father, and Jeſus Chriſt his eternal "Son, the true God, and the Holy Spirit, one God for evermore; and "acknowledge the Holy Scriptures of the Old and New Teſtament to be "given by Divine Inſpiration."

It has been holden, ſince this Statute, a Prohibition lies to the Spiritual Court proceeding againſt Perſons for Incontinency who have been married in a licenſed Conventicle †. 3 Lev. 376.

† Quakers making the Declaration are exempted. 7 & 8 *W.* 3. c. 27. ſ. 12.

By the 5 *Geo.* 1. *cap.* 4. it is enacted, "That if any Magiſtrate ſhall be "knowingly preſent at any Public Meeting for Religious Worſhip, other "than the Church of *England*, in the peculiar Habit of, or attended with "the Enſigns belonging to, his Office, he ſhall be diſabled to hold ſuch "Office, and adjudged incapable to bear any public Office or Employ-"ment whatſoever."

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* HERIOT.

* Page 47

(A) Of the Original and Nature of Heriots. 47.
(B) Of the ſeveral Kinds, and where an Heriot ſhall be ſaid to be due. 48.

And herein,

1. Where an Heriot ſhall be ſaid to be due by Cuſtom. 48.
2. Where an Heriot ſhall be ſaid to be due by Tenure or Reſervation. 50.

(C) Of the Remedies to be purſued for the Recovery of an Heriot where it is due. 52.

(A) Of the Original and Nature of Heriots.

THE Heriot Duty is thought by our beſt Antiquaries to be far more ancient than and to differ from (*a*) *Relief*, the Original whereof ſeems to be thus. Spelm. 287.

(*a*) *Relief* began in this Manner: Anciently,

When the Feuds were only for Life, yet if the Tenant had any Son or Relation fit for the Service, the Tenant would recommend him to the Lord, and the Lord would generally let him in on better Terms than any other; and thus began the Payment of Money on new Admittances, which, when the Feud became inheritable, was turned into a Sum certain, and was called a *Relief*, being originally a charitable Benignity to the Heir, to admit him though he paid not the full Value of the Land. See *Wright of Tenures*, 97, &c.—And *Fleta* thus defines a Heriot: *Heriottum eſt quædam præ-ſtatio*

Spel. Gloſſ. 287. Bract. lib. 2. fo. 60. Britton. 178.

Anciently, when the Tenures were Military, and for Life only, the Arms and War-Horſe of the Tenant, upon his Death, went, together with the Land, to the Lord, being due to him, as having been purchaſed out of the Profits of the Land, or as having been originally granted by the Lord for publick Defence, and therefore belonged to the Lord, that he might beſtow them on the ſucceeding Tenant for the like Service; but when the Feud became inheritable, the Reaſon of the Heriot ceaſed, and then the Arms and War-Horſe went to the Heir who ſucceeded to the Land; yet in ſome Manors the Cuſtom of the Heriot was by particular Agreement retained, or the Lord reſerved it as Parcel of his Tenure; and though originally the Heriot was the (*b*) beſt Horſe, yet in Time it came to be the beſt Beaſt; for the Tenants, to diſappoint their Lords, would often ſell their Arms and Horſes, and then of Neceſſity a Law was made that the Lord might take the beſt Beaſt in lieu of them, and ſo the Heriot came to be eſteemed the beſt Beaſt * ever after; and as it aroſe by Cuſtom, or Tenure, after the Feud became inheritable; hence we find, in ſome Manors, a Cuſtom of paying it in (*c*) Goods, and in ſome, in Money.

* Page 48

(*b*) That in the *Saxon* Language the Word Heriot ſignifies Armour, Weapons or Proviſion, and was a Tribute of old given to the Lord of a Manor for his better Preparation towards War; and therefore at their firſt Inſtitution were paid in Arms, and Habiliments of War. *Forteſc.* in the Preface to *Abſolute and limited Monarchy*, 57. (*c*) *Vide* Kitchen 133.

Spel. 287. (*d*) In *Lambert* we have an Account of theſe Laws, and among others that which follows: *Si quis Incuria ſive Morte repentina fuerit inteſtat' mortuus, Dominus tamen nullam rerum ſuarum partem (præterquam quæ de jure debetur Herriotti nomine) ſibi aſſumito, verum ea judicio ſuo Uxori, Liberis & Cognatione Proximis juſte pro ſuo cuique Jure diſtribuito.* Lamb. Sax. Laws, 119.—And in Co. Lit. 185. b. the ſame Law cited.

It appears, not only from *Spelman*'s Conjectures, but likewiſe from the (*d*) Laws themſelves by King *Canutus*, that the *Danes* were the firſt Inventers of Heriots, and that is was a Political Inſtitution of theirs, whereby the *Daniſh* Tenants were to hold by Military Service, and their Arms and Horſes, at their Deaths, to revert to the Public; and by that Means putting the whole Strength and Defence of the Kingdom into their Hands, committing only the Affairs of Agriculture, and the Improvement of the Nation to the *Engliſh*, though thereby they enjoyed greater Freedom and Immunities, in their Tenures, than the *Daniſh Tenants* did.

(B) Of the ſeveral Kinds, and where an Heriot ſhall be ſaid to be due: And herein,

1. Where an Heriot ſhall be ſaid to be due by Cuſtom.

Dyer 199. b. Bro. Tit. *Heriot* 2, 3.

AS to the ſeveral Kinds of Heriots, ſome are due by Cuſtom, ſome by Tenure, and ſome by Reſervation on Deeds executed within Time of

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ſtatio ubi tenens liber, vel Servus in morte ſua Dominum ſuum reſpicit de meliori averio ſuo vel de Secundo meliori, quæ quidem præſtatio magis ſit de gratia quam de jure, & nullam habet comparationem ad relevium, eo quod hæred. non contingit quia factum eſt Anteceſſoris. Fleta, lib. 4. c. 18.—My Lord *Coke* ſays, that Heriots are very antient, and that they were preferred to Mortuaries, the Lord being intitled to the beſt Beaſt, and the ſecond was due as a Mortuary. Co. Lit. 185. b. † † Heriot comes from the Saxon *Heregeat*, which ſignifies *Bellicus Apparatus*, Armour, Weapons, or Proviſions for War, from the Saxon Word, *Here*, which ſignifies an Army, and *geat*, or *geot*, *fuſus*, *effuſus quaſi fuerit quid in exercitum erogatum*, and was a Tribute of old, given to the Lord of a Manor, for his better Preparations towards War.—So that it ſeems a *Heriot* was the beſt *Arms*. *Pref. to Forteſcue's Reports* 21. In Proceſs of Time, it came to be paid in Goods, Beaſts, Money. *Ibid.*—A *Relief* differs from an *Heriot*. *Relief* not mentioned among the Saxons. *Ibid.*

of Memory; thoſe due by Cuſtom are the moſt frequent, and aroſe by the Contract or Agreement of the Lord and Tenant, in Conſideration of ſome Benefit or Advantage accruing to the Tenant, and for which an Heriot, as the beſt Beaſt, beſt Piece of Houſhold Furniture, &c. became due and belonged to the Lord, either on the Death or (c) Alienation of the Tenant, and which the Lord may ſeize, either within the Manor or without, at his Election.

(c) That an Heriot may be as well due by Cuſtom upon an Alienation of the Tenant, as by his Death. 8 Co. 106. a. Palm. 342.

But, though a Cuſtom that the Lord ſhall have the beſt Beaſt, &c. of his Tenant who dies, is good, yet a Cuſtom or Preſcription to have a Heriot of every Stranger dying within ſuch a Manor, is void; becauſe it cannot have a reaſonable Commencement between the Lord and a Stranger, though it may between him and his Tenants. Dyer 199. b. Dav. 33. 2 And. 153. Rol. Abr. 561.

So a Cuſtom or Preſcription to have a Heriot, *viz.* the beſt Beaſt of his Tenant, and if it be eſloigned before the Lord (d) ſeiſes it, that then he may take the Beaſt of any other Perſon Levant and Couchant upon the Land, is unreaſonable and void. Moor 16. pl. 58. adjudged. N. Bendl. 112. pl. 147.

adjudged. 4 Mod. 321. cited. Dyer 199. b. 2 Stra. 1145, 1224. (d) But the Cattle of a Stranger may be diſtrained, though not ſeiſed. N. Bendl. 302. pl. 294. Dall. 61. Owen 146. March 165. & *vide infra.* Letter (C) 52.

If the Cuſtom be, that the Lord ought to have the beſt Beaſt as an Heriot of him that dies his Tenant, and the Parſon of the Pariſh the ſecond beſt Beaſt as a Mortuary; if the Tenant holds two ſeveral Tenements of the Lord, ſubject to the Cuſtom, within the Pariſh, the Lord ſhall have the two beſt Beaſts, within the Intent of the Cuſtom, and the Parſon the third. 7 H. 6. 26. b. Bro. Tit. *Heriot* 3. Bro. Cuſtom, 22. Rol. Abr. 567. S. C.

* A Copyholder for Life, where the Cuſtom is, that if the Tenant died ſeiſed, a Heriot ſhould be paid, dies diſſeiſed or ouſted, the Lord having firſt granted the Seignory to *A.* for 99 Years, if the Tenant ſhould ſo long live, Remainder to *B.* for 4000 Years; and herein two Queſtions were made: 1*ſt*, Whether the Heriot ſhould be paid, becauſe the Copyholder did not die ſeiſed: And as to this, the Court held clearly, that a Heriot was due and payable; for notwithſtanding the Ouſter and Diſſeiſin, he ſtill continued legal Tenant, and ſuch Diſſeiſin might have been by Combination to defeat the Lord of his Heriot. The ſecond Queſtion was (e), to whom the Heriot ſhould be paid: And as to this, the Court held clearly, that the Remainder Man for 4000 Years could have no Right to it, becauſe the Copyholder was never his Tenant; and as to the Grantee for 99 Years, *Barkley* Juſtice was of Opinion, that it belonged to him; but hereof *Jones* Juſtice (they two only being in Court) doubted, becauſe that *eo Inſtante* the Tenant died, *eodem Inſtante* the Eſtate of the Grantee for 99 Years was determined. * Page 49 March 23. *Norrice* and *Norrice.* 2 Rol. Abr. 72. S. C.

(e) That an Heriot ſhall go with the Reverſion, *Winch* 57. and always incident thereto, 2 Lutw. 1367.

If by the Cuſtom of a Copyhold Manor the Lord may grant a Copyhold to three Perſons, to hold to them *ſucceſſivè ſicut nominantur in Charta, & non alibi*, for their Lives, and that on the Death of every Tenant the Lord ſhould have his beſt Beaſt for an Heriot, and a Grant is made to *J. S.* and his Aſſigns, to hold to him for his own Life and the Lives of two others; this at leaſt is a good Grant for the Life of *J. S.* though not ſtrictly purſuant to the Cuſtom, and the Lord on his Death ſhall have an Heriot; but 6 Mod. 63, &c. Salk 188. pl. 7. S. C. *Smartle* and *Penhallow.* Ld. Raym. 994.

See Ld. Raym. 132. 12 Mod. 57. Will. Rep. 781. pl. 227.

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he cannot have an Heriot on the Death of the *Ceſtui que Vies* (*b*) becauſe they were never his Tenants.

(*b*) So where a Bill was exhibited in Chancery to diſcover the beſt Beaſt of *Ceſtui que Truſt* of a College Leaſe, and the Defendant demurred thereto, becauſe the beſt Beaſt of *Ceſtui que Truſt* could not be taken for a Heriot; alſo it appeared by the Plaintiff's own ſhewing, that the Tenants who had the Eſtate in Law in them were ſtill living; and the Demurrer was allowed. Vern. 441.

Salk. 189. If a Copyholder for Life, on whoſe Death the Lord is intitled to a Heriot, becomes a Bankrupt, and the Copyhold is aſſigned to the Creditors, this Tranſmutation of the Tenant by Act of Parliament ſhall not work a Prejudice to the Lord; but the Lord ſhall, on the Death of the (*c*) Copyholder, have an Heriot.

(*c*) But not on the Death of the Aſſignee, 2 Ld. Raym. 1002.

8 Co. 106. 2 Brownl. 296. If an Heriot be due by *Cuſtom* of the Manor, *viz.* that upon the Death of every Tenant of the Manor the Lord ſhall have an Heriot, if the Lord purchaſes Parcel of the Tenancy it ſhall not extinguiſh the Cuſtom, becauſe the Lord has only purchaſed Part, and the Tenant, on Account of the Reſidue, is ſtill within the Lord's Homage, and Tenant of his Manor; and conſequently upon his Death, as upon the Death of every other Tenant of the Manor, the Lord is intitled to the Heriot.

8 Co. 104. 6 Co. 1. Moor 203. Co. Lit. 149. a. But if the Heriot were due by *Tenure* or *Heriot-Service*, and the Lord had purchaſed Parcel of the Tenancy, the whole Heriot-Service had been extinct; for being intire, it cannot, from the Nature of the Thing, be apportioned, and the Tenant ſhall be diſcharged from the Payment of it: For the whole Tenancy being equally chargeable with the Payment of ſuch Service, the Lord by his own Act ſhall not diſcharge Part, and throw the whole Burden upon the Reſidue, for his own private Benefit and Advantage.

If there be Lord and Tenant by Fealty and Heriot-Service, and the Tenant aliens Part of the Tenancy, the Alienee ſhould hold by a diſtinct Heriot-Service; for in this Caſe the Services ſhall be (*d*) multiplied; and * Page 50 * if after ſuch Alienation the Lord purchaſes the Reſidue of the Tenancy, only the Heriot-Service due from the firſt Tenant ſhall be extinguiſhed; becauſe by the Alienation each held his Proportion by a ſeparate and diſtinct Tenure; and therefore if the Lord purchaſes one Tenancy, that can no way affect the Services of his other Tenant; but if the Lord, before the Tenancy had been ſeparated and held by two diſtinct Tenures, had purchaſed Part of it, the whole Heriot-Service had been extinct, for the Reaſons above-mentioned.

8 Co. 104. *J. Talbot's* Caſe. Co. Lit. 149. b.

(*d*) That if the Tenure be by Homage, Fealty and a Horſe, Hawk or Spur, if the Tenant aliens Part, the Services ſhall multiply, and both Feoffer and Feoffee ſhall pay each of them a Horſe and a Spur to the Lord; but if the Tenure had been by any corporal Service, as to be Butler to the Lord, Steward or Bailiff of his Manor, or to cover or repair his Houſe, or to reap or threſh his Corn; in all theſe Caſes upon Alienation of Part, ſuch perſonal Services ſhall not multiply. Co. Lit. 149. 6 Co. 1. *Bruerton's* Caſe, Plow. 240. b.

Palm. 342. *Snag* ver. *Fox.* If by the Cuſtom of a Manor every Copyholder, upon his Alienation and Surrender, is to pay a Heriot to the Lord, and a Copyholder ſurrenders Part of his Copyhold to one, and Part to another, and retains Part in his own Hands, the Heriots in this Caſe ſhall be multiplied; and as to the firſt Alienation, the Heriot ſhall be paid by the Copyholder who aliened, becauſe he ſtill continued Tenant to the Lord, and ſo upon the Alienation of every other Tenant *toties quoties*; for otherwiſe it might be in the Power of the Copyholder intirely to defeat the Lord of his Heriot.

The

The Dean and Chapter of *Worceſter* were ſeiſed of the Manor of *H.* in Fee in Right of their Church, of which Manor one *G.* was Copyholder for Life under the antient Rent of 8*s.* and 8*d.* payable at the four Quarter-Days of the Year, and heriotable at the Death of the Tenant, and the Copyholds of that Manor were grantable by Cuſtom for three Lives; the Dean and Chapter by Indenture under their common Seal demiſe the ſaid Lands to *G.* and his Aſſigns, for the Lives of *A. B.* and *C.* and the Survivor of them, rendering 8*s* and 8*d.* half-yearly, and without Reſervation of any Heriot; and after this Leaſe made the Dean dies, and his Succeſſor and the Chapter enter to avoid this Leaſe, upon the 13 *Eliz. cap.* 10. (among other Reaſons) becauſe the antient Rent was not reſerved, by reaſon of the Loſs of the Heriot: But the Leaſe was adjudged good, and that it ſhould bind the Succeſſor. For the 13 *Eliz. cap.* 10. does not avoid any Leaſe, if the accuſtomed Rent or more be reſerved; and here the accuſtomed Rent is reſerved, and the Omiſſion or Loſs of the Heriot is not material, becauſe that was not a Thing annual or depending upon the Rent, but perfectly caſual and accidental.

6 Co. 37. Cro. Jac. 76, 77. Moor 759. Dean and Chapter of *Worceſter*. Co. Lit. 44. b. S. P. 6 Mod. 64. S. C. cited.

2. Where an Heriot ſhall be ſaid to be due by Tenure or Reſervation.

It has been already obſerved, that when the Feud became inheritable the Heriot was ſtill continued by Cuſtom, or the Lord reſerved it as Parcel of his Tenure, and then he might either ſeize or diſtrain for the ſame as he might do for any other Feudal Service.

Plow. 96. Bro. Tit. *Heriot*, 2.

If a Feme Tenant by Fealty, certain Rent, and Heriot-Service dies, leaving a Huſband Tenant by the Curteſy, the Heriot becomes due by the Death of the (*a*) Wife, though the Lord need not diſtrain for it till after the Death of the Huſband; but if he diſtrains for it after the Death of the Huſband; it is not ſufficient for him to alledge Seiſin of the Services by the Hands of the Tenant by the Curteſy; for ſuch Seiſin can no more bind the Heir, than the Seiſin of any other Tenant for Life, who has no Body's Eſtate but his own.

Keilw. 84. pl. 8.

(*a*) But by *Dodderidge* it does not become due by the Death of the Wife, becauſe the Wife can have no Property. 4 Leon. 239.——† See Com. D. 2 V. 408.

A Man made a Leaſe for 99 Years, if *A. B.* and *C.* ſhould ſo long live, rendering an Heriot after the Death of each of them ſucceſſively as they were all three named in the Deed; the laſt named died firſt; and if an Heriot ſhould be paid, was the Queſtion. It was objected, that the Reſervation being upon the Death of the three ſucceſſively, the Leſſor was contented to truſt to that Contingency: But as to this Point the Court gave no * Opinion; but Judgment was given againſt the Avowant for other Faults in the Pleadings‡.

Mod. 216. 2 Mod. 93. S.C. *Ingram* and *Tothil*.

* Page 51

‡ See Com. Dig. 2 V. 405, 408.

In Covenant the Plaintiff ſets forth a Leaſe made to the Defendant for 99 Years, if *J.* and *S.* ſhould ſo long live, which Leaſe was to commence after the End, Forfeiture, Surrender, or other Determination of another Leaſe for 99 Years, if *A.* and *B.* did ſo long live, & *poſt Principium inde reddendo & ſolvendo* 10*l.* Rent *per Ann.* and alſo one Capon every *Chriſtmas, ac etiam reddendo & ſolvendo* to the Lord the chief Rent, and alſo rendering and paying at the Death of *J.* or *S.* or either of them, 3*l.* in the Name of an Heriot, and alſo doing ſeveral Days Work with his Team

2 Sand. 161. Vent. 9. 91. Lev. 294. Sid. 437. 2 Keb. 677. S. C. between *Lanion* and *Kerne*.

at

at ſuch Days in the Year as was therein appointed; he ſaith that *J.* is dead, and that *S.* is living, and that the Defendant according to his Covenants hath not paid the 3*l.* &c. and upon Demurrer, the Queſtion was, whether the 3*l.* was payable before the Leaſe took Effect. *Keling* C. J. was of Opinion, 1*ſt*. That a Reſervation being in lieu of the Profits, the other Reſervations (though there had been no ſuch Thing expreſſed as *poſt Principium inde*) muſt not have begun till the Leaſe had come into Poſſeſſion. 2*dly*, That this 3*l.* is a Sum in groſs, and could not have been diſtrained for, being only an Agreement of the Parties that a Sum of Money ſhould be paid at the Death of *J.* and *S.* or either of them, like an Agreement to pay a Fine; and being ſuch an Agreement ſhall be paid, though the Leaſe never take Effect; neither is it material what other Reſervations it comes in Company with, for no Body ſhall make an Interpretation of the expreſs Words of the Party. But the other three Judges were of Opinion that the 3*l.* in the Name of an Heriot was not to be paid upon any Death that fell out before the Leaſe came into Poſſeſſion; for though it be appointed to be paid after the Death of *J.* and *S.* or either of them, yet that muſt be underſtood *ſecundum Subjectum materiam, viz.* if their Death happen within the Term; for till the former Leaſe expire, this is a future Intereſt, and then the Leſſor hath no Reverſion, and the Leſſee has no Term; and how then can a Heriot be payable? for a Heriot by Reſervation is in the Nature of a Rent, and may be diſtrained for as well as any other. 2*dly*, (*a*) Covenants muſt be expounded according to the Intentions of the Parties, which are to be collected from the Nature of the Grant on which they depend, and of other Covenants which come in Company with them; and therefore the Reſervation of 3*l.* in the Name of an Heriot being upon Account of the Term, and the Term not being yet come *in eſſe*, and alſo being joined with other Reſervations, none of which were to begin till *poſt Principium* of the Term, this muſt have the ſame Conſtruction too, and muſt not commence before the Term.

(*a*) For this *vide* Hob. 275. Dyer 371. pl. 5. 377. pl. 27. 10 Co. 107.

If to an Avowry for Heriot Cuſtom or Service, the Party pleads in Bar, that the Tenant at the Time of his Death *nulla habet Animalia*; this, as to its being a good Plea, is left a *Quære* by *Hobart* and *Hutton*; though the latter Book ſeems to hold it a good Plea, and that it will bar the Lord, eſpecially (*b*) if there was no fraudulent Diſpoſition to defeat the Lord of his Heriot; in which Caſe he has his Remedy by Force of the Statute (*c*) 13 *Eliz. cap.* 5. *ſect.* 3.

Hob. 176. Hutt. 4. 5. *Shaw* and *Taylor*.

(*b*) The Lord ſhall have his Heriot, tho' the Tenant deviſes away all his Goods. Co. Lit. 158. b. (*c*) An Action brought on this Statute by the Lord againſt a Perſon being Party to a fraudulent Diſpoſition, in order to defeat a Lord of his Heriot. 2 Leon. 8.

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* Page 52 * (C) Of the Remedies to be purſued for the Recovery of an Heriot when it is due.

IT ſeems to have been always agreed, that for an *Heriot-Cuſtom* the Lord might ſeize the beſt Beaſt of the Tenant, or whatever elſe was due as an Heriot, wherever he could find it.

Bro. Tit. *Heriot*, 2, 3. Keilw. 82.

But according to ſome antient Opinions, the Lord could only diſtrain, but not ſeize for an *Heriot-Service*; becauſe, ſay they, it lies in *Render*, and not *Prender*; alſo the Form of Pleading is, that he was ſeiſed thereof by the Hands of his Tenant, which would be abſurd, if the Lord had ſuch a Property therein that he might ſeize it as his own.

Doctor and *Student*, Dialogue 2. c. 9. N. Bendl. 30. pl. 47. Keilw. 82.

But

But it hath been ſolemnly adjudged, that for a *Heriot-Service*, or for a *Heriot* reſerved by way of *Tenure*, the Lord may either ſeize or diſtrain; for when the Tenant agrees that the Lord ſhall on his Death have his beſt Beaſt, *&c.* the Lord hath his Election which Beaſt he will take, and by ſeizing thereof reduces that to his Poſſeſſion, wherein he had a Property at the Death of the Tenant, without the concurring Act of any other Perſon; and it is not like the Caſe where the Leſſor reſerves 20 *s.* or a Robe, for there the Leſſee hath his Election which he will pay, and being to do the firſt Act, the Lord cannot ſeize, but muſt diſtrain. Plow. 96. adjudged. Cro. Eliz. 589. *Odiham* and *Smith* S. P. adjudged in *B. R.* on a Writ of Error of a Judgment to the contrary in *C. B.* Moor 540. S. C. adjudged accordingly in *B. R.* on a Conference with the Judges of the Court of *C. B.* And. 298. S. C. as adjudged in *C. B.*

Alſo though the Lord may either ſeize or diſtrain for an Heriot-Service, yet he can only ſeize the *(a)* proper Beaſt of the Tenant; but he may *(b)* diſtrain any Man's Beaſts which are upon the Land, and retain them until the Heriot be paid. Cro. Car. 60. (*a*) This muſt be the very Beaſt of the Tenant. 3 Mod. 231. Ld. Raym. 169, 308. (*b*) For this *vide* Dalſ. 61. Owen. 146. March 165. N. Bendl. 302. pl. 294. Lit. Rep. 35.

So it hath been ruled, that for a Heriot-Cuſtom or Service the Lord may ſeize as well in the Manor as out; *(c)* but if he diſtrains, it muſt be in the Manor. Salk. 356. *Auſtin* and *Bennet, per Cur.* Show. 81. S. P. 3 Mod. 231. S. P. *arguendo.* Cro. Car. 260. Jones 300. Ld. Raym. 169, 308. (*c*) For a Heriot-Cuſtom the Lord may ſeize in the Highway, for that is no Diſtreſs, but a Seizure; but he cannot diſtrain for a Heriot-Service there. 2 Inſt. 132.

But it is ſaid, that this Liberty muſt be underſtood to be annexed to antient Tenures, on which the Lords had many Privileges, and not to be extended to thoſe which are created within Time of Memory, upon particular Reſervations; and therefore (*d*) where a Leaſe was made of Land for 99 Years, if *A.* and *B.* ſhould ſo long live, reſerving a yearly Rent and an Heriot, or 40 *s.* in lieu thereof, after the Death of either of them, provided that no Heriot ſhall be paid after the Death of *A.* living *B.* and *A.* and *B.* being both dead, and conſequently the Leaſe (*e*) determined; the Court was divided in Opinion, whether the Leſſor could *(f)* diſtrain for the Heriot or not. Show. 81. 3 Mod. 231. (*d*) 2 Lutw. 1366. *Oſborne* and *Steward.* 3 Mod. 230. S. C. adjourned into the Exchequer, *& vide* Mod. 217. 2 Mod. 93. (*e*) That after the Determination of the Leaſe the Leſſor cannot diſtrain. Co. Lit. 47. 6 Co. 64. But for this *vide* Title *Rents*, and the Statute of the 8 Ann. c. 14. ſ. 6. (*f*) But may have an Action of Covenant. Sand. 165.

If the Tenure be by Rent and Heriot-Service, *viz.* to have the beſt Beaſt after the Death of the Tenant, and the Lord diſtrains for the He-
* riot, he need not in his Avowry ſhew which was the beſt Beaſt which he was intitled to, nor of what Value it was; for the Tenant might have eſloigned the Cattle, and thereby it might be impoſſible for the Lord to know which was the beſt Beaſt; and the Tenant at his Peril is to render the beſt Beaſt or ſufficient Recompence. * Page 53 Cro. Car. 260. *Major* and *Brandwood* adjudged, and two Precedents cited to the ſame Purpoſe. Jones 300. S. C. adjudged, and the ſame Precedents taken Notice of; but there ſaid, that there were divers Precedents in which the beſt Beaſt is preciſely avowed, and this by the Reporter is ſaid to be the beſt Way, when it can be known, though the other is ſufficient:——But in Hob. 176. *Shaw* and *Taylor*, for this Incertainty in the Avowry Judgment was given againſt the Lord. Hutt. 4. S. C. and S. P. adjudged as in *Hobart.*

Cro. Car. 313. *Randal* and *Scory*: But *vide* this Caſe as reported in *Hetley* 57. and 2 Rol. Abr. 451.

If in Replevin the Defendant avows for an Heriot upon a Leaſe made by Indenture to *A.* his Executors and Aſſigns, for 99 Years, if the ſaid *A. B.* and *C.* or any of them, ſhould ſo long live, rendering Rent, and rendering and paying after the Death of the ſaid *A.* his *Executors and Aſſigns*, his or their beſt Beaſt for an Heriot, or 50*s.* at the Election of the Leſſor, his Heirs or Aſſigns, and *A.* aſſigns to *J. S.* and dies, on whom the Leſſor diſtrains; and upon Oyer of the Indenture it appears, that the Clauſe for the Heriot was *rendering and paying to the Leſſor, his Heirs and Aſſigns, after the Death of the ſaid* A. B. *and* C. *and every of them, his or their beſt Beaſt in the Name of an Heriot, or* 50s. *&c.* This Variance is fatal; for tho' the Leſſor be intitled to an Heriot on the Death of *A. B.* or *C.* yet ought he to have ſet it forth according to the Indenture, and not to have avowed for an Heriot after the Death of *A. his Executors and Aſſigns*, when there are no Words which make an Heriot payable on the Death of the Executors or Aſſigns.

Bulſ. 101. If an Heriot be due by Cuſtom from every Tenant dying ſeiſed, the Lord need not alledge what Eſtate the Tenant died ſeiſed of.

Cro. Eliz. 530. Dyer 229. Sid. 265. (*a*) Mod. 217. 2 Mod. 93. But where a Perſon would intitle himſelf as Deviſee of a Reverſion after a Leaſe on which an Heriot is reſerved, he ought to ſhew of what Eſtate the Deviſor was ſeiſed at the Time of making his Will, and *(a)* that he died ſeiſed of ſuch Eſtate; for if diſſeiſed before his Death, the Will could not operate.

See Eq. Caſ. Abr. 46. Wil. Rep. 516. 3 Wil. Rep. 20. pl. 6, 61, 145. pl. 34, 252. pl. 61. Vern. 165, 283. Ch. Pre. 156. 8 Mod. 72, 123, 221. 9 Mod. 32, 122, 157, 159, 171. 10 Mod. 45. 12 Mod. 23, 540. Caſ. Temp. Talb. 44, 268. 2 Stra. 763. 2 Ld. Raym. 1477. 2 Stra. 1221. Swinb. 390.

HIGHWAYS.

(A) Of the ſeveral Kinds, and what ſhall be ſaid a Highway. 54.
(B) To whom the Highway and Soil belong. 54.
(C) Who hath a Right to a Way, and how he muſt claim it. 55.
(D) Whether a Highway may be changed. 56.
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(F) Who are obliged to repair a Way by the Common Law; and herein where a Perſon ſhall be liable by reaſon of Incloſure, Tenure, or Preſcription. 57.
(G) Of the Proviſion for Repairing the Highways by ſeveral Acts of Parliament. 59.

(H) How

(H) How the Parties obliged to repair are to be proceeded againſt, and what Defence they may make. 60.

(A) Of the ſeveral Kinds, and what ſhall be ſaid a Highway.

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IT ſeems that (*a*) antiently there were but four Highways in *England*, which were free and common to all the King's Subjects, and through which they might paſs without any Toll, unleſs there was a particular Conſideration for it; all others, which we have at this Day, are ſuppoſed to have been made through private Perſons Grounds, on a Writ of *Ad quod Damnum*, &c. which being an Injury to the Owner of the Soil, it is (*b*) ſaid that they may preſcribe for Toll without any ſpecial Conſideration.

(*a*) That without any Reſervation of Tenure, &c. the *Trinoda Neceſſitas* lay upon all Lands in *England*, viz. Contributions againſt Invaſions, to the Highways, and to Bridges. (*b*) Mod. 231. 2 Mod. 143. Ld. Raym. 385.

There are ſays my Lord *Coke*, at this Day three Kinds of Ways: 1. A Footway, called in Latin *Iter*. 2. A Pack and Primeway, which is both a Horſe and a Footway, called in Latin *Actus*. 3. A Cartway, called in Latin *Via* or *Aditus*, which contains the other two, as well as a Cartway, and is called *Via Regia*, if it be common to all Men; and *Communis Strata*, if it belong only to ſome Town or private Perſon. Co. Lit. 56. a.

But notwithſtanding theſe Diſtinctions, it ſeems that any of the ſaid Ways which is common to all the King's Subjects, whether it directly led to a Market-Town, or only from Town to Town, may properly be called a Highway, and that any ſuch Cartway may be called the King's Highway: and that a River common to all Men may alſo be called a Highway; and that Nuſances in any of the ſaid Ways are puniſhable by Indictment; for otherwiſe they would not be puniſhed at all: For they are not actionable unleſs they cauſe a ſpecial Damage to ſome particular Perſon; becauſe if ſuch Action would lie, a Multiplicity of Suits would enſue. But it ſeems that a Way to a Pariſh Church, or to the common Fields of a Town, or to a Village, which terminates there, may be called a Private Way, becauſe it belongs not to all the King's Subjects, but only to the particular Inhabitants of ſuch Pariſh, Houſe or Village, each of which, as it ſeems, may have an Action for Nuſance therein. Palm. 389. Cro. Eliz. 634, 664. Vent. 189, 208. 3 Keb. 28. Co. Lit. 56. 6 Mod. 255. Hawk. P. C. 201. 2 Ld. Raym. 1174. Salk. 359. pl. 8.

If Paſſengers have uſed Time out of Mind, when the Roads are bad, to go by Outlets on the Land adjoining to a Highway in an open Field, ſuch Outlets are Parcel of the Highway; and therefore if they be ſown with Corn, and the Track foundrous, the King's Subjects may go upon the Corn. Rol. Abr. 390. Cro. Car. 366. S. C.

(B) To whom the Highway and Soil belong.

THOUGH every Highway is ſaid to be the King's, yet this muſt be underſtood ſo, as that in every Highway the King and his Subjects may paſs and repaſs at their Pleaſure. 2 E. 4. 9. Rol. Abr. 392.

Rol. Abr. 392. (b) That if

But the Freehold, and all the Profits as Trees, &c. belong to the (b) Lord of the Soil, or to the Owner of the Lands on both Sides the Way.

Trees grow upon the Highway, he to whom the Seignory of the Leet of the ſame Place doth belong ſhall have the Trees. Rol. Abr. 392.

8 E. 4. 9. Rol. Abr. 392.

Alſo the Lord or Owner of the Soil ſhall have an Action of Treſpaſs for digging the Ground.

*Page 55 Rol. Abr. 392. Brownl. 42. Keilw. 141.

* But the Lord of a Rape, within which there are ten Hundreds, may preſcribe to have all the Trees growing within any Highway within this Rape, though the Manor or Soil adjoining belongs to another: For Uſage to take the Trees is a good Badge of Ownerſhip.

(C) Who hath a Right to a Way, and how he muſt claim it.

Vent. 274. 2 Lev. 148. 3 Keb. 528, 531. *St. John* ver. *Moody*.

A Man may have a Way either by Preſcription, by Grant, by Reſervation, by Implication, or by Owelty of Partition, and ſhall not in a *Ca. Claudend.* be obliged to ſhew which Way he claims it; but it will be ſufficient for him to alledge *debet & ſolet, &c.* but in a Bar or Replication he muſt ſhew his Title preciſely.

Yelv. 163.

But he who preſcribes for a Way, muſt ſhew in certain (‡) whether it is a Foot, Horſe, or Cartway.

(‡) The uſual Form now uſed in *Engliſh* is, to go, return, paſs, and repaſs, on Foot and on Horſeback, and with his and their Horſes, Carts, Waggons, and other Carriages.

Yelv. 163. adjudged. (b) In an Indictment for an Incroachment upon, or not repairing the

If in Bar of an Action of Treſpaſs the Defendant pleads that *J. S.* and all thoſe whoſe Eſtate he hath in certain Lands, for themſelves and their Servants, Time out of Mind have had and uſed a Way *in per & trans* the Place where, &c. to the ſaid Lands, this is no good Plea, becauſe it is not (b) ſhewn (c) *a quo Loco* the ſaid Way is claimed, and the rather, becauſe it is claimed by Preſcription, which ought not to be laid *in certo Loco.*

Highway it muſt be ſhewn, 2 Rol. Abr. 81. pl. 18.——But it need not be ſhewn where in pleading an Highway is named only as an Abuttal, and is not the Foundation of the Plea. Palm. 421. (c) It muſt be ſhewn *a quo loco ad quem*, becauſe you muſt not go over any Ground but to the right Place. Hob. 198. yet *vide* 2 Rol. Rep. 134. and ſuch Defect is helped where Iſſue is joined and tried upon the Right of the Way. Hob. 189, 190. Hutton 10. Vent. 13. 2 Keb. 480, 488. adjudged, & *vide* Brownl. 6.

Po'. Abr. 391. *Hodder* and *Holman*.

If *A* be ſeiſed in Fee of a Backſide in a Town, and the High-ſtreet is next adjoining thereto of the Eaſt, and there is a Gate in the Backſide which incloſes it from the Street, the Gate being in the Eaſt next to the Street, and *A* is alſo ſeiſed in Fee of a Meſſuage and Piece of Land next adjoining to the Backſide of the North of the Backſide, and by Deed infeoffs *B.* of the Meſſuage and Piece of Land which are of the North of the Backſide, and by the ſame Deed further grants to him and his Heirs *liber' ingreſſum, egreſſum, & regreſſum in, ad & extra eadem conceſſa præmiſſa in, per & trans prædict. Januam* and Backſide, by force of this Grant *B* may go from the Street through the Gate, and over the Backſide, to the Meſſuage or Piece of Land of which he is infeoffed; but he cannot go through the ſaid Gate and

and Backſide to other Places, or from other Places, to the Street, without coming to the ſaid Meſſuage or Piece of Land; for the Liberty is granted to him of Ingreſs and Egreſs *in, ad & extra eadem conceſſa præmiſſa*; ſo that this is made appurtenant to the Premiſſes before granted.

In Treſpaſs for breaking his Cloſe, if the Defendant juſtifies going over this Cloſe, becauſe he had uſed Time out of Mind to have a Way over it from *D.* to *Blackacre*, and the Plaintiff replies, that at the Time * of the Treſpaſs the Defendant went with his Carriages from *D.* to *Blackacre*, *& debinc* to a Mill; this will not maintain his Action, for when the Defendant was at *Blackacre*, he might go whither he would †.

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Rol. Abr. 391. *Sanders & Moſe*, & *vide* Mod. 190. 10 Mod. 228, 300. Ld. Raym. 75.

† *Sed qu.* If this is Law? See the Caſes, particularly Ld. Raym. 75.

But it ſeems, that if a Man hath a Way for Carriages from *D.* to *Blackacre* over my Cloſe, and after he purchaſes Land adjoining to *Blackacre*, he cannot uſe the ſaid Way with Carriages to the Land adjoining, for then it may be very prejudicial to my Cloſe; but it ſeems, if I will help myſelf, I muſt ſhew the ſpecial Matter, and that he uſed it for the Land adjoining.

Rol. Abr. 391.

A Way muſt not be claimed as (*a*) Appendant or Appurtenant to a Houſe, becauſe it is only an Eaſement, and no Intereſt.

Yelv. 159.

(*a*) But it may be *quaſi* Appendant thereto, and as ſuch paſs by Grant thereof. Cro. Jac. 190.

If in Bar to an Action of Treſpaſs the Defendant pleads, that *J. S.* and all thoſe whoſe Eſtate he hath in certain Lands Time out of Mind, for themſelves and their Servants, have had and uſed *Paſſagium in, per & trans* the Place where, &c. and ſo juſtifies as Servant, this is no good Plea, for (*b*) *Paſſagium* is (*c*) properly a Paſſage over Water, and not over Land; and he ought to have preſcribed in the Way, and not in the Paſſage, and ſhould have ſuch Words as are proper and known in Law.

Yelv. 163. adjudged.

(*b*) For this *vide* 8 Co. 46. b. (*c*) So a Preſentment in a Leet for diverting the King's Highway is merely void, for the Word *Divert* may be applied to a Courſe of Water, and a Way may be obſtructed or ſtopped, but it is not diverted and ſtopped, and another made in another Place. And. 234. adjudged.

A Man may preſcribe for a Way from his Houſe, through a certain Cloſe, &c. to Church, (*d*) though he himſelf hath Lands next adjoining to his ſaid Houſe, through which of Neceſſity he muſt firſt paſs; for the general Preſcription ſhall be applied only to the Lands of others.

Palm. 387, 388. 2 Rol. Rep. 397.

(*d*) So if a Man hath a Way over a common Field, Part whereof doth belong to himſelf, for the Infiniteneſs of the Caſe he may preſcribe generally. Palm. 388. 2 Rol. Rep. 398.

A Man cannot alledge that he cannot uſe his Way as well as he could before, but muſt plead that he could not uſe the Way at all ‡.

Godb. 52, 53.

‡ If a Way is in part obſtructed, and may be paſſed through, but ſuch Paſſage is attended with Danger or Difficulty, he may alledge, that he cannot uſe his Way in ſo large and ample a manner as he was uſed, and of Right ſtill ought to uſe the ſame.

(D) Whether a Highway may be changed.

Cro. Car. 266. Vaugh. 341. Yelv. 141. Hawk. P.C. 201, 2.

AN ancient Highway cannot be changed without an Inquiſition found on a Writ of *Ad quod Damnum*, that ſuch Change will be no Prejudice to the Public; and it is ſaid, that if one change a Highway without ſuch Authority, he may ſtop the new Way whenever he pleaſes; neither can the King's Subjects, in an Action brought againſt them for going over ſuch new Way, juſtify generally as in a common Highway, but ought to ſhew ſpecially, by way of Excuſe, how the old Way was obſtructed, and a new one ſet out; neither are the Inhabitants bound to keep Watch in ſuch new Way, or to repair it, or to make Amends for a Robbery committed in it.

22 Aſſ. 93. Rol. Abr. 390.

But it hath been holden, that if a Water, which hath been an ancient Highway, by degrees changes its Courſe, and goes over different Ground from that whereon it is uſed to run, yet the Highway continues in the new Channel in the ſame Manner as in the old.

(E) Of Stopping a Highway, and other Nuſances therein.

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Kitchen 34. Hawk. P.C. 212.

IT is clearly agreed to be a Nuſance to dig a Ditch, or make a Hedge over-thwart the Highway, or to erect a new Gate, or to lay Logs of Timber in it, or generally to do any other Act which will render it leſs commodious.

Hawk. P.C. 214.

Alſo it is a Nuſance for an Heir, and for which he may be indicted, to continue an Incroachment, or other Nuſance to a Highway, begun by his Anceſtor; becauſe ſuch a Continuance thereof amounts in the Judgment of Law to a new Nuſance.

2 Rol. Abr. 137. Hawk. P.C. 212.

Alſo it is agreed, that it is no Excuſe for him who lays Logs in the Highway, that he laid them only here and there, ſo that the People might have a Paſſage through them by Windings and Turnings.

8 H. 7. 5. a. Kitchen 34. Dalt. c. 26. Hawk. P.C. 212, 213.

It is a Nuſance to ſuffer the Highway to be incommoded by reaſon of the Foulneſs, *&c.* of the adjoining Ditches, or by Boughs of Trees hanging over it, *&c.* and it is ſaid, that the Owner of Land next adjoining to the Highway, ought of common Right to ſcour his Ditches; but that the Owner of Land, next adjoining to ſuch Land, is not bound by the Common Law ſo to do, without a ſpecial Preſcription; alſo it is ſaid, that the Owner of Trees hanging over an Highway, to the Annoyance of Travellers, is bound by the Common Law to lop them; and it is clear, that any other Perſon may lop them, ſo far as to avoid the Nuſance.

2 Rol. Abr. 137.

But it is no Nuſance for an Inhabitant of a Town to unlade Billets, *&c.* in the Street before his Houſe, by reaſon of the Neceſſity of the Caſe, unleſs he ſuffer them to continue there an unreaſonable Time.

2 Rol. Abr. 144. Cro. Car. 184. Jon. 221.

Any one may juſtify pulling down, or otherwiſe deſtroying, a common Nuſance, as a new Gate or Houſe erected in a Highway; and it hath been of late holden, that there is no need, in pleading ſuch Juſtification, to ſhew that as little Damage was done as might be †.

2 Salk. 458. pl. 3.——† But its proper that as little Damage ſhould be done, as poſſible, and its uſual to alledge the ſame in Pleading.

Alſo,

Alſo, beſides that all Nuſances are puniſhable by Indictment with Fine and Impriſonment, it is ſaid, that one convicted of a Nuſance to the High-way, may be commanded by the Judgment to remove it at his own Coſts, *&c.* 2 Rol. Abr. 84. Hawk. P.C. 200.

‡ See *infra* 61.

(F) Who are obliged to repair a Way by the Common Law; and herein, where a Perſon ſhall be liable by reaſon of Incloſure, Tenure, or Preſcription.

OF common Right, the general Charge of Repairing Highways lies on the (*a*) Occupiers of Lands in the Pariſh wherein they lie; but it is ſaid, that the Tenants of the Lands adjoining are bound to ſcour their Ditches. Rol. Abr. 390. March 26. Vent. 90, 183. 8 H. 7. 5.

(*a*) But if there be no Occupier, by the Owner's letting the Lands lie freſh, he muſt repair them himſelf. 2 Rol. Rep. 412. Palm. 389.

Alſo if a Pariſh is Part in one County and Part in another, and the Highways in one County are out of Repair, the whole Pariſh ſhall con-* tribute to the Repair; but there may be an Agreement between the In-habitants, that the one ſhall repair one Part, and the other the other; and ſuch Agreement is good between themſelves, and for Breach the one may have an Action upon the Caſe againſt the other; but in an Indictment they ſhall take no Advantage of theſe Agreements, for as to the King they are equally liable. * Page 58 Mod. 112. Vent. 256. 3 Keb. 301.

See 10 Mod. 150, 382. 12 Mod. 15, 198, 409. Ld. Raym. 725. 2 Ld. Raym. 922, 1169. Stra. 179.

Therefore if the Indictment is general againſt all the Pariſh, all the Pariſh ſhall be charged; but if it be intended to charge one Part or Precinct of the Pariſh to repair all the Ways within the Pariſh, it muſt be alledged in Pleading, that by ſpecial Preſcription, or *ratione tenuræ*, ſuch a Part of the Pariſh *de tempts dont*, *&c.* have been charged with the Reparation of the Ways. Vent. 256. Mod. 112. 3 Keb. 301. and the Authorities in the laſt Paragraph.

But though the Pariſh be obliged of Common Right to repair the Highways in it, yet it is certain that particular Perſons may be bound to repair the Highway, by reaſon of Incloſure or Preſcription; as where the Owner of Lands not incloſed, next adjoining to the Highway, incloſes his Lands on both Sides of it; in which Caſe he is bound to make a perfect good Way, and ſhall not be excuſed by making it as good as it was before the Incloſure, if it were then any way defective; becauſe by the Incloſure he takes from the People the Liberty of going over the Lands adjoining to the common track. Rol. Abr. 390. Cro. Car. 366. Sid. 464.

Alſo it is ſaid, that if one incloſe Land on one Side, which hath anciently been incloſed on the other Side, he ought to repair all the Way; but that if there be no ſuch an ancient Incloſure on the other Side, he ought to repair but half the Way. Sid. 464.

Therefore,

Sid. 464. 2 Keb. 665. 2 Sand. 157. Therefore, if there be an old Hedge, Time out of Mind, belonging to *A.* on the one Side of the Way, and *B.* having Land lying on the other Side, makes a new Hedge, there *B.* ſhall be charged with the whole Repair.

Sid. 464. 2 Keb. 665. But if *A.* makes a Hedge on the one Side of the Way, and *B.* on the other, they ſhall be chargeable by Moieties.

2 Sand. 160. But it ſeems clear, that wherever a Perſon makes himſelf liable to repair a Highway by reaſon of Incloſure, that by throwing of it open again, he thereby frees himſelf of the Burthen of any further Reparation.

27 Aſſ. 8. 21 E. 4. 38. Bro. Preſcription 49, 78. Keilw. 52. a. Latch 206. Hawk. P.C. 202, 203. Particular Perſons may be bound to repair a Highway by Preſcription; and it is ſaid, that a Corporation aggregate may be charged by a general Preſcription, that it ought and hath uſed to do it, without ſhewing any Conſideration in reſpect whereof they had uſed to do it, becauſe ſuch a Corporation never dies, neither is it any Plea, that they have done it out of Charity; but it is ſaid, that ſuch a general Preſcription is not ſufficient to charge a private Perſon; becauſe no Man is bound to do a Thing which his Anceſtors have done, unleſs it be for ſome ſpecial Reaſon; as having Lands deſcended to him holden by ſuch Service, &c. but it ſeems, that an Indictment charging a Tenant of Lands in (*a*) Fee with having uſed of Right to repair ſuch a Way *ratione tenuræ terræ ſuæ*, without adding that his Anceſtors, or thoſe whoſe Eſtate he hath, have ſo done, is ſufficient, for it is implied.

(*a*) Alſo an Occupier as ſuch, though at Will only, is indictable for ſuffering a Houſe ſtanding upon the Highway to be ruinous, &c. and the Words *ratione tenuræ*, &c. if added, are Surplus. Salk. 357. pl. 3.

Mod. 112. 3 Keb. 301. Vent. 256. See 10 Mod. 150, 382. 12 Mod. 15. 198, 409. Ld. Raym. 725. 2 Ld. Raym. 922, 1162. Stra. 179. And it ſeems certain in all thoſe Caſes, whether a private Perſon be bound to repair a Highway by Incloſure or Preſcription, that the Pariſh cannot take Advantage of it on the general Iſſue, but muſt plead it ſpecially; and that therefore, if to an Indictment againſt the Pariſh for not repairing a Highway, they plead Not guilty, this ſhall be intended only that the Ways are in Repair, but does not go to the Right of Reparation.

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(G) Of the Proviſion for Repairing the Highways and Turnpike Roads by Act of Parliament.

THE ſeveral Statutes for the Amendment and Preſervation of the Highways being very numerous, and in ſome reſpects ineffectual, are repealed and reduced into one Act [by 13 *Geo.* 3. *cap.* 78. the eſſential Part of which follows, *viz.*

By *ſect.* 1. it is enacted, That upon the Twenty-ſecond Day of *September*, in every Year, unleſs that Day ſhall be *Sunday*, and then on the Day following, the Conſtables, Headboroughs, Tythingmen, Churchwardens, Surveyor of the Highways, and Houſeholders, being aſſeſſed to any Parochial or Public Rate of every Pariſh, Townſhip, or Place, ſhall aſſemble together at the Church or Chapel of ſuch Pariſh, &c. or if there ſhall be no Church or Chapel, then at the uſual Place of public Meetings for ſuch Pariſh, &c. at the Hour of Eleven in the Forenoon; and the major Part of them, ſo aſſembled, ſhall make a Liſt of the Names of at

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leaſt Ten Perſons living within ſuch reſpective Pariſhes, &c. who each of them have an Eſtate in Lands, Tenements, or Hereditaments, lying within ſuch reſpective Pariſh, &c. in their own Right, or in the Right of their Wives, of the Value of Ten Pounds by the Year; or a perſonal Eſtate of the Value of One hundred Pounds; or are Occupiers or Tenants of Houſes, &c. of the Yearly Value of Thirty Pounds: And if there ſhall not be Ten Perſons having ſuch Qualifications as aforeſaid, then they ſhall inſert in ſuch Liſt the Names of ſo many of ſuch Perſons as are ſo qualified as above required, together with the Names of ſo many of the moſt ſufficient and able Inhabitants of ſuch Pariſh, &c. not ſo qualified, as ſhall make up the Number Ten, if ſo many can be found; if not, ſo many as ſhall be there reſident, to ſerve the Office of Surveyor of the Highways: And the Conſtable, Headborough, or Tythingman, of ſuch Pariſh, &c. ſhall, within Three Days after ſuch Meeting, tranſmit a Duplicate of ſuch Liſt to One of the Juſtices of the Peace within the Limit of the County, &c. where ſuch Pariſh, &c. ſhall lie, living in or near the ſame; and ſhall alſo return and deliver the original Liſt, made and agreed upon at ſuch Meeting, to the Juſtices of the Peace, at their Special Seſſions to be held for the Highways within that Limit, in the Week next after the *Michaelmas* General Quarter-Seſſions of the Peace, in every Year; and ſhall alſo, within Three Days after making the ſaid Liſt, give perſonal Notices to, or cauſe Notices in Writing to be left at the Places of Abode of, the ſeveral Perſons contained in ſuch Liſt, informing them of their being ſo named, to the Intent that they may ſeverally appear before the Juſtices at the ſaid Special Seſſions, to accept ſuch Office, if they ſhall be appointed thereto, or to ſhew Cauſe, if they have any, againſt their being appointed: And the ſaid Juſtices are required to hold ſuch Special Seſſions at ſuch convenient Place or Places, within their reſpective Limits, as they, in their Diſcretion, ſhall judge proper; and to give Notice of the Time and Place where they intend to hold the ſame, to the Conſtables, Headboroughs, or Tythingmen of every ſuch Pariſh, &c. at leaſt Ten Days before the holding of the ſaid Seſſion; and the ſaid Juſtices, from the ſaid Liſts, by Warrant under their Hands and Seals, ſhall appoint One, Two, or more, of ſuch Perſons as aforeſaid, if he or they ſhall, in the Opinion of ſuch Juſtices, be qualified for the Office of Surveyor; if not, One, Two, or more of the other ſubſtantial Inhabitants or Occupiers of Lands, &c. within ſuch Pariſh, &c. living within three Miles thereof, and within the ſame County, fit and proper to ſerve the Office of Surveyor of the Highways for ſuch Pariſh, &c. if any ſuch can be found; which Appointment ſhall, by the Conſtables, Headboroughs, or Tythingmen aforeſaid, be notified to every Perſon ſo appointed by the ſaid Juſtices, within Three Days after ſuch Appointment, by ſerving him with the ſaid Warrant, or by leaving the ſame, or a true Copy thereof, at his Houſe, or uſual Place of Abode; and every Perſon ſo appointed, if he accepts the ſaid Office, ſhall be Surveyor of the Highways for the ſaid Pariſh, &c. for the Year enſuing, and ſhall take upon him, and duly execute, the Office aforeſaid; and the ſaid Juſtices ſhall then and there give ſuch of the ſaid Surveyors as ſhall perſonally appear before them a Charge, for the better Performance of their Duty: And if any of the ſaid Perſons, ſo appointed, ſhall refuſe or neglect to appear at the ſaid Special Seſſions, and accept the ſaid Office, if appointed thereto, in Manner aforeſaid, or ſhall not, within Six Days after being ſerved with ſuch Warrant of Appointment, ſignify his Acceptance thereof, either in Perſon or by Writing, to One of the ſaid Juſtices, he ſhall forfeit the Sum of Five Pounds; and in caſe any Perſon ſo appointed by the Juſtices, whoſe Name was not contained in ſuch Liſt, ſhall refuſe or neglect to accept the ſaid Office, or ſhall not, within Six Days after being ſerved with ſuch Appointment, ſhew to One of the Juſtices ſigning ſuch Appointment

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ſufficient Cauſe why he ſhould not ſerve ſuch Office, he ſhall forfeit the Sum of Fifty Shillings: Provided that no Perſon who hath been appointed and ſerved the Office of Surveyor for One Year, ſhall be liable to be appointed Surveyor for the ſame Pariſh, &c. within Three Years from the Time of ſuch firſt Appointment and Service, unleſs he ſhall conſent thereto; but if no ſuch Liſt ſhall be made and returned, or if the ſaid Juſtices ſhall make ſuch Appointment as aforeſaid, and the Perſon or Perſons ſo appointed ſhall refuſe to ſerve the ſaid Office, the ſaid Juſtices, or any Two of them, ſhall at the ſaid Special Seſſions, or at ſome ſubſequent Special Seſſions, to be held within One Month after, nominate and appoint ſome other Perſon or Perſons to be Surveyor, whom they ſhall judge proper to execute that Office, and ſhall fix ſuch Salary to be paid to ſuch Surveyor, out of the ſaid Forfeitures, and all other Forfeitures, Aſſeſſments, &c. as ſuch Juſtices ſhall think fit, not exceeding One Eighth Part of what ſhall have been raiſed by an Aſſeſſment of Sixpence in the Pound, for the Uſe of the Highways within ſuch Pariſh, &c. and obſerving the ſame Reſtriction, as near as they can, from the beſt Information they ſhall be able to get of the probable Amount of ſuch an Aſſeſſment, where none hath been already made; and the ſaid Juſtices may, if they think fit, require the Conſtables, Headboroughs, Tythingmen, and Surveyor, of every ſuch Pariſh, &c. or any of them, to return to them, at ſuch Time and Place as they ſhall appoint, an Account in Writing, of the Sum which ſuch Aſſeſſment of Sixpence in the Pound hath raiſed, or will, in his or their Opinion raiſe within ſuch Pariſh, &c.: And if the Conſtables, &c. and ſuch Houſeholders as aforeſaid, of any Pariſh, &c. ſhall neglect or refuſe to make ſuch Liſt as aforeſaid; or if the Conſtable, &c. of any Pariſh, &c. ſhall not return the ſaid Liſt of Names, when made, and ſuch Duplicate, and give ſuch Notice, and ſerve ſuch Warrant as in this Act is directed; or if the ſaid Conſtable, &c. and Surveyor, or any of them, ſhall neglect to return ſuch Account of the Amount of ſuch Aſſeſſment, as aforeſaid, when ſo required as aforeſaid; every Conſtable, &c. ſo neglecting or refuſing, in any of the ſaid Caſes, ſhall, for every ſuch Default reſpectively, forfeit the Sum of Forty Shillings.

By *ſect.* 2. That in all Caſes where the Juſtices, upon Neglect or Refuſal of the Perſon ſo nominated Surveyor to accept the Office, ſhall appoint any other Perſon for ſuch Surveyor, with a Salary, the Juſtices ſhall appoint One ſubſtantial Inhabitant of ſuch Pariſh, &c. for Aſſiſtant to ſuch Surveyor, until the next annual Appointment of Surveyors; and if the Perſon ſo appointed Aſſiſtant ſhall, upon Notice of ſuch Appointment, refuſe to accept that Office, he ſhall forfeit the Sum of Fifty Shillings: And, in that Caſe, it ſhall be lawful for ſuch Juſtices to appoint any other ſubſtantial Inhabitant of ſuch Pariſh, &c. for Aſſiſtant to ſuch Surveyor; and if ſuch Second appointed Aſſiſtant ſhall decline or refuſe to accept the ſaid Office, he ſhall, in like Manner, forfeit the Sum of Fifty Shillings; and the Juſtices ſhall appoint any other Perſon, inhabiting in ſuch Pariſh, &c. Aſſiſtant to ſuch Surveyor, who ſhall be intitled to the ſaid Forfeitures; and alſo to ſome further Allowance by Way of Salary, (to be paid as the Surveyor's Salary is directed to be paid), if the Juſtices ſhall think any ſuch Salary neceſſary, and ſhall order the ſame: Provided that no Perſon ſo appointed Aſſiſtant for One Year ſhall be liable to be appointed Aſſiſtant, for the ſame Pariſh &c. within Three Years next following ſuch firſt Appointment, without his Conſent.

By *ſect.* 3. That the Surveyor of every Pariſh, &c. who ſhall not reſide therein, but ſhall be appointed with ſuch Salary as aforeſaid, ſhall, if required by the Churchwarden, Overſeer of the Poor, or any principal Inhabitant of the Pariſh, &c. for which he ſhall be ſo appointed Surveyor, at the Time of his Appointment, or within Fourteen Days after, give a Bond upon Paper, without Stamp thereupon, to ſome proper Perſon, within

within ſuch Pariſh, &c. to be nominated by the Juſtices, with ſufficient Surety, to account for the Money which ſhall come to his Hands as Surveyor.

By *ſect.* 4. That the Aſſiſtant, ſo to be nominated and appointed, ſhall, to the beſt of his Skill and Judgment, aſſiſt the Surveyor, whenever requeſted by him, in calling in and attending the Performance of the Statute-duty; in collecting the Compoſitions, Fines, Penalties, and Forfeitures, in making and collecting the Aſſeſſments; in making out and ſerving the Notices, and in ſuch other Matters and Things as ſhall be reaſonably required of him by the Surveyor, in the Execution of his Office as Surveyor: And the Aſſiſtant ſhall juſtly and truly account with, and pay to, the Surveyor, or to his Order, from Time to Time, all the Money which ſhall come to his Hands as Aſſiſtant, by the Means aforeſaid; and, in Default thereof, he ſhall forfeit Double the Value of the Money; and if the Aſſiſtant ſhall wilfully neglect or make Default in the Performance of any of the Duty required from him by the Act, he ſhall forfeit, for every ſuch Offence, any Sum not exceeding Five Pounds, nor leſs than Forty Shillings, at the Diſcretion of the Juſtice or Juſtices: And the Surveyor ſhall ſend Orders, in Writing, upon the Aſſiſtant, for the Payment of all Sums due to any Perſon for Work or Materials, which amount to Forty Shillings, or upwards; and the Surveyor ſhall not be reſponſible for any Sum which ſhall be received by the Aſſiſtant, and ſhall not be actually paid to ſuch Surveyor, or to his Order.

By *ſect.* 5. it is provided, That if Two Parts out of Three of thoſe ſo to be aſſembled in any ſuch Pariſh, &c. for the Nomination of Surveyors, ſhall agree in the Choice of any particular Perſon of Skill and Experience, to ſerve the Office of Surveyor for ſuch Pariſh, &c. and in the ſettling of a certain Salary for his Trouble, and ſhall return the Name of ſuch Perſon, together with the Liſt herein-before directed, to the Juſtices of the Peace at their ſaid Seſſions, to be held in the Week next after the *Michaelmas* Quarter Seſſions; that then it ſhall be lawful for the Juſtices, if they ſhall think proper, to appoint ſuch Perſon to be Surveyor for ſuch Pariſh, &c. and allow him the Salary mentioned in ſuch Agreement, which ſhall be raiſed and paid in the ſame Manner as the Salary before mentioned is directed to be raiſed and paid; and in caſe any Surveyor to be appointed under the Authority of the Act ſhall die, or become incapable of executing that Office, before ſuch next Special Seſſions for appointing Surveyors, the Juſtices, or any Two of them, ſhall and may, at ſome Special Seſſions, nominate and appoint ſuch Perſon as they ſhall think proper, to execute the Office, until ſuch next Special Seſſions for appointing Surveyors; and, if ſuch deceaſed Surveyor had a Salary, they may allow the ſame Salary to his Succeſſor, in Proportion to the Time he ſhall ſerve the Office; and if the Juſtices, at their ſaid Special Seſſions, or at any Time afterwards, purſuant to the Powers of the Act, ſhall appoint more than One Perſon for Surveyor of any Pariſh, &c. all and every Perſon or Perſons ſo appointed, ſhall be comprehended under the Word *Surveyor* in every Part of the Act.

By *ſect.* 6. No Tree, Buſh, or Shrub, ſhall be permitted to ſtand, or grow, in any Highways, within the Diſtance of Fifteen Feet from the Centre thereof, (except for Ornament or Shelter to the Houſe, Building, or Court-yard of the Owner thereof,) or hereafter to be planted within the Diſtance aforeſaid; but the ſame ſhall reſpectively be cut down, grubbed up, and carried away, by the Owner or Occupier of the Land or Soil where the ſame doth or ſhall ſtand or grow, within Ten Days after Notice to him, her, or them, or his, her, or their Steward or Agent given by the ſaid Surveyors, or any of them, on Pain of forfeiting, for every Neglect, the Sum of Ten Shillings.

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By *ſect.* 7. The Poſſeſſors of the Land next adjoining to every Highway ſhall cut, prune, and plaſh their Hedges, and alſo cut down or prune and lop the Trees growing in or near ſuch Hedges or other Fences, (except thoſe Trees planted for Ornament or Shelter, as aforeſaid,) in ſuch Manner that the Highways ſhall not be prejudiced by the Shade thereof reſpectively, and that the Sun and Wind may not be excluded from ſuch Highway to the Damage thereof; and, if ſuch Poſſeſſor ſhall not, within Ten Days after Notice given by the Surveyor for that Purpoſe, cut, prune, and plaſh, ſuch Hedges, and cut down or prune and lop ſuch Trees, in Manner aforeſaid, it ſhall be lawful for the Surveyor, and he is required to make Complaint thereof to ſome Juſtice of the Peace of the Limit where ſuch Highway ſhall be, who ſhall ſummon the Poſſeſſor of the ſaid Lands to appear before the Juſtices at ſome Special Seſſions for that Limit, to anſwer to the ſaid Complaint; and if it ſhall appear to the Juſtices, that ſuch Poſſeſſor had not complied with the Requiſites of the Act, it ſhall be lawful for the Juſtices, upon hearing the Surveyor and the Poſſeſſor of ſuch Land, or his Agent, (or, in Default of his Appearance, upon having due Proof of the Service of ſuch Summons,) and conſidering the Circumſtances of the Caſe, to order ſuch Hedges to be cut, *&c.* in ſuch Manner, as may beſt anſwer the Purpoſes aforeſaid; and if the Poſſeſſor of ſuch Lands ſhall not obey ſuch Order, within Ten Days after it ſhall have been made, and he ſhall have had due Notice, he ſhall forfeit the Sum of Two Shillings for every Twenty-four Feet in Length of ſuch Hedge which ſhall be ſo neglected to be cut and plaſhed, and the Sum of Two Shillings for every Tree which ſhall be ſo neglected to be cut down or pruned, and lopped; and the Surveyor, in caſe of ſuch Default made by the Poſſeſſor, ſhall cut, *&c.* ſuch Hedges, and cut down, *&c.* ſuch Trees, in the Manner directed by ſuch Order; and ſuch Poſſeſſor ſhall be charged with, and pay, over and above the Penalties, the Charges and Expences, or, in Default, the ſame ſhall be levied upon his or her Goods and Chattels, by Warrant from a Juſtice of Peace.

By *ſect.* 8. Ditches, Drains, or Watercourſes, of a ſufficient Depth and Breadth, for the keeping all Highways dry, and conveying the Water from the ſame, ſhall be made, ſcoured, cleanſed, and kept open, and ſufficient Trunks, Tunnels, Plats, or Bridges, ſhall be made and laid where any Cartways, Horſeways, or Footways, lead out of the ſaid Highways into the Lands or Grounds adjoining thereto, by the Occupier or Occupiers of ſuch Lands or Grounds; and every Perſon or Perſons, who ſhall occupy any Lands or Grounds adjoining to or lying near ſuch Highway through which the Water hath uſed to paſs from the ſaid Highway, ſhall from Time to Time, as often as Occaſion ſhall be, open, cleanſe, and ſcour the Ditches, Watercourſes, or Drains, for ſuch Water to paſs without Obſtruction; and every Perſon making Default in any of the Matters or Things aforeſaid, after Ten Days Notice to him, her, or them, given of the ſame, by the ſaid Surveyor, ſhall, for every ſuch Offence, forfeit the Sum of Ten Shillings.

By *ſect.* 9. it is enacted, That if any Perſon ſhall lay, in any Highway, any Stone, Timber, Straw, Dung, or other Matter, or in making, ſcouring, or cleanſing the Ditches or Watercourſes, ſhall permit the Soil or Earth, dug out of ſuch Ditches, Drains, or Watercourſes, to remain in ſuch Highway, in ſuch Manner as to obſtruct or prejudice the ſame, for the Space of Five Days after Notice thereof given by the Surveyor of the Highways; every Perſon offending, ſhall, for every ſuch Offence, forfeit and pay the Sum of Ten Shillings.

By *ſect.* 10. That if any Stone or Timber, or any Hay, Straw, Stubble, or other Matter, for the making of Manure, or on any other Pretence whatſoever, not tolerated by the Act, ſhall be laid in any Highway, within the

the Diſtance of Fifteen Feet from the Centre thereof, and ſhall not, within Five Days after Notice given by the Surveyor, or ſome Perſon aggrieved thereby, be removed, it ſhall be lawful for the Owner or Poſſeſſor of the Lands adjacent, or any other Perſon or Perſons whomſoever, by Order from ſome Juſtice of Peace, to clear the ſaid Highways, by removing the ſaid Stone, Timber, Hay, Straw, Dung, or other Matter, and to have, take, and diſpoſe of the ſame to his and their own Uſe.

By *ſect.* 11. For preventing Obſtructions in the ſaid Highways, it is enacted, That if any Perſon ſhall wilfully ſet, place, or leave, any Waggon, Cart, or other Carriage, or any Plough or Inſtrument of Huſbandry, in any of the ſaid Highways, (except only with reſpect to ſuch Waggon, Cart, or Carriage, during ſuch reaſonable Time as the ſame ſhall be loading, or unloading, and ſtanding as near the Side of ſuch Highway as conveniently may be), ſo as to interrupt or hinder the free Paſſage of any other Carriage, or of his Majeſty's Subjects; every Perſon ſo offending ſhall forfeit the Sum of Ten Shillings for every ſuch Offence.

By *ſect.* 12. That the Surveyors of the Highways ſhall, at all ſuch Times and Seaſons as they ſhall judge proper, view all the common Highways, Trunks, Tunnels, Plats, Hedges, Ditches, Banks, Bridges, Cauſeways, and Pavements, within the Pariſh, *&c.* for which they ſhall be appointed Surveyors; and in caſe they ſhall obſerve any Nuiſances, *&c.* upon or to the Prejudice of them, or any of them, contrary to the Directions of the Act, they ſhall give perſonal Notice, or Notice in Writing, to be left at the uſual Place of Abode of the Offender, ſpecifying the Particulars wherein ſuch Nuiſances, *&c.* conſiſt; and if the ſame ſhall not be removed, and the Ditches, *&c.* effectually made, ſcoured, *&c.* and ſuch Trunks, *&c.* made and laid, and ſuch Hedges properly cut, *&c.* within Twenty Days after Notice, then the Surveyors are fully authoriſed forthwith to remove ſuch Nuiſances, *&c.* and open, *&c.* ſuch Ditches, *&c.* and make or amend ſuch Trunks, *&c.* and cut, *&c.* ſuch Hedges, for the Improvement of the Highways, to the beſt of their Skill; and the Perſon neglecting, after ſuch Notice, ſhall forfeit, for every Foot in Length which ſhall be ſo neglected, the Sum of One Penny; and the Surveyors ſhall be reimburſed Charges and Expences by the Perſon who ought to have done the ſame, over and above the Forfeiture; and in caſe ſuch Perſon ſhall, upon Demand, neglect to pay the Surveyor his Charges and Expences, and alſo the Forfeiture of One Penny *per* Foot, then the Surveyor ſhall apply to any Juſtice of the Peace; and upon making Oath before him of Notice, and of the Work done; and of the Expences, the Surveyor ſhall be repaid by ſuch Perſon all ſuch his Charges as ſhall be allowed to be reaſonable by the Juſtice; or, in Default of Payment on Demand, the ſame ſhall be levied.

By *ſect.* 13. it is provided, That no Perſon ſhall be compelled, nor any Surveyor permitted, by virtue of the Act, to cut or prune any Hedge at any other Time than between the laſt Day of *September* and the laſt Day of *March*; and nothing herein contained ſhall extend to oblige any Perſon to fell any Timber Trees growing in Hedges at any Time whatſoever, except where the Highways ſhall be ordered to be enlarged, or to cut down or grub up any Oak Trees growing within ſuch Highway, or in ſuch Hedges, except in the Months of *April*, *May*, or *June*, or any Aſh, Elm, or other Trees, in any other Months than in the Months of *December*, *January*, *February*, or *March*.

By *ſect.* 14. it is enacted, That where the Ditches, *&c.* which have been uſually made, or which are directed to be made, cleanſed, and kept open, ſhall not be ſufficient to carry off the Water which ſhall lie upon and annoy the Highways; that then it ſhall be lawful for the Surveyors, by the Order

Order of any One or more of the ſaid Juſtices, to make new Ditches and Drains in and through the Lands and Grounds adjoining, or lying near to, ſuch Highways, or in and through any other Lands or Grounds, if it ſhall be neceſſary, for the more eaſy and effectually carrying off ſuch Water from the ſaid Highways, and alſo to keep ſuch Ditches, *&c.* ſcoured, *&c.* and the Surveyors, and their Workmen, are authoriſed to go upon the Lands, for the Purpoſes aforeſaid: Provided, That the ſaid Surveyors make proper Trunks, *&c.* Bridges, *&c.* over ſuch Ditches, *&c.* where the ſame ſhall be neceſſary, for the convenient Enjoyment of the Lands, *&c.* through which the ſame ſhall be made, and keep the ſame in Repair; and do alſo make Satisfaction to the Owner or Occupier of ſuch Lands which are not Waſte or Common, for the Damages; to be ſettled and paid in ſuch Manner as the Damages for getting Materials in ſeveral incloſed Lands or Grounds.

By *ſect.* 15. That the Surveyors of the Highways ſhall make, ſupport, and maintain, every public Cartway leading to any Market-Town, Twenty Feet wide at the leaſt; and every public Horſeway or Driftway, Eight Feet wide at the leaſt, if the Ground between the Fences incloſing the ſame will admit thereof.

By *ſect.* 16. That where it ſhall appear, upon the View of any Two or more of the ſaid Juſtices of the Peace, that the Ground or Soil of any Highway between the Fences thereof is not of ſufficient Breadth, and may be conveniently widened and enlarged, or that the ſame cannot be conveniently enlarged, and made commodious for Travellers, without diverting and turning the ſame; ſuch Juſtices ſhall, within their reſpective Juriſdictions, order ſuch Highways reſpectively to be widened and enlarged, or diverted and turned, in ſuch Manner as they ſhall think fit, ſo that the ſaid Highways, when enlarged and diverted, ſhall not exceed Thirty Feet in Breadth; and that neither of the ſaid Powers do extend to pull down any Houſe or Building, or to take away the Ground of any Garden, Park, Paddock, Court, or Yard; and for the Satisfaction of the Perſon or Perſons, Bodies Politick or Corporate, who are ſeiſed or poſſeſſed of, or intereſted in their own Right, or in Truſt for any other Perſon or Perſons, in the ſaid Ground that ſhall be laid into the ſaid Highways reſpectively, ſo to be enlarged, or through which ſuch Highway, ſo to be diverted and turned, ſhall go, the ſaid Surveyor, under the Direction and with the Approbation of the ſaid Juſtices, ſhall make an Agreement with him, her, or them, for the Recompence to be made for ſuch Ground, and for the making ſuch new Ditches and Fences as ſhall be neceſſary, according and in Proportion to their ſeveral and reſpective Intereſts therein, and alſo with any other Perſon, *&c.* that may be injured for the Satisfaction to be made: And if the Surveyor, under the Direction and with the Approbation of the Juſtices, cannot agree with the ſaid Perſon, *&c.* or if he cannot be found, or ſhall refuſe to treat, or take Satisfaction offered; then the Juſtices of the Peace, at any General Quarter Seſſions to be holden for the Limit, upon Certificate in Writing, ſigned by the Juſtices making ſuch View, of their Proceedings, and upon Proof of Fourteen Days Notice in Writing having been given by the Surveyor of ſuch Pariſh, *&c.* to the Owner, Occupier, or other Perſon, *&c.* intereſted in ſuch Ground, or to his, her, or their Guardian, *&c.* ſignifying an Intention to apply to ſuch Quarter Seſſions for the Purpoſe of taking ſuch Ground, ſhall impanel a Jury of Twelve diſintereſted Men out of the Perſons returned to ſerve as Jurymen at ſuch Quarter Seſſions; and the Jury ſhall, upon their Oaths, to the beſt of their Judgment, aſſeſs the Damages as they ſhall think reaſonable, not exceeding Forty Years Purchaſe for the clear yearly Value of the Ground, and likewiſe ſuch Recompence

compence as they ſhall think reaſonable, for the making of new Ditches and Fences, and alſo Satisfaction to any Perſon, &c. that may be otherwiſe injured. And, upon Payment or Tender of the Money awarded and aſſeſſed to the Perſon, &c. intitled to receive the ſame, or leaving it in the Hands of the Clerk of the Peace of ſuch Limit, in caſe ſuch Perſon, &c. cannot be found, or ſhall refuſe to accept the ſame, for the Uſe of the Owner of, or others intereſted, &c. the Intereſt of the ſaid Perſon, &c. ſhall be for ever diveſted out of them, and the ſaid Ground, after ſuch Agreement or Verdict as aforeſaid, ſhall be eſteemed and taken to be a publick Highway, ſaving nevertheleſs to the Owner, all Mines, Minerals, and Foſſils, lying under the ſame, which can or may be got without breaking the Surface of the ſaid Highway; and alſo all Timber and Wood growing upon ſuch Ground, to be fallen and taken by ſuch Owner within One Month after ſuch Order, or, in Default, to be fallen by the Surveyor, within the reſpective Months aforeſaid, and laid upon the Land adjoining, for the Benefit of the Owner: And where there ſhall not appear ſufficient Money in the Hands of the Surveyor, then the Two Juſtices, in caſe of Agreement, or the Court of Quarter Seſſions, after ſuch Verdict as aforeſaid, ſhall order an equal Aſſeſſment to be made, levied, and collected, upon all and every the Occupiers of Lands, &c. in the reſpective Pariſhes, &c. where ſuch Highways ſhall lie, and direct the Money to be paid to the Perſon, &c. ſo intereſted: And the Money thereby raiſed ſhall be employed and accounted for, according to the Order and Direction of the ſaid Juſtices, or Court of Quarter Seſſions reſpectively, for and towards the purchaſing the Land, and for making the Ditches and Fences, and alſo Satisfaction for the Damages; and the Aſſeſſment, if not paid within Ten Days after Demand, ſhall, by Order of the Juſtices, or Court of Quarter Seſſions reſpectively, be levied by the Surveyor: Provided that no ſuch Aſſeſſment to be made in any One Year ſhall exceed the Rate of Sixpence in the Pound of the yearly Value of the Lands, Tenements, Woods, Tithes, and Hereditaments, ſo aſſeſſed.

By *ſect.* 17. That when any ſuch new Highways ſhall be made, the old Highway ſhall be ſtopped up, and the Land and Soil thereof ſhall be ſold by the Surveyor, with the Approbation of the Juſtices, to ſome Perſon whoſe Lands adjoin thereto, if willing to purchaſe, if not, to ſome other Perſon, for the full Value: But if ſuch old Road ſhall lead to any Lands, Houſe, or Place, which cannot, in the Opinion of ſuch Juſtices reſpectively, be accommodated with a convenient Way and Paſſage from ſuch new Highway, which they are hereby authoriſed to order and lay out, if they find it neceſſary; then the old Highway ſhall only be ſold ſubject to the Right of Way and Paſſage to ſuch Lands, &c. according to the ancient Uſage, and the Money ariſing from ſuch Sale ſhall be applied towards the Purchaſe of the Land where ſuch new Highway ſhall be made: And upon Payment or Tender of the Money, and upon a Certificate by the Two Juſtices, or by the Chairman of the Court of Quarter Seſſions, in caſe the ſame ſhall be determined there, deſcribing the Lands ſo ſold, and expreſſing the Sum ſo agreed for, and directing to whom the ſame ſhall be paid; and upon the Purchaſer's taking a Receipt for ſuch Purchaſe-money from the Perſon intitled to receive the ſame, by an Indorſement on the Back of ſuch Certificate, the Soil of ſuch old Highway ſhall become veſted in ſuch Purchaſer and his Heirs; but all Mines, Minerals, and Foſſils, lying under the ſame, ſhall continue to be the Property of the Perſon who would from Time to Time have been intitled to the ſame, if ſuch old Highway had continued there.

By *ſect.* 18. That in caſe ſuch Jury ſhall give in and deliver a Verdict for more Monies, as a Recompence for the Right, Intereſt, or Property,

perty, of any Perſon, *&c.* or for the making ſuch Fence, or for ſuch Damage, than what ſhall have been offered by the Surveyor, before ſuch Application to the Court of Quarter Seſſions; then the Coſts and Expences attending the ſaid ſeveral Proceedings ſhall be borne and paid by the Surveyor out of the Monies in his Hands, or to be aſſeſſed and levied by virtue and under the Powers of the Act; but if ſuch Jury ſhall give a Verdict for no more, or for leſs Monies than ſhall have been offered before ſuch Application to the Court of Quarter-Seſſions; then the Coſts and Expences ſhall be borne and paid by the Perſon, *&c.* who ſhall have refuſed to accept the Recompence.

By *ſect.* 19. That when it ſhall appear, upon the View of any Two or more of the Juſtices of the Peace, that any public Highway, not in the Situation herein-before deſcribed, or public Bridleway, or Footway, may be diverted, ſo as to make the ſame nearer or more commodious to the Publick, and the Owner or Owners of the Lands and Grounds through which ſuch new Highway, Bridleway, or Footway, is propoſed to be made, ſhall conſent thereto, by Writing under his or their Hand and Seal, or Hands and Seals, it ſhall be lawful, by Order of ſuch Juſtices, at ſome ſpecial Seſſions, to divert and turn, and to ſtop up ſuch Footway, and to divert, turn, and ſtop up, and incloſe, ſell, and diſpoſe of ſuch old Highway or Bridleway, and to purchaſe the Ground and Soil for ſuch new Highway, Bridleway, or Footway, by ſuch Ways and Means, and ſubject to ſuch Exceptions and Conditions, in all Reſpects, as herein before mentioned with regard to Highways to be widened or diverted; and where any ſuch Highway, Bridleway, or Footway, herein laſt before deſcribed, ſhall be ſo ordered to be ſtopped up or incloſed, and ſuch new Highway, Bridleway, or Footway, ſet out and appropriated in lieu thereof, as aforeſaid, it ſhall and may be lawful for any Perſon or Perſons injured or aggrieved by any ſuch Order or Proceeding, or by the Incloſure of any Road or Highway, by virtue of any Inquiſition taken upon any Writ of *Ad quod damnum*, to make his or their Complaint thereof, by Appeal to the Juſtices of the Peace, at the next General Quarter Seſſions, which ſhall be holden within the Limit where the ſame ſhall lie, after ſuch Order made or Proceeding had, as aforeſaid, upon giving Ten Days Notice in Writing of ſuch Appeal to the Surveyor and Party intereſted in ſuch Incloſure, if there ſhall be ſufficient Time for that Purpoſe; if not, ſuch Appeal may be made upon the like Notice to the next ſubſequent Quarter Seſſions of the Peace; which Courts of Quarter Seſſions are hereby reſpectively authoriſed and impowered to hear and finally determine ſuch Appeal; and if no ſuch Appeal be made, or, being made, ſuch Order and Proceedings ſhall be confirmed by the ſaid Court, the ſaid Incloſures may be made, and the ſaid Ways ſtopped, and the Proceedings thereupon ſhall be binding and concluſive to all Perſons whomſoever; and the new Highway, Bridleway, or Footway, ſo to be appropriated and ſet out, ſhall be, and for ever after continue, a public Highway, Bridleway, or Footway, to all Intents and Purpoſes whatſoever; but no Incloſures of ſuch old Highways or Bridleway, or Stoppage of ſuch Footway, ſhall be made, until ſuch new Highways, Bridleway, or Footway, ſhall be completed, and put into good Condition and Repair, and ſo certified by Two Juſtices of the Peace, upon View thereof; which Certificate ſhall be returned to the Clerk of the Peace, and by him inrolled amongſt the Records of the ſaid Court of Quarter Seſſions; but from and after ſuch Certificate ſuch old Highways, Bridleway, or Footway, ſhall and may be ſtopped up, and the Soil of ſuch old Highways or Bridleway ſold, in the Manner, and ſubject to the Reſervations and Reſtrictions herein before mentioned with reſpect to Highways to be enlarged or diverted by virtue of this Act: And where any Highway, Bridleway, or

Footway,

Footway, hath been diverted and turned above Twelve Months, either from Neceſſity, where the ſame have been deſtroyed by Floods, or Slips of the Ground on which they were made, or from other Cauſes and Motives, if new Highways, Bridleways, or Footways, have been made in lieu thereof, nearer or more commodious to the Publick, and the ſame have been acquieſced in, and no Suit or Proſecution hath been commenced for the diverting or turning the ſame, every new Highway, Bridleway, or Footway, ſet out and uſed in the Place of that ſo diverted and turned, ſhall from henceforth be the public Highway, Bridleway, or Footway, to all Intents and Purpoſes whatſoever; and all Perſons liable to the Repair of any ſuch old Highways, Bridleway, or Footway, ſo diverted and turned, or to be diverted and turned, as aforeſaid, ſhall, in the ſame Manner, be and continue liable to the Repair of ſuch new Highways, Bridleway, or Footway, except where any Agreement ſhall have been made relative to ſuch Repairs, between the Parties intereſted therein, which hath laid the Burthen thereof, or of any Part thereof, upon any other Perſon, in which Caſe the ſame ſhall be obſerved.

By *ſect.* 20. That no common Land, lying between the Fences of any old Highway to be ſtopped up or incloſed by virtue of this Act, ſhall be incloſed; and where the Land lying between the Fences of ſuch Highway, not being common Land, ſhall, upon a Medium, exceed Thirty Feet in Breadth, and not extend to Fifty Feet in Breadth, the ſame ſhall not be ſtopped up or incloſed, until Satisfaction ſhall be made to the Owner of ſuch Land, for ſo much thereof as ſhall exceed the ſaid Breadth of Thirty Feet; and if the Parties cannot agree in the Satisfaction ſo to be made, the ſame ſhall be adjuſted by the ſaid Juſtices, or the Jury, if a Jury ſhall be impanelled; and if the Land between the Fences incloſing ſuch Highways, not being common Land, ſhall exceed Fifty Feet in Breadth upon a Medium, or if the ſaid old Road, ſo to be diverted or turned, ſhall lie through the open Field or Ground belonging to any particular Perſon, ſuch Perſon, and alſo the Perſon intitled to the Land between the Fences on the Side of ſuch Highway, ſhall reſpectively hold and enjoy the Land and Soil of ſuch old Highway, and pay to the Surveyor, for the Uſe of the Highways, ſo much Money as ſhall be agreed upon between the Parties; or, if they cannot agree, ſo much as ſhall be adjudged by the Juſtices, or Jury, if ſuch Jury ſhall be impanelled, as aforeſaid, to be adequate to the Purchaſe, eſtimating ſuch Highway at Thirty Feet in Breadth, upon an Average.

By *ſect.* 21. That where any Footway ſhall be diverted by virtue of the Act through the Land belonging to the ſame Perſon who owned the Land through which ſuch old Footway lay, the ſame ſhall be adjudged and deemed an Exchange only, and no Satisfaction or Compenſation ſhall be made, unleſs the Land to be uſed for ſuch new Footway ſhall be of greater Length, and of greater Value, than the Land uſed for ſuch old Footway; and where the Footway ſhall not be turned through the Lands belonging to the ſame Perſon, the Damage occaſioned by ſuch old Footway to the Lands through which it lay, if the Parties intereſted ſhall not agree in adjuſting the ſame, ſhall be adjudged by Two indifferent Perſons, the One to be named by the Owner, and the other by the Two Juſtices; and if the Perſons ſo to be nominated cannot agree therein, they ſhall chuſe ſome Third Perſon to adjudge the ſame, whoſe Determination ſhall be final; and the Money at which ſuch Damages ſhall be aſſeſſed ſhall be applied in making Satisfaction to the Owner

By *ſect.* 22. That if in any Pariſh, *&c.* where any Highway ſhall be diverted and turned by virtue of the Act, it ſhall appear to the Juſtices, that there are other Highways within ſuch Pariſh, *&c.* beſides that ſo to

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be diverted, which may, without Inconvenience to the Public, be diverted into ſuch new Highway, or into any other Highway or Highways within ſuch Pariſh, *&c.* and the Charge of repairing ſuch Highway or Highways may be thereby ſaved to ſuch Pariſh, *&c.* it ſhall be lawful for ſuch Juſtices to order ſuch Highway or Highways, which ſhall appear to them unneceſſary, to be ſtopped up, and the Soil thereof ſold, in ſuch Manner, and ſubject to ſuch Reſtrictions, and ſuch Right of Appeal to the Party aggrieved, as before directed concerning Highways, to be ſtopped up or incloſed.

By *ſect.* 23. That every Surveyor ſhall give Information upon Oath to the Juſtices, or any Two or more of them, of all ſuch Highways, and of all Bridges, Cauſeways, or Pavements, upon ſuch Highways, as are out of Repair, and ought to be repaired by any Perſon, *&c.* by reaſon of any Grant, Tenure, Limitation, or Appointment, of any charitable Gift or otherwiſe howſoever; and the Juſtices ſhall limit a Time for repairing the ſame, of which Notice ſhall be given by the ſaid Surveyor to the Occupier of the Lands or Tenements liable to the Burthen, or to ſuch other Perſons, *&c.* as are chargeable; and if ſuch Repairs ſhall not be effectually made within the Time limited, the Juſtices ſhall preſent ſuch Highways, Bridges, Cauſeways, or Pavements, ſo out of Repair, together with the Perſons, *&c.* liable to repair the ſame, at the next General Quarter Seſſions of the Peace for the Limit wherein ſuch Highway ſhall lie, and the Juſtices at ſuch Quarter Seſſions may, if they ſee juſt Cauſe, direct the Proſecution to be carried on at the general Expence of ſuch Limit, and to be paid out of the general Rates within the ſame.

By *ſect.* 24. That every Juſtice of Aſſize, Juſtices of the Counties Palatine of *Cheſter*, *Lancaſter*, and *Durham*, and of the Great Seſſions in *Wales*, ſhall have Authority by this Statute, upon his or their own View, and every Juſtice of the Peace, either upon his own View, or upon Information upon Oath to him given by any Surveyor of the Highways, to make Preſentment at their reſpective Aſſiſes or Great Seſſions, or in the open General Quarter Seſſions, of ſuch reſpective Limit, of any Highway, Cauſeway, or Bridge, not ſufficiently repaired and amended, or of any other Default or Offence committed and done contrary to the Proviſion and Intent of the Statute; and that all Defects in the Repair thereof ſhall be preſented in ſuch Juriſdiction where the ſame do lie, and not elſewhere; and that no ſuch Preſentment, nor any Indictment for any ſuch Default or Offence, ſhall be removed by *Certiorari*, or otherwiſe, out of ſuch Juriſdiction, till ſuch Indictment or Preſentment be traverſed, and Judgment thereupon given, *except* where the Duty or Obligation of repairing the ſaid Highways, Cauſeways, or Bridges, may come in Queſtion; and that every ſuch Preſentment ſhall be of the ſame Effect, as if preſented and found by the Oaths of Twelve Men; and that for every ſuch Default or Offence ſo preſented, the Juſtices of Aſſize, Counties Palatine, and Great Seſſions, at their reſpective Courts, and the Juſtices of the Peace, at their General Quarter Seſſions, ſhall have Authority to aſſeſs ſuch Fines as to them ſhall be thought meet: Saving to every Perſon that ſhall be affected his lawful Traverſe, as well with reſpect to the Fact of Non-repair as to the Duty or Obligation of repairing, as they might have had upon any Indictment; and the Juſtices of the Peace, at their General Quarter Seſſions, or the major Part of them, may, if they ſee juſt Cauſe, direct the Proſecutions upon ſuch Preſentments as ſhall be made at the Quarter Seſſions, to be carried on at the general Expence of ſuch Limit, and to be paid out of the general Rates within the ſame.

By *ſect.* 25. That the Juſtices of the Peace, at any Special Seſſions to be held by Virtue of the Act, may, by Writing under their Hands and Seals, order thoſe Highways, (not being Turnpike Road,) which in their Opinion do moſt want Repair within their Juriſdiction, to be firſt amend-

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ed, and at what Time, and in what Manner, the ſame ſhall be amended; according to which Order, if ſuch there be, all and ſingular the reſpective Surveyors of the Highways are required to proceed within their reſpective Liberties.

By *ſect.* 26. For the better Convenience of Travellers, where ſeveral Highways meet, the Juſtices, at ſome Special Seſſions, ſhall iſſue their Precept to the Surveyor of the Highways for any Pariſh, *&c.* where ſeveral Highways meet, and there is no proper or ſufficient Direction Poſt, or Stone, already erected, requiring him forthwith to cauſe to be erected, in the moſt convenient Place where ſuch Ways meet, a Stone or Poſt, with Inſcriptions thereon, in large legible Letters, painted each Side, containing the Name or Names of the next Market Town or Towns, or other conſiderable Place or Places, to which the ſaid Highways reſpectively lead; and alſo at the ſeveral Approaches or Entrances to ſuch Parts of any Highways as are ſubject to deep or dangerous Floods, graduated Stones or Poſts, denoting the Depth of Water in the deepeſt Part of the ſame, and likeways ſuch Direction Poſts or Stones, as the Juſtices ſhall judge to be neceſſary, for the guiding of Travellers in the beſt and ſafeſt Tract through the Floods or Waters; and the Surveyor ſhall be reimburſed the Expences out of the Monies received purſuant to the Directions of the Act; and in caſe any Surveyor ſhall, by the Space of Three Months after ſuch Precept to him directed and delivered, neglect or refuſe to cauſe ſuch Stones or Poſts to be fixed, every ſuch Offender ſhall forfeit the Sum of Twenty Shillings.

By *ſect.* 27. For the better repairing, and keeping in Repair, the Highways, and providing Materials, it ſhall be lawful for every Surveyor to take and carry away ſo much of the Rubbiſh or Refuſe Stones, of any Quarry or Quarries, lying and being within the Pariſh, *&c.* (except ſuch as ſhall have been got by the Surveyor of any Turnpike Road,) without the Licence of the Owner, as they ſhall judge neceſſary for the Amendment of the Highways, but not to dig or get Stone in ſuch Quarry without Leave of the Owner, and alſo that it ſhall be lawful for every ſuch Surveyor, for the Uſe aforeſaid, in any waſte Land or common Ground, River, or Brook, within the Pariſh, *&c.* or within any other Pariſh, *&c.* wherein Gravel, Sand, Chalk, Stone, or other Materials, are reſpectively likely to be found, (in caſe ſufficient cannot be conveniently had within the Pariſh, *&c.* where the ſame are to be employed, and ſufficient ſhall be left for the Uſe of the Roads in ſuch other Pariſh, *&c.*) to ſearch for, dig, get, and carry away the ſame, ſo that the Surveyor doth not thereby divert or interrupt the Courſe of ſuch River or Brook, or prejudice or damage any Building, Highway, or Ford, nor dig or get the ſame out of any River or Brook within the Diſtance of One Hundred Feet above or below any Bridge, nor within the like Diſtance of any Dam or Wear; and likewiſe to gather Stones lying upon any Lands or Grounds within the Pariſh, *&c.* where ſuch Highway ſhall be, for ſuch Service and Purpoſe, and to take ſo much of the Materials as by the Diſcretion of the Surveyor ſhall be thought neceſſary, without making any Satisfaction for the ſaid Materials; but Satisfaction ſhall be made for all Damages done to the Lands or Grounds of any Perſon, by carrying away the ſame, in the Manner directed for getting and carrying Materials in incloſed Lands or Grounds; but no ſuch Stones ſhall be gathered without the Conſent of the Occupier of ſuch Lands or Grounds, or a Licence from a Juſtice of Peace for that Purpoſe, after having ſummoned ſuch Occupier to come before him, and heard his Reaſons, if he ſhall appear and give any, for refuſing his Conſent.

By *ſect.* 28. That nothing in this Act contained, relative to the gathering or getting of Stones, ſhall extend to any Quantity of Land, (being

private Property,) covered with Stones thrown up by the Sea, commonly called *Beach*.

By *ſect.* 29. That it ſhall be lawful for every ſuch Surveyor, for the Uſe aforeſaid, to ſearch for, dig, and get Sand, Gravel, Chalk, Stone, or other Materials, if ſufficient cannot conveniently be had within ſuch waſte Lands, common Grounds, Rivers, or Brooks, in and through any of the ſeveral or incloſed Lands or Grounds of any Perſon or Perſons whomſoever, within the Pariſh, *&c.* where the ſame ſhall be wanted, by Licence from Two Juſtices of the Peace, at a Special Seſſions, within any other Pariſh, *&c.* adjoining or lying near to the Highway for which ſuch Materials ſhall be required, if it ſhall appear to ſuch Juſtices that ſufficient Materials cannot be conveniently had in the Pariſh, *&c.* where ſuch Highways lie, or in the waſte Lands, or common Grounds, Rivers, or Brooks, of ſuch adjacent Pariſh, *&c.* and that a ſufficient Quantity of Materials will be left for the Uſe of the Pariſh, *&c.* where the ſame ſhall be, (ſuch Lands or Grounds not being a Garden, Yard, Avenue to a Houſe, Lawn, Park, Paddock, or incloſed Plantation,) and to take and carry away ſo much of the Materials as by the Diſcretion of the Surveyor ſhall be thought neceſſary; the Surveyor making ſuch Satisfaction for the Damage to be done to ſuch Lands or Grounds by getting and carrying away the ſame, as ſhall be agreed upon between him and the Owner, Occupier, or other Perſon intereſted in ſuch Lands or Ground reſpectively, in the Preſence, and with the Approbation, of Two or more ſubſtantial Inhabitants of ſuch Pariſh, *&c.* and in caſe they cannot agree, then ſuch Satisfaction and Recompence ſhall be ſettled and aſcertained by Order of One or more Juſtice or Juſtices of the Peace of the Limit where ſuch Land or Ground ſhall lie: And in ſuch Places, where, from the want of other Materials, burnt Clay may be ſubſtituted in the Place thereof, it ſhall be lawful for the Surveyor to dig Clay in ſuch Places as he is authoriſed to dig Chalk or Gravel, and to dry the ſame upon the Lands adjoining, and to burn the ſame upon any waſte Lands or common Grounds, and to carry ſuch Clay in ſuch Manner as other Materials are allowed to be carried by the Act, upon making ſuch Satisfaction for the Damages within the ſeveral incloſed Lands or Grounds where ſuch Clay ſhall be placed or carried, as herein directed with regard to other Materials: Provided, that when the Owner of any ſuch incloſed Lands ſhall have Occaſion for any ſuch Materials lying within the ſame, for the Repair of any Highway, or other Roads or Ways upon his Eſtate, or which he ſhall be under Obligation to repair, and ſhall give Notice to ſuch Surveyor that he apprehends there will not be ſufficient for thoſe Purpoſes, and alſo for the Uſe of the public Highways; then the Surveyor ſhall not be permitted to dig or take ſuch Materials without the Conſent of ſuch Owner, or an Order of Two Juſtices of the Peace, after having ſummoned and heard the Owner or Occupier, or his Steward or Agent; which Juſtices are authoriſed to inquire into the Nature and Circumſtances of the Caſe, and to permit or reſtrain ſuch Power, in ſuch Manner, and under ſuch Directions, as to them ſhall ſeem juſt.

By *ſect.* 30. Reciting that whereas in ſome Pariſhes, *&c.* there may not be ſufficient Materials for the Repair of the Highways within the ſame, nor within the waſte Lands, common Grounds, Rivers, or Brooks, of any other Pariſh, *&c.* lying within a convenient Diſtance from ſuch Highway, by reaſon whereof the Surveyor of ſuch Highway may be forced to buy ſuch Materials, and to make Recompence and Satisfaction to the Owner or Occupier of incloſed Lands, for Damage which may be done by getting and carrying thereof: And reciting that whereas no Proviſion is made for raiſing a Fund to reimburſe the Expences, and alſo ſuch Expences as the Surveyors may incur, by erecting Guide-poſts, or

other

other Posts or Stones, and by making or repairing such Trunks, Tunnels, Plates, Bridges, or Arches, as aforesaid, and by rendering Satisfaction for Damages done to Lands by the making of new Ditches or Drains, nor for the Salary to be paid by such Parish, Township, or Place, to such Surveyor, as aforesaid; it is enacted, That upon Application by such Surveyor to the Justices of the Peace, at their Special Sessions, and Oath made of the Sum or Sums of Money which he hath *bona fide* laid out and expended, or which will be required for the Purposes aforesaid, the said Justices, or any Two or more of them, shall, by Warrant under their Hands and Seals, cause an equal Assessment to be made, for the Purposes aforesaid, upon all Occupiers of Lands, Tenements, Woods, Tithes, and Hereditaments, within such Parish, *&c.* where such Money shall be so expended; and the same shall be made and collected by such Person, and allowed in such Manner, as the Justices by their Order at such Sessions, shall direct and appoint in that Behalf; and the Money thereby raised shall be employed and accounted for, according to the Direction of the Justices, for the Purposes aforesaid; and the Assessment shall be levied in such Manner as after mentioned: Provided nevertheless, That no such Assessment to be made for those or any of those Purposes, in any One Year, shall exceed the Rate of Sixpence in the Pound, of the yearly Value of the Lands, *&c.* so to be assessed.

By *sect.* 31. That if any Surveyor, or Person employed by him, shall, by reason of the searching for, digging, or getting any Gravel, Sand, Stones, Chalk, Clay, or other Materials for repairing any Highways, make any Pit or Hole in any such Lands or Grounds, Rivers or Brooks, wherein such Materials shall be found, he shall forthwith cause the same to be sufficiently fenced off, and such Fence supported during such Time as the Pit or Hole shall continue open, and shall, within Three Days after such Pit or Hole shall be made, where no Gravel, Stones, or Materials, shall be found, cause the same to be forthwith filled up, levelled, and covered with the Turf or Clod which was dug out; and where any such Materials shall be found, within fourteen Days after having dug up sufficient Materials in such Pit or Hole, cause the same to be filled up, sloped down, or fenced off, and so continued; and every Surveyor shall, within Twenty Days after he shall be appointed to that Office, cause all the Pits and Holes which shall then be open, and not likely to be further useful, to be filled up or sloped down; and, if they are likely to be further useful, he shall secure the same by Posts and Rails, or other Fences, to prevent Accidents; and, in case of Neglect, shall forfeit the Sum of Ten Shillings for every Default: And in case of Neglect for the Space of Six Days after Notice from any Justice of the Peace, or from the Owner or Occupier, or any Person having Right of Common, and such Neglect and Notice shall be proved upon Oath before One or more of the said Justices of the Peace, he shall forfeit not exceeding Ten Pounds, nor less than Forty Shillings, for every such Neglect; to be determined and adjudged by such Justice or Justices, and to be laid out and applied in the fencing off, filling up, or sloping down, such Pit or Hole, and toward the Repair of the Roads in the Parish, *&c.* where the Offence shall be committed.

By *sect.* 32. That no Stone, Gravel, or Materials, to be dug for the Use of any other Parish, *&c.* than that wherein the same are found, shall be removed or carried from the Place where they shall be so dug, at any other Time than between the First Day of *April* and the First Day of *November*, or in the Time of hard Frost in the Winter Season.

By *sect.* 33. That if any Person shall dig, or cause to be dug, Materials for the Highways, contrary to the Direction of the Act, whereby any Bridge, Mill, Building, Dam, Highway, Ford, Mines, or Tin-works, may

be damaged or endangered; every Offender ſhall forfeit, for every ſuch Offence, any Sum not exceeding Five Pounds, nor leſs than Twenty Shillings, at the Diſcretion of the Court or Juſtices before whom Complaint thereof ſhall be made.

By *ſect.* 34. That the Surveyor, together with the Inhabitants and Occupiers of Lands, Tenements, Woods, Tithes, and Hereditaments, within each Pariſh, *&c.* ſhall, at proper Seaſons in every Year, uſe their Endeavours for the Repair of the Highways, and ſhall be chargeable thereunto, as followeth; that is to ſay, Every Perſon keeping a Waggon, Cart, Wain, Plough, or Tumbrel, and Three or more Horſes or Beaſts of Draught uſed to draw the ſame, ſhall be deemed to keep a Team, Draught, or Plough, and be liable to perform Statute-duty with the ſame, in the Pariſh, *&c.* where he reſides, and ſhall, Six Days in every Year, (if ſo many Days ſhall be found neceſſary,) to be computed from *Michaelmas* to *Michaelmas*, ſend, on every Day, and at every Place, to be appointed by the Surveyor for amending the Highways in ſuch Pariſh, *&c.* One Wain, Cart, or Carriage, furniſhed after the Cuſtom of the Country, with Oxen, Horſes, or other Cattle, and all other Neceſſaries fit to carry Things for that Purpoſe, and alſo Two able Men with ſuch Wain, Cart, or Carriage; which Duty ſo performed ſhall excuſe every ſuch Perſon from his Duty in ſuch Pariſh, *&c.* in reſpect of all Lands, Tenements, Woods, Tithes, or Hereditaments, not exceeding the annual Value of Fifty Pounds, which he ſhall occupy therein: And every Perſon keeping ſuch Team, Draught, or Plough, and occupying in the ſame Pariſh, *&c.* Lands, *&c.* of the yearly Value of Fifty Pounds, over and beyond the ſaid yearly Value of Fifty Pounds, in reſpect whereof ſuch Team-duty ſhall be performed; and every ſuch Perſon occupying Lands, *&c.* of the yearly Value of Fifty Pounds, in any other Pariſh, *&c.* beſides that wherein he reſides, and every other Perſon not keeping a Team, Draught, or Plough, but occupying Lands, *&c.* of the yearly Value of Fifty Pounds, in any Pariſh, *&c.* ſhall, in like Manner reſpectively, and for the ſame Number of Days, find and ſend One Wain, Cart, or Carriage, furniſhed with not leſs than Three Horſes, or Four Oxen and One Horſe, or Two Oxen and Two Horſes, and Two able Men to each Wain, Cart, or Carriage; and, in like Manner, for every Fifty Pounds *per Annum* reſpectively which every ſuch Perſon ſhall further occupy, in any ſuch Pariſh, *&c.* ſuch Wains, Carts, or Carriages, to be employed by the Surveyor in the repairing and amending the Highways within the Pariſh, *&c.* where ſuch Lands, *&c.* ſhall reſpectively lie; and every Perſon who ſhall not keep a Team, Draught, or Plough, but ſhall occupy Lands *&c.* under the yearly Value of Fifty Pounds, in the Pariſh, *&c.* where he reſides, or in any other Pariſh, *&c.* and every Perſon keeping a Team, Draught, or Plough, and occupying Lands, *&c.* under the yearly Value of Fifty Pounds, in any other Pariſh, *&c.* than that wherein he reſides, ſhall reſpectively contribute to the Repair of the Highways, and pay to the Surveyor of ſuch Pariſh, *&c.* reſpectively, in lieu of ſuch Duty, the Sums following; *videlicet*, For every Twenty Shillings of the annual Value of ſuch Lands, *&c.* reſpectively, the Sum of One Penny for every Day's Statute-duty which ſhall be required and called for by the Surveyor of ſuch Pariſh, *&c.* reſpectively, in every Year, not exceeding Six Days Duty in the Whole, as aforeſaid; and every ſuch Perſon reſpectively ſhall, in like Manner, pay the Sum of One Penny for every Twenty Shillings of the annual Value of the Lands, *&c.* which he ſhall occupy in any ſuch Pariſh, *&c.* reſpectively, above the annual Value of Fifty Pounds, and leſs than One Hundred Pounds, and ſo for every Twenty Shillings that each progreſſive and intermediate annual Value of Twenty Shillings, of the Lands, *&c.* which he ſhall ſo occupy, ſhall fall ſhort of the further

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Increaſe of Fifty Pounds, in every Pariſh, &c. where ſuch Lands, &c. ſhall reſpectively lie, for every Day's Statute-duty ſo to be required as aforeſaid; which ſeveral Sums ſhall be conſidered as Compoſitions, and ſhall be paid to the Surveyor of the Pariſh, &c. in which they are charged, for the Uſe of the Highways therein, at the Time ſuch Compoſitions are to be paid under the Authority of the Act, or within Ten Days after; or, in Default of ſuch Payments, ſuch Money ſhall be levied by Diſtreſs and Sale: Provided that no Perſon keeping ſuch Team, Draught, or Plough, and performing Duty with the ſame, as aforeſaid, in the Pariſh, &c. where he reſides, and not occupying Lands, &c. within the ſame, of the yearly Value of Thirty Pounds, ſhall be obliged to ſend more than One Labourer with ſuch Team, Draught, or Plough.

By ſect. 35. That every Perſon who ſhall not keep a Team, Draught, or Plough, but ſhall keep One or more Cart or Carts, and One or Two Horſes or Beaſts of Draught only, uſed to draw in each of ſuch Carts upon the Highways, ſhall be obliged to perform his Statute-duty for the like Number of Days with ſuch Cart or Carts, and Horſe or Horſes, or Beaſts of Draught, and One Labourer to attend each Cart, or to pay for the Lands &c. which he ſhall occupy, according to the Rate aforeſaid, at the Option of the Surveyor; and every Perſon who ſhall keep a Coach, Poſt-chaiſe, Chair, or other Wheel-carriage, and not keep a Team, Draught, or Plough, nor occupy Lands, &c. of the annual Value of Fifty Pounds, in the Pariſh, &c. where he ſhall reſide, ſhall pay to the Surveyor One Shilling in reſpect of every ſuch Day's Stature-duty, for every Horſe which he ſhall draw in any ſuch Carriage, or ſhall pay according to the Value of the Lands, &c. which he ſhall occupy, according to the Rate aforeſaid, at the Option of the Surveyor; and alſo every Man inhabiting in any Pariſh, &c. and being of the Age of Eighteen, and under the Age of Sixty Years, not chargeable in any of the Reſpects aforeſaid for Lands, &c. of the yearly Value of Four Pounds or upwards, and not being *bona fide* an Apprentice or menial Servant, nor having performed the ſaid Duty, or paid the Compoſition for the ſame, in any other Pariſh, &c. for that Year, ſhall, by themſelves, or One ſufficient Labourer for every of them, upon every of the ſaid Days on which they ſhall be called forth by the Surveyor, together with the other Labourers, work and labour in the Amendment of the Highways, as they ſhall be directed by ſuch Surveyor; and if the Teams, Draughts, or Ploughs, or any of them, ſhall not be thought needful by the Surveyor, on any of the ſaid Days, then every ſuch Perſon who ſhould have ſent any ſuch Team, &c. according to the Directions aforeſaid, ſhall, according to the Notice to be given, as directed, ſend unto the Work, for every One ſo ſpared, Three able Men, there to labour or pay to the Surveyor the Sum of Four Shillings and Sixpence in lieu thereof; and all ſuch Perſons ſhall reſpectively have and bring with them ſuch Shovels, Spades, Picks, Mattocks, and other Tools and Inſtruments as are uſeful and proper for the Purpoſes, and all the Perſons and Carriages ſhall diligently perform the Work and Labour to which they ſhall be appointed by ſuch Surveyor for Eight Hours in every of the Days, within ſuch Pariſh, &c. or in getting and carrying Materials in and from any other Pariſh, &c. to be employed in the Repair of the Highways of the Pariſh, &c. for which they ſhall be required to perform ſuch Duty and Labour as aforeſaid: And if any Perſon, ſending a Team, ſhall not ſend a ſufficient Labourer beſides the Driver, (except as before mentioned;) or if any ſuch Labourer, or Driver, or any other Labourer, or the Driver of any Cart, required by the Act to perform Statute-duty, ſhall refuſe to work and labour, during the Time mentioned, according to the Direction of the Surveyor; or if any Driver ſhall refuſe to carry proper and ſufficient Loads; it ſhall be

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lawful for ſuch Surveyor to diſcharge every ſuch Team, Cart, or Labourer, and to recover from the Owner of every ſuch Team or Cart the Forfeiture which every ſuch Perſon would have incurred, in caſe no ſuch Team, *&c.* reſpectively had been ſent.

By *ſect.* 36. That it ſhall and may be lawful for the Surveyor, where the Employment for Teams is of ſuch Sort that Two Horſes will be ſufficient for One Cart, or where a Stand-Cart with One Horſe ſhall be neceſſary, to call upon any Perſon liable to ſend a Team, Draught, or Plough, who keeps One or more Cart or Carts, and Three or more Horſes, to ſend ſuch Cart or Carts, Horſe or Horſes, to perform his Statute-duty, as the Surveyor ſhall find moſt convenient, and ſhall direct; and the Surveyor ſhall allow every ſuch Stand-Cart and One Horſe as Half a Team, and every Cart and Two Horſes as Two-thirds of a Team; and if a Waggon ſhall be found neceſſary for any particular Buſineſs, the Surveyor may require the Duty, or any Part, to be performed with ſuch Waggon, by any Perſon who keeps One; which Directions of the Surveyor ſhall be obſerved, or the Perſon liable to perform ſuch Duty ſhall forfeit ſuch Sum as the Duty ſo required of him ſhall bear, in Proportion to the Forfeiture inflicted for every Neglect in performing Duty with a Team, Draught, or Plough.

By *ſect.* 37. That every Surveyor ſhall, from Time to Time, give to, or cauſe to be left at the Houſe, or uſual Place of Abode, of every Perſon liable to perform ſuch Duty or Labour, Four Days Notice at the leaſt of the Day, Hour, and Place, upon which each of the Day's Duty ſhall be required to be performed; and every Perſon making Default in finding and ſending each Wain, Cart, or Carriage, furniſhed as aforeſaid, and ſuch able Men with the ſame, as required, or in performing the Duty at the Time and Place, and in the Manner directed, ſhall, for every ſuch Default or Neglect in ſending ſuch Wain, Cart, or Carriage, with ſuch Men as aforeſaid, forfeit the Sum of Ten Shillings; and for every Default in ſending every Cart with One Horſe and One Man, Three Shillings; and for not ſending every Cart with Two Horſes and One Man, Five Shillings: And every Perſon or Perſons making Default in ſending any ſuch Labourer, and every Perſon making Default in performing ſuch Labour at the Time and Place, and in the Manner directed, or in paying Compoſition-money ſhall, for every ſuch Neglect, forfeit the Sum of One Shilling and Sixpence; all which Forfeitures ſhall be applied for the Uſe of the Highways within the Pariſh, *&c.* where the ſame ſhall ariſe; and the Surveyor ſhall fairly and equally demand and require ſuch Duty and Labour from every Perſon liable, according to the Directions of the Act, without Favour or Partiality to any Perſon: And if in any Pariſh, *&c.* it ſhall not be neceſſary to call forth the whole Duty in any Year, it ſhall be abated in a juſt and equal Proportion amongſt all Perſons liable to the ſame; and the Surveyor ſhall, with all convenient Speed, after Default made in Performance of ſuch Duty or Labour, proceed for the Recovery of the Penalties or Forfeitures, ſo that the ſame may be recovered before he makes up his Accounts.

By *ſect.* 38. That any Perſon liable to perform the Duty, by ſending One or more Team or Teams, Draught or Draughts, Plough or Ploughs, with Men, Horſes, or Oxen, ſhall and may compound for the ſame, if he ſhall think fit, by paying to the Surveyor, at the Time and in the Manner after mentioned, ſuch Sum as the Juſtices of the Peace for the Limit wherein ſuch Pariſh, *&c.* ſhall be, or the major Part at their ſaid Special Seſſions, to be held in the firſt Week after *Michaelmas* Quarter Seſſions in every Year, ſhall adjudge and declare to be reaſonable, not exceeding Six Shillings, nor leſs than Three Shillings, for each Team, Draught, or Plough, for each Day; and in Default of their adjudging

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and declaring the ſame, the Sum of Four Shillings and Sixpence for and in lieu of every ſuch Day's Duty for each Team, Draught, or Plough; and for every Cart and One Horſe or Beaſt of Draught, Two Shillings; and for every Cart with Two Horſes or Beaſts of Draught, Three Shillings, for and in lieu of every Day's Duty; and every Inhabitant liable to perform ſuch Duty or Labour, and not chargeable in any other Reſpect, ſhall and may compound for the ſame, if he think fit, by paying to the Surveyor the Sum of Four-pence for and in lieu of every ſuch Day's Duty or Labour reſpectively, at the Time and in the Manner directed for Payment of Compoſition-money.

By *ſect.* 39. That if it ſhall appear to the Juſtices, at their Special Seſſions, to be held in the Week next after *Michaelmas* Quarter Seſſions, that, from the Directions before given for the performing and compounding the Statute-duty, there will be Difficulty in procuring the neceſſary Carriage, or a ſufficient Number of Labourers for the Repair of the Highways, in any particular Pariſh, *&c.* within their reſpective Limits, without paying high and extravagant Prices, it ſhall be lawful for ſuch Juſtices to order and direct the Team-duty, or ſo much as they ſhall think fit, to be performed in Kind, within every ſuch Pariſh, *&c.* except in reſpect of ſuch Teams as belong to Perſons who do not occupy Lands, *&c.* of the annual Value of Thirty Pounds within the ſame; and alſo to order the Labourers, liable to perform or compound for Statute-duty, or ſuch Part of them as they ſhall think fit, to perform Six Days Labour upon ſuch Highways in Kind, in caſe ſo many Days Duty ſhall be required, upon being paid for ſuch Labour the uſual and cuſtomary Wages given to Labourers in ſuch Pariſh, *&c.* deducting thereout the Sum of Four-pence for each Day's Duty, being the Compoſition allowed for Labourers: Provided, that if Part of ſuch Teams or Labourers only are required, it ſhall be directed by the Order of the Juſtices in ſome given Proportion, as One Half, Third, or Fourth Part thereof; and the Surveyor ſhall, in that Caſe, at a public Veſtry for ſuch Pariſh, *&c.* put the Names of all the Perſons liable to ſend ſuch Teams into One Hat or Box, and the Names of all the Perſons liable to perform ſuch Labour, into another Hat or Box, and ſome Inhabitant ſhall draw out ſuch Number from each as ſhall be equal to the Proportion ordered by the Juſtices, and the Perſons ſo drawn ſhall perform ſuch Duty in Kind for that Year; and if any ſuch Order ſhall be made or continued in the ſubſequent Year, the ſame Method ſhall be obſerved, but the Names drawn in the preceeding Year ſhall not be put into ſuch Hat or Box; and in every ſucceeding Year ſuch Method and Regulation ſhall be obſerved by ſuch Surveyor, as to render the Duty ſo required to be performed in Kind as equal amongſt the ſeveral Perſons liable thereto as may be: Which Order of the Juſtices, ſo far as the ſame ſhall be extended, ſhall ſuperſede the Power or Liberty of compounding, and ſhall be binding and effectual, and ſhall continue in Force until it ſhall be diſcharged or varied by the Juſtices at ſome ſubſequent Special Seſſions, to be held in the Week next after *Michaelmas* Quarter Seſſions.

By *ſect.* 40. That if any Perſon who ſhall keep a Team, Draught, or Plough, and ſhall not occupy Lands, *&c.* to the Value of Thirty Pounds *per Annum*, in the Pariſh, *&c.* where he ſhall reſide, but ſhall in Part maintain his Horſes and Beaſts of Draught uſed in ſuch Team upon or from Lands which he ſhall occupy in One or more adjacent Pariſh or Pariſhes, it ſhall be lawful for the Juſtices, at ſome Special Seſſions, to mitigate and reduce the Duty or Compoſition to ſuch Sum as they ſhall think juſt and reaſonable.

By *ſect.* 41. That the Surveyor of every Pariſh, *&c.* ſhall, on ſome *Sunday* in *November* in every Year, cauſe Ten Days Notice at the leaſt to

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be given in the Church or Chapel of ſuch Pariſh, &c. and if there be no Church or Chapel, or no Service performed therein, then at the moſt public Place there, and repeat the like Notice in ſuch Church, Chapel, or Place, on the next ſucceeding *Sunday*, of the Time and Place when and where Perſons permitted and inclined to compound, may ſignify to ſuch Surveyor their Intention, and every Perſon ſignifying the ſame, who ſhall then, or within the Space of One Calender Month afterwards, pay to ſuch Surveyor the Compoſition, ſhall be diſcharged from the Performance of ſuch Duty, which Compoſition-money ſhall be employed by the Surveyor for the Uſe of the Highways; and no Compoſition ſhall be permitted, unleſs the ſame ſhall be paid at the Day, or within the Time aforeſaid; but in Caſes where the Occupation of any Lands, &c. ſhall be changed, or any new Occupant or Inhabitant ſhall come to reſide in ſuch Pariſh, &c. after the Time appointed for ſuch Compoſition, then the Perſon or Perſons occupying ſuch Lands, &c. or ſo reſiding in ſuch Pariſh, &c. ſhall be allowed to compound in Manner aforeſaid: Provided he, ſhe, or they, ſhall pay the ſaid Compoſition-money to the ſaid Surveyor within Fourteen Days after he, ſhe, or they, ſhall enter upon ſuch Lands, &c. or ſhall come to reſide in ſuch Pariſh, &c. and every Tenant or Occupier of any Lands, &c. who intends to quit the Poſſeſſion thereof within Six Calendar Months from the Time fixed for making ſuch Compoſition, ſhall and may compound for Half the Duty, and the ſucceeding Tenant or Occupier ſhall and may, in that Caſe, compound or perform the Duty in Kind for the other Half; and if the Surveyor ſhall receive from any Perſon a Compoſition for more Duty than required from the other Inhabitants and Occupiers within the ſame Pariſh, &c. for the ſame Year, he ſhall repay ſuch extraordinary Compoſition-money to ſuch Perſon ſo as to bring the Duty to an Equality amongſt all ſuch Inhabitants and Occupiers.

By *ſect.* 42. That in every Pariſh, &c. where any Perſon ſhall keep a Draught or Plough, and no Carriage, he ſhall pay to the Surveyor the Sum of One Shilling for every Horſe, or Pair of Oxen or neat Cattle, uſed in ſuch Draught or Plough, for every Day's Statute-duty on the Day ſuch Duty is required to be performed, or pay according to the Rate aforeſaid for the Lands, &c. which he ſhall occupy in ſuch Pariſh, &c. at the Option of the Surveyor.

By *ſect.* 43. In order to prevent as much as poſſible any Inconvenience to the Perſons liable to perform Statute-duty, it ſhall be lawful for the Inhabitants of every Pariſh, &c. at ſome Veſtry, or other public Meeting or Meetings, to be held purſuant to the Act, to appoint Three Months in every Year, within which no Statute-duty ſhall be performed; *videlicet*, One Month in the Spring, to be called the *Seed Month*; One Month in the Summer, for the Hay Harveſt; and One other Month in the Summer, for the Corn Harveſt: Provided, Notice in Writing be given of the Times ſo appointed to the Surveyor of ſuch Pariſh, &c. reſpectively, and alſo to the Surveyor of every Turnpike Road lying within the ſame, within Three Days after every ſuch Meeting, and Fourteen Days at leaſt before the Beginning of each of ſuch Months.

By *ſect.* 44. reciting that whereas, by ſeveral Acts of Parliament concerning Turnpike Roads, a certain Part of the Duty called *Statute-duty*, is or may be directed to be performed on ſuch Roads, and it may happen in ſome Places, that the ſeveral Perſons liable thereto may have compounded for the ſame; it's enacted, That in all ſuch Caſes, the Surveyor of the Highways of the Pariſh, &c. where ſuch Compoſition ſhall have been made, ſhall pay to the Treaſurer or Surveyor of ſuch Turnpike Roads a certain Part of the Compoſition-money ſo received, to be proportioned according to the Number of Days Duty which ſuch Perſon or Perſons was or were liable to perform on ſuch Turnpike Road; which

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Money ſhall be laid out and expended on ſuch Part of the ſaid Turnpike Road as lies within the Pariſh, &c. from which it was received, and not elſewhere; and if ſuch Surveyor neglect to pay, within Twenty Days after he ſhall have received the ſame, upon Demand made by ſuch Treaſurer or Surveyor, the ſame ſhall be levied upon the Goods and Chattels of ſuch Surveyor.

By *ſect.* 45. That if upon Application of the Surveyor of the Highways for any Pariſh, &c. to the Juſtices of the Peace for the Limit wherein ſuch Pariſh, &c. lieth, at their General or Quarter Seſſions of the Peace, or at ſome Special Seſſions for the Highways, the Juſtices ſhall be fully ſatisfied, by Proof upon Oath, that the Duty directed to be performed, and the Money authoriſed to be collected and received, has been performed, applied, and expended, according to the Directions of the Act, or ſhall be fully ſatisfied that the common Highways, Bridges, Cauſeways, Streets, or Pavements, belonging to ſuch Pariſh, &c. are ſo far out of Order that they cannot be ſufficiently amended and repaired, paved, cleanſed, and ſupported, by the Means before preſcribed, (Notice being firſt given of ſuch intended Application at the Church or Chapel of ſuch Pariſh, &c. on ſome *Sunday* preceding ſuch Quarter or Special Seſſions, or if the Place be extraparochial, Notice in Writing being firſt given of ſuch intended Application to ſome of the principal Inhabitants reſiding in ſuch extraparochial Place, a Week at leaſt before ſuch General or Special Seſſions); then, an equal Aſſeſſment upon all and every the Occupier of Lands, &c. within any ſuch Pariſh, &c. ſhall be made and collected by ſuch Perſon and Perſons, and allowed in ſuch Manner, as the Juſtices, by their Order, at ſuch General or Special Seſſions, ſhall direct; and the Money raiſed ſhall be employed and accounted for, according to the Orders and Directions of the Juſtices, for and towards the amending, repairing, paving, cleanſing, and ſupporting ſuch Highways, Cauſeways, Streets, Pavements, and Bridges.

By *ſect.* 46. That the Aſſeſſment laſt before authoriſed, and the Aſſeſſment before authoriſed, for buying Materials, making Satisfaction for Damages, erecting Guide-poſts, and paying the Surveyor's Salary, ſhall not together, in any One Year, exceed the Rate of Nine-pence in the Pound of the yearly Value of the Lands, &c. ſo to be aſſeſſed.

By *ſect.* 47. That no Fine, Iſſue, Penalty, or Forfeiture, for not repairing the Highways, or not appearing to any Indictment or Preſentment for not repairing the ſame, ſhall be returned into the Court of Exchequer, or other Court, but ſhall be levied by and paid into the Hands of ſuch Perſon or Perſons, reſiding in or near the Pariſh, &c. where the Road ſhall lie, as the Court impoſing ſuch Fines, Iſſues, Penalties, or Forfeitures, ſhall order and direct, to be applied towards the Repair and Amendment of ſuch Highways; and the Perſon or Perſons ſo ordered to receive ſuch Fine ſhall receive, apply, and account for the ſame, according to the Direction of ſuch Court, or, in Default thereof, ſhall forfeit Double the Sum received; and if any Fine, Iſſue, Penalty, or Forfeiture, to be impoſed on any ſuch Pariſh, &c. for not repairing the Highways, or not appearing as aforeſaid, ſhall be levied on any One or more of the Inhabitants of ſuch Pariſh, &c. ſuch Inhabitant may make his Complaint to the Juſtices of the Peace, at their Special Seſſions; and the Juſtices are authoriſed, by Warrant under their Hands and Seals, to cauſe a Rate to be made, according to the Form and Manner laſt before preſcribed, for the reimburſing the ſame; which Rate ſo made, and confirmed by any Two Juſtices, ſhall be collected and levied by the Surveyor of the Highways of ſuch Pariſh, &c. ſo preſented or indicted, as aforeſaid; and the Surveyor ſhall, within One Month next after the making

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and confirming the Rate, collect, levy, and pay unto ſuch Inhabitant the Money ſo levied on him.

By *ſect.* 48. That the Surveyor of the Highways for every Pariſh, *&c.* ſhall carefully and diligently collect the ſeveral Aſſeſſments, Forfeitures, Penalties, Sums of Money, and Compoſitions, within the Year for which he is appointed Surveyor, and ſhall keep One or more Book or Books, in which he ſhall fairly enter a juſt, true, and fair Account of all ſuch Money as ſhall have come to his Hands, or to the Hands of the ſaid Aſſiſtant, in reſpect of ſuch Pariſh, *&c.* and to whom, and on what Occaſion, paid or applied; and ſhall alſo enter in ſuch Book or Books a Liſt or Liſts of all ſuch Sums of Money as ſhall then remain due and owing; and the Surveyor ſhall alſo enter in the ſaid Book or Books an Account of all Tools, Materials, Implements, and other Things provided, or to be provided, by Order of the Inhabitants, at a Veſtry, or other public Meeting for the Repair of the ſaid Highways, at the public Expence of ſuch Pariſh, *&c.* and ſhall produce ſuch Books, and the Aſſeſſments made within that Year, unto the Inhabitants of the Pariſh, *&c.* to which they belong, at a Veſtry or other public Meeting to be held for that Purpoſe, within Fifteen Days before the ſaid Special Seſſions ſo to be held in the Week next after *Michaelmas* Quarter Seſſions, to the Intent that the Accounts, Aſſeſſments, and Liſts, may be inſpected by the Inhabitants; and every ſuch Surveyor ſhall, after the Books and Aſſeſſments ſhall have been produced, take the ſame to ſuch Juſtice of the Peace for the Limit wherein ſuch Pariſh, *&c.* doth lie, and on ſuch Day, and at ſuch Hour, as ſhall be agreed upon at ſuch Meeting, ſome Day after the Meeting of the Inhabitants, and before ſuch laſt-mentioned Special Seſſions, and verify ſuch Account, or any Part thereof, upon Oath, if required; and ſuch Juſtice may allow ſuch Account, if he finds it juſt, or poſtpone it until ſuch Special Seſſions, if he finds Cauſe for ſo doing, in which Caſe it may be ſettled and allowed at ſuch Special Seſſions, after the Parts objected to by ſuch Juſtice ſhall have been explained and verified by proper Evidence, to the Satisfaction of the Juſtices at ſuch Special Seſſions; and in caſe any Articles contained in ſuch Accounts ſhall not be explained and proved to the Satisfaction of ſuch Juſtices, they may diſallow the ſame; and whenever the Accounts ſhall be ſo ſettled and allowed, or diſallowed, all ſuch Books and Aſſeſſments ſhall be tranſmitted to the Churchwarden or Overſeer of the Poor for ſuch Pariſh, *&c.* reſpectively, or, if the Place be extraparochial, then to ſome principal Inhabitant thereof, to be kept for the Uſe of ſuch Pariſh, *&c.* and the Surveyor ſhall forthwith deliver a Duplicate of ſuch Book and Account, together with all Sums of Money as ſhall remain in his Hands, and likewiſe all Tools, Materials, Implements, and other Things, as aforeſaid, to the ſucceeding Surveyor for ſuch Pariſh, *&c.* in caſe any new Surveyor ſhall be appointed, or retain the ſame in his Hands, and account for them in his next Account, if he ſhall be continued Surveyor; and the ſucceeding Surveyor is authoriſed and required to recover, collect and receive, all Sums of Money which ſhall be due and owing, as the preceding Surveyor could have recovered the ſame: And in caſe the Surveyor ſhall neglect to provide ſuch Book or Books, or to enter ſuch reſpective Accounts and Liſts therein, or to deliver the Book or Books, and ſuch Duplicate thereof, and ſuch Aſſeſſments, Tools, Materials, Implements, and other Things, he ſhall, for every ſuch Offence, forfeit any Sum not exceeding Five Pounds, nor leſs than Forty Shillings, and in caſe he ſhall make Default in the paying or accounting for the Money ſo remaining in his Hands, within the Time, and according to the Directions aforeſaid, he ſhall forfeit double the Value of the Money which ſhall be adjudged by the Juſtices to be in his Hands; and in caſe any

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ſuch Surveyor ſhall die before ſuch reſpective Accounts and Liſts ſhall be made out, or ſuch Monies, Books, Aſſeſſments, Tools, Materials, and Implements, ſhall be ſo delivered and paid, the Executors or Adminiſtrators of ſuch Surveyor ſhall make out, pay, and deliver the ſame, in like Manner, and under the like Penalty, as ſuch Surveyor is required and made ſubject and liable to.

By *ſect.* 49 †. That in every Pariſh, *&c.* where a ſufficient Quantity of Stone, Gravel, Chalk, or other Materials, cannot be provided and carried by the Labourers and Teams required to perform Statute-duty within ſuch Pariſh, *&c.* the Surveyor ſhall contract for the getting and carrying thereof, (in the Preſence of the Aſſiſtant, if any ſuch ſhall be appointed), at a Meeting to be held for that Purpoſe, of which Ten Days Notice, in Writing, ſhall be given, by fixing the ſame upon the Door of the Church or Chapel of ſuch Pariſh, *&c.* or, if there be no Church or Chapel, at the moſt public Place there; which Notice ſhall ſpecify the Work to be done, and the Time and Place for letting thereof; and if any Surveyor ſhall have any Part, Share, or Intereſt, directly or indirectly, in any ſuch Contract, or in any other Contract or Bargain for Work or Materials to be made, done, or provided, upon, for, or on account of any of the Highways, Roads, Bridges, or other Works whatſoever, under his Care or Management, or ſhall, upon his own Account, directly or indirectly, let to hire any Team, or ſell or diſpoſe of any Timber, Stone, or other Materials, to be uſed or employed in making or repairing ſuch Roads, Bridges, or other Works, as aforeſaid, (unleſs a Licence, in Writing, for the Sale of any ſuch Materials, or to let to hire any ſuch Team, be firſt obtained from ſome Juſtice of the Peace within that Limit), he ſhall forfeit, for every ſuch Offence, the Sum of Ten Pounds, and be for ever after incapable of being employed as a Surveyor with a Salary, under the Authority of this Act.

† In the Quarto Edition of the Statutes there is not any Section, numbered 49, but this is marked 50, and the ſubſequent Sections accordingly.

By *ſect.* 50. That if any Surveyor of the Highways, after his Acceptance of the Office, ſhall neglect his Duty in any Thing required of him by the Act, for which no particular Penalty is impoſed, he ſhall forfeit for every ſuch Offence, any Sum not exceeding Five Pounds, nor leſs than Ten Shillings, at the Diſcretion of the Juſtice or Juſtices having Juriſdiction therein.

By *ſect.* 51. That where any Lands have been, or ſhall be given, for the Maintenance of Cauſeways, Pavements, Highways, and Bridges, all ſuch Perſons who are, or ſhall be enfeoffed or truſted with any ſuch Lands, ſhall let them to farm at the moſt improved yearly Value, without Fine: and that the Juſtices of the Peace, in their open Seſſions, ſhall and may inquire, by ſuch Ways and Means as they ſhall think fitting, into the Value of all ſuch Lands ſo given, or to be given, and order the Improvement and Employment of the Rents and Profits according to the Will and Direction of the Donor, if they find that the Perſons ſo intruſted have been negligent or faulty in the Performance of their Truſt, (except ſuch Lands have been given for the Uſes aforeſaid to any College or Hall in either of the Univerſities of this Kingdom, which have Viſitors of their own).

By *ſect.* 52. reciting that whereas in ſome Places it hath been and may be found neceſſary, and the Surveyors are required, to ſecure Horſe Cauſeways and Foot Cauſeways, by Poſts, Blocks, or great Stones, fixed in the Ground, or by Banks of Earth caſt up, or otherwiſe, from being broken up and ſpoiled with Waggons, Wains, Carts, or Carriages; and foraſmuch as ſeveral evil-diſpoſed Perſons do or may wilfully or wantonly pull up, cut down, and remove or damage the Poſts, Blocks, and great Stones, ſo fixed, and drive Carriages upon ſuch Banks and Cauſeways, or againſt the Sides, and alſo dig or caſt down the Banks, which are the Securities and Defence of the Cauſeways, whereby the Cauſeways or Banks are often

often ruined and deſtroyed; and ſuch evil-diſpoſed Perſons do or may break, damage, or throw down the Stones, Bricks, or Wood, fixed upon the Parapets or Battlements of Bridges, and do or may pull down, deſtroy, obliterate, or deface, any Mile Stone or Poſt, Graduated or Direction Poſt or Stone erected or to be erected upon any Highway: For Prevention thereof, it is enacted, That every Perſon who ſhall be guilty of any ſuch Offence, ſhall, upon Complaint thereof made to any Juſtice of the Peace of the Limit where the ſame ſhall be proved to be done, by the Oath of any One credible Witneſs, or upon View of the Juſtice himſelf, forfeit for every of the ſaid Offences any Sum not exceeding Five Pounds, nor leſs than Ten Shillings; and, in Default of Payment, ſhall be committed to the Houſe of Correction, there to be whipped, and kept to hard Labour for any Time not exceeding One Calendar Month, nor leſs than Seven Days.

By *ſect.* 53. That the Juſtices of the Peace of all Cities, Corporations, Boroughs, and other Places, are required to put in Execution every Part of this Act within their reſpective Juriſdictions.

By *ſect.* 54. That nothing in this Act contained ſhall impower any Juſtice, for any City, Town Corporate, or Borough, to fix or allow any Salary to or for any Surveyor to be appointed by any ſuch Juſtice, except ſuch Salary as ſhall be ſettled and agreed upon by Two Parts out of Three of the Perſons aſſembled in the Pariſh, *&c.* within ſuch City, Town Corporate, or Borough.

By *ſect.* 55. No Waggon, having the Sole or Bottom of the Fellies of the Wheels of the Breadth of Nine Inches, ſhall be drawn with more than Eight Horſes; no Cart, having the Sole or Bottom of the Fellies of the Wheels of the Breadth of Nine Inches, ſhall be drawn with more than Five Horſes; no Waggon, having the Sole or Bottom of the Fellies of the Wheels of the Breadth of Six Inches, and rolling on each Side a Surface of Nine Inches, ſhall be drawn with more than Seven Horſes; no ſuch Waggon, rolling a Surface of Six Inches only, ſhall be drawn with more than Six Horſes; no Cart, having the Sole or Bottom of the Fellies of the Wheels of the Breadth of Six Inches, ſhall be drawn with more than Four Horſes; no Waggon, having the Sole or Bottom of the Fellies of the Wheels of leſs Breadth than Six Inches, ſhall be drawn with more than Five Horſes; and no Cart, having the Sole or Bottom of the Fellies of the Wheels of leſs Breadth than Six Inches, ſhall be drawn with more than Three Horſes upon ſuch Highways, under the following Pains, Penalties, and Forfeitures, *viz.* That the Owner of ſuch Waggon or Cart reſpectively ſhall forfeit the Sum of Five Pounds, and the Driver not being the Owner, the Sum of Ten Shillings, for every Horſe or Beaſt which ſhall be ſo drawing above the Number, to the ſole Uſe of the Informer; but Carriages moving upon Wheels or Rollers, of the Breadth of Sixteen Inches on each Side, with flat Surfaces, are allowed to be drawn with any Number of Horſes, or other Cattle.

By *ſect.* 56. That no Proſecution ſhall be commenced before a Juſtice of Peace, by way of Information, for any Forfeiture incurred by the Owner or Driver of any Carriage, having a greater Number of Horſes than allowed, unleſs laid within Three Days after the Offence, and no Action ſhall be commenced for any ſuch Offence, unleſs within One Calendar Month after the Offence; and that neither ſuch Information or Action ſhall be laid or commenced, unleſs Notice ſhall be given by the Informer to the Driver of every ſuch Carriage, on the Day upon which the Offence ſhall be committed, of an Intention to complain of ſuch Offence; and if it ſhall appear to the Juſtice before whom ſuch Complaint ſhall be made, that the Offender lives ſo remote as to make it inconvenient to ſummon him to appear before ſuch Juſtice, the Juſtice may diſmiſs

miſs the Complaint, and leave the Informer to his Remedy by Action at Law.

By *ſect.* 57. That it ſhall be lawful for the Juſtices, at their reſpective General Quarter Seſſions of the Peace, to be held in the Week after *Michaelmas*, to licenſe, in ſuch Manner, and for ſuch Time, as they ſhall think fit, an Increaſe of the Number of Horſes to be drawn in Carriages up any ſteep Hill, or on any Road not Turnpike, within their reſpective Juriſdictions, over and above the Number before limited, if neceſſary; and, from Time to Time, at any *Michaelmas* Quarter Seſſions, to revoke, alter, or vary the ſame.

By *ſect.* 58. That if it ſhall appear upon the Oaths of credible Witneſſes, to the Satisfaction of any Juſtice or Juſtices of the Peace, or of any Court of Juſtice authoriſed to enforce the Execution of the Act, that any Waggon, Cart, or Carriage, could not, by Reaſon of deep Snow or Ice, be drawn by the Number of Horſes or Beaſts of Draught allowed; then it ſhall be lawful, and they are required, to ſtop all Proceedings for Recovery of any Penalty or Forfeiture. The Regulations concerning the Number of Horſes, and Wheels of Carriages, not to extend to Carts, Waggons, or other Carriages, employed only in carrying any One Stone, Block of Marble, Cable Rope, or Piece of Metal, or Piece of Timber, or to ſuch Ammunition or Artillery as ſhall be for his Majeſty's Service; and that Two Oxen or horned Cattle ſhall, for all the Purpoſes of the Act, be conſidered as One Horſe.

By *ſect.* 59. That the Owner of every Waggon, Wain, or Cart, and alſo of every Coach, Poſt Chaiſe, or other Carriage let to Hire, ſhall paint, upon ſome conſpicuous Part of his Waggon, *&c.* and upon the Pannels of the Doors of all ſuch Coaches, *&c.* before uſed upon any public Highway, his Chriſtian and Surname, and the Place of his Abode, in large legible Letters, and continue the ſame thereupon ſo long as ſuch Waggon, *&c.* or other Carriage, ſhall be uſed upon any ſuch Highway; and the Owner of every Common Stage Waggon or Cart, employed in Travelling Stages from Town to Town, ſhall, over and above his or her Chriſtian and Sirname, paint on the Part, and in the Manner aforeſaid, the following Words, *Common Stage Waggon* or *Cart*, as the Caſe may be; and every Perſon uſing any ſuch Carriage upon any Highway, without the Names and Deſcriptions painted, or who ſhall paint any falſe or fictitious Name or Place of Abode, on ſuch Waggon, *&c.* or other Carriage, ſhall forfeit, for every ſuch Offence, a Sum not exceeding Five Pounds, nor leſs than Twenty Shillings.

By *ſect.* 60. That if the Driver of any Cart, Car, Dray, or Waggon, ſhall ride upon any ſuch Carriage in any Street or Highway, not having ſome other Perſon on Foot, or on Horſeback, to guide the ſame, (ſuch Carriages as are conducted by ſome Perſon holding the Reins of the Horſe or Horſes drawing the ſame excepted;) or if the Driver of any Carriage whatſoever on any Part of any Street or Highway ſhall, by Negligence, or wilful Miſbehaviour, cauſe any Hurt or Damage to any Perſon or Carriage paſſing or being upon ſuch Street or Highway, or ſhall quit the Highway, and go on the other Side the Hedge or Fence incloſing the ſame; or wilfully be at ſuch Diſtance from ſuch Carriage, whilſt it ſhall be paſſing upon ſuch Highway, that he cannot have the Direction and Government of the Horſes or Cattle drawing the ſame; or ſhall, by Negligence or wilful Miſbehaviour, prevent, hinder, or interrupt the free Paſſage of any other Carriage, or of his Majeſty's Subjects, on the Highways; or if the Driver of any empty or unloaded Waggon, Cart, or other Carriage, ſhall refuſe or neglect to turn aſide and make Way for any Coach, Chariot, Chaiſe, loaded Waggon, Cart, or other load d Carriage;

Carriage; or if any Perſon ſhall drive, or act as the Driver of, any ſuch Coach, Poſt-Chaiſe, or other Carriage let for Hire, or Waggon, Wain, or Cart, not having the Owner's Name, as before required, painted thereon, or ſhall refuſe to diſcover the true Chriſtian and Surname of the Owner of ſuch reſpective Carriages; every ſuch Driver ſo offending in any of the Caſes aforeſaid, and being convicted of any ſuch Offence, either by his own Confeſſion, the View of a Juſtice of Peace, or by the Oath of One or more credible Witneſs or Witneſſes, before any Juſtice of the Peace of the Limit where ſuch Offence ſhall be committed, ſhall, for every ſuch Offence, forfeit any Sum not exceeding Ten Shillings, in caſe ſuch Driver ſhall not be the Owner of ſuch Carriage; and in caſe the Offender be Owner of ſuch Carriage, then any Sum not exceeding Twenty Shillings: And in either of the ſaid Caſes ſhall, in Default of Payment, be committed to the Houſe of Correction, for any Time not exceeding One Month, unleſs the ſame ſhall be ſooner paid; and every ſuch Driver, offending in either of the Caſes, may, with or without any Warrant, be apprehended by any Perſon who ſhall ſee ſuch Offence committed, and ſhall be immediately conveyed or delivered to a Conſtable or other Peace Officer, in order to be conveyed before ſome Juſtice of the Peace, to be dealt with according to Law: And if any ſuch Driver, in any of the Caſes aforeſaid, ſhall refuſe to diſcover his Name, it ſhall be lawful for the Juſtice before whom he ſhall be taken, or to whom any ſuch Complaint ſhall be made, to commit him to the Houſe of Correction for any Time not exceeding Three Months, or to proceed againſt him for the Penalty, by a Deſcription of his Perſon and the Offence, and expreſſing in ſuch Proceedings that he refuſed to diſcover his Name †.

† This Clauſe does not prevent any Perſon injured ſuing by Action at Law, for Damages.

By *ſect.* 61. That it ſhall be lawful for any Two or more Juſtices of the Peace within their reſpective Limits, from Time to Time, whenever they ſhall judge proper, to hold any Special Seſſions, beſides that before directed, for executing the Purpoſes of the Act; and to adjourn the ſame from Time to Time, as they ſhall think fit, cauſing Notice to be given of the Time and Place of holding ſuch Special Seſſions, and of the Adjournments thereof, to the ſeveral Juſtices acting and reſiding within ſuch Limits, by the High Conſtable, or other proper Officer within the ſame.

By *ſect.* 62. That if any Perſon or Perſons, collecting any Tolls payable for paſſing over any public Bridge with Carriages or Cattle of any Kind, ſhall keep any Victualling-houſe, Alehouſe, or other Place of public Entertainment, or ſhall ſell, or permit to be ſold therein, any Wine, Beer, Ale, Cyder, Spirituous Liquors, or other Strong Liquors, by Retail, being lawfully convicted by the Oath of One or more credible Witneſs or Witneſſes, or by his own Confeſſion, before any Juſtice of the Peace of the Limit wherein ſuch Offence ſhall be committed, ſhall, for every ſuch Offence, forfeit the Sum of Five Pounds.

By *ſect.* 63. That if any Perſon ſhall incroach, by making any Hedge, Ditch, or other Fence, on any Highway, not being Turnpike Road, within the Diſtance of Fifteen Feet from the Middle or Centre thereof, or ſhall plough, harrow, or break up the Soil of any Land or Ground, or, in ploughing or harrowing the adjacent Lands, ſhall turn his Plough in or upon any Land or Ground within the Diſtance of Fifteen Feet from the Middle or Centre of any Highway, where the Breadth of ſuch Highway is formed and marked, or deſcribed with Certainty, and does not exceed in Breadth Thirty Feet, every Perſon ſo offending ſhall forfeit, for every ſuch Offence, Forty Shillings, to ſuch Perſon who ſhall make Information of the ſame; and it ſhall be lawful for the Surveyor who hath the Care of any ſuch Road to cauſe ſuch Hedge, Ditch, or Fence to be taken down, or filled up, at the Expence of the Perſon to whom the ſame ſhall belong: And it ſhall be lawful for any One or more Juſtice or Juſtices of

the

the Peace of the Limit where ſuch Offence ſhall be committed, upon Proof upon Oath, to levy as well the Expences of taking down ſuch Hedges as aforeſaid, as the ſeveral and reſpective Penalties impoſed, by Diſtreſs and Sale.

By *ſect.* 64. That it ſhall be lawful for the Court, before whom any Indictment or Preſentment ſhall be tried for not repairing Highways, to award Coſts to the Proſecutor, to be paid by the Perſon ſo indicted or preſented, if Defence frivolous; or Coſts to the Perſon indicted or preſented, to be paid by the Proſecutor, if Proſecution vexatious.

By *ſect.* 65. That if the Inhabitants of any Pariſh, *&c.* ſhall agree, at a Veſtry or public Meeting, to proſecute any Perſon by Indictment for not repairing any Highway within ſuch Pariſh, *&c.* which they apprehend ſuch Perſon was obliged by Law to repair, or for committing any Nuiſance upon any Highways, or ſhall agree at ſuch Veſtry Meeting to defend any Indictment or Preſentment preferred againſt any ſuch Pariſh, *&c.* it ſhall be lawful for the Surveyor to charge in his Account the reaſonable Expences, after the ſame ſhall have been agreed to by ſuch Inhabitants, or allowed by a Juſtice; which Expences ſhall be paid by ſuch Pariſh, *&c.* out of the Fines, Forfeitures, Compoſitions, Payments, and Aſſeſſments.

By *ſect.* 66. That in all Caſes where a Veſtry or public Meeting of the Inhabitants of any Pariſh, *&c.* is authoriſed or directed by the Act, there ſhall be public Notice given of the Day, Hour, and Place of holding the Meeting, at the Church or Chapel of ſuch Pariſh, *&c.* on the *Sunday* next preceding, and alſo Notice thereof in Writing, ſpecifying the Purpoſe of ſuch Meeting, fixed at the ſame Time upon the Door of ſuch Church or Chapel, and the ſame ſhall not be held till Three Days at leaſt after ſuch Notice given; and if there be no Church or Chapel, the like Notice of ſuch Meeting ſhall be given in Writing, and put up at the moſt public Place therein, Three Days at leaſt before ſuch Meeting.

By *ſect.* 67. That if any Perſon ſhall refuſe or neglect to pay the Sum aſſeſſed upon him within Ten Days after Demand, the ſame ſhall be levied by the Surveyor, or any other Perſon authoriſed by Warrant under the Hand and Seal of One Juſtice, having Juriſdiction by Diſtreſs and Sale of the Goods and Chattels of the Perſon rendering the Overplus to the Owner, neceſſary Charges being firſt deducted; and, in Default of ſuch Diſtreſs, it ſhall be lawful for any ſuch Juſtice to commit the Perſon to the common Gaol, there to remain until he ſhall have paid the Sum and the Coſts and Charges.

By *ſect.* 68. That the Surveyor ſhall be deemed, in all Caſes, a competent Witneſs, in all Matters relative to the Execution of this Act, notwithſtanding his Salary may ariſe in Part from the Forfeitures and Penalties.

By *ſect.* 69 That the Forms of Proceedings ſet forth and expreſſed in the Schedule annexed to the Act, ſhall be uſed, upon all Occaſions, with ſuch Additions or Variations only as may be neceſſary to adapt them to the particular Exigencies of the Caſe; and that no Objection ſhall be made, or Advantage taken, for want of Form.

By *ſect.* 70 The Juſtices of the Peace ſhall, at every Special Seſſions to be held in the Week next after the *Michaelmas* General Quarter Seſſions of the Peace, deliver a printed Abſtract of the moſt material Parts of the Act to every Surveyor.

By *ſect.* 71. In caſe any Perſon ſhall reſiſt or make forcible Oppoſition againſt any Perſon employed in the due Execution of the Act, or make any Reſcue of the Cattle or other Goods diſtrained; or if any Conſtable, Headborough, or Tithingman, ſhall refuſe or neglect to execute or obey any Warrant or Precept granted by any Juſtice of the Peace; every ſuch

Perſon

Perſon offending and being convicted by a Juſtice of the Peace, ſhall, for every ſuch Offence, forfeit any Sum not exceeding Ten Pounds, nor leſs than Forty Shillings, at the Diſcretion of the Juſtice; to be paid to the Surveyor, to be laid out in the Repair of the Highways: And in caſe of Non-payment, or Security, be committed to the common Gaol or Houſe of Correction, there to remain for any Time not exceeding Three Months, unleſs the Forfeiture ſooner paid.

By *ſect.* 72. All Penalties and Forfeitures, and all Coſts and Charges (the Manner of levying and recovering of which is not otherwiſe particularly directed,) ſhall be levied by Diſtreſs and Sale of the Goods and Chattels of the Offender, or Perſon liable, by Warrant under the Hand and Seal of ſome Juſtice of the Peace for the Limit where ſuch Offence, Neglect, or Default, ſhall happen, or ſuch Order for Payment of ſuch Coſts or Charges ſhall be made, rendering the Overplus of ſuch Diſtreſs (if any be) to the Party, after deducting the Charges; which Warrant ſuch Juſtice is required to grant, upon Conviction of the Offender by Confeſſion, or upon the Oath of One or more credible Witneſs or Witneſſes, or upon Order made; and the Penalties and Forfeitures, when ſo levied, ſhall be paid, the One Half to the Informer, and the other Half to the Surveyor, to be applied towards the Repair of the Highway, unleſs otherwiſe directed; but in caſe the Surveyor ſhall be the Informer, then the Whole ſhall be employed towards the Repair of ſuch Highway: And in caſe ſuch Diſtreſs cannot be found, and ſuch Penalties and Forfeitures, or the Coſts and Charges, ſhall not be forthwith paid, it ſhall be lawful for ſuch Juſtice, and he is required, by Warrant under his Hand and Seal, to commit ſuch Offender, or Perſon, to the common Gaol or Houſe of Correction, for any Time not exceeding Three Months, unleſs the Penalty, Forfeiture, Coſts, and Charges, ſhall reſpectively be ſooner paid; and if ſuch Offender, or Perſon, ſhall live out of the Juriſdiction of the Juſtice authoriſed to grant ſuch Warrant, it ſhall be lawful for any Juſtice of the Peace of the Limit wherein ſuch Perſon ſhall inhabit, and every ſuch Juſtice is required, upon Requeſt, and upon a true Copy of the Conviction, and of the Order for the Payment of ſuch Coſts and Charges, produced and proved by a credible Witneſs upon Oath, by Warrant under his Hand and Seal, to cauſe the Penalty or Forfeiture mentioned in ſuch Conviction, and the Coſts and Charges mentioned in ſuch Order, or ſo much as ſhall not have been paid, to be levied by Diſtreſs and Sale; and if no ſufficient Diſtreſs, to commit.

By *ſect.* 73. That no Warrant of Diſtreſs, unleſs otherwiſe directed by the Act, ſhall be iſſued for levying any Penalty or Forfeiture, Coſts or Charges, until Six Days after the Offender ſhall have been convicted, and an Order made and ſerved upon him for Payment.

By *ſect.* 74. That every Proſecutor or Informer may, at his Election, ſue for and recover any Forfeiture or Penalty, which ſhall amount to the Sum of Forty Shillings or upwards, (the Manner of Recovery thereof not being particularly directed by this Act) either in the Manner before directed, or by Action at Law, to be brought in any of His Majeſty's Courts of Record, thus, Where any Perſon ſhall be liable to any ſuch pecuniary Penalty, it ſhall be lawful to ſue for and recover the ſame by Action of Debt in which it ſhall be ſufficient to declare, that the Defendant is indebted to the Plaintiff in the Sum of being forfeited by an Act, paſſed in the Thirteenth Year of the Reign of His preſent Majeſty, intituled, *An Act to explain, amend, and reduce into One Act of Parliament, the Statutes now in being for the Amendment and Preſervation of the Public Highways within that Part of* Great Britain *called* England, *and for other Purpoſes*; and the Plaintiff, if he recovers in any ſuch Action, ſhall have Double Coſts.

By

By *ſect.* 75. That there ſhall not be more than One Recovery for the ſame Offence; and that Ten Days Notice in Writing be given to the Party offending, previous to the Commencement of ſuch Action; and that the ſame be brought and commenced within One Calendar Month after the Offence for which ſuch Action is brought ſhall have been committed.

By *ſect.* 76. That no Conviction ſhall be had, unleſs upon Confeſſion of the Party accuſed, or upon the Oath of One or more credible Witneſs or Witneſſes, or upon the View of a Juſtice of Peace, in the Caſes before mentioned; and that any Inhabitant of any Pariſh, *&c.* in which any Offence ſhall be committed, ſhall be deemed a competent Witneſs.

By *ſect.* 77. Any Juſtice of the Peace to adminiſter an Oath to any Witneſs or Witneſſes, or other Perſon or Perſons.

By *ſect.* 78. That where any Diſtreſs ſhall be made, the Diſtreſs itſelf ſhall not be deemed unlawful, nor the Party a Treſpaſſer, on account of any Default or want of Form in any Proceedings relating thereto, nor ſhall the Party diſtraining be deemed a Treſpaſſer *ab initio*, on account of any Irregularity which ſhall be afterwards done by the Party diſtraining, but the Perſon aggrieved by ſuch Irregularity may recover full Satisfaction for the Special Damage, in an Action on the Caſe.

By *ſect.* 79. No Plaintiff ſhall recover in any Action for any Irregularity, Treſpaſs, or wrongful Proceedings, if Tender of ſufficient Amends ſhall be made, before ſuch Action brought; and in caſe no Tender, it ſhall be lawful for the Defendant, by Leave of the Court, at any Time before Iſſue joined, to pay into Court ſuch Sum of Money as he ſhall ſee fit, whereupon ſuch Proceedings or Orders, and Judgment, ſhall be had, as in other Actions where the Defendant is allowed to pay Money into Court.

By *ſect.* 80. That if any Perſon ſhall think himſelf aggrieved by any Thing done by any Juſtice, or other Perſon, in the Execution of any of the Powers given by the Act, and for which no particular Method of Relief hath been already appointed, every ſuch Perſon may appeal to the Juſtices of the Peace, at any General Quarter Seſſions, cauſing to be given, Notice in Writing, of his Intention to bring ſuch Appeal, and of the Matter thereof, to the Juſtice, or other Perſon againſt whom ſuch Complaint ſhall be made, within Six Days after the Cauſe of ſuch Complaint aroſe, and within Four Days after ſuch Notice, entering into Recognizance before ſome Juſtice of the Peace, within ſuch Limit, with One ſufficient Surety, conditioned to try ſuch Appeal at, and abide the Order of, and pay ſuch Coſts as ſhall be awarded by the Juſtices, at ſuch Quarter Seſſion; and every Juſtice of the Peace, and other Perſon having received Notice of ſuch Appeal, ſhall return all Proceedings whatſoever had before them reſpectively touching the Matter of ſuch Appeal to the Juſtices, at their General Quarter Seſſions, on Pain of forfeiting Five Pounds for every Neglect; and the Juſtices at ſuch Seſſion, upon due Proof of ſuch Notice, and of the entering into ſuch Recognizance, ſhall hear and finally determine the Cauſes and Matters of ſuch Appeal in a ſummary Way, and award ſuch Coſts to the Parties appealing or appealed againſt, as they ſhall think proper; to be levied and recovered as before directed; and the Determination of ſuch Quarter Seſſion ſhall be final; and that no Proceedings to be had or taken ſhall be quaſhed or vacated for want of Form, or removed by *Certiorari*, or any other Writ or Proceſs whatſoever, (except as before mentioned:) Provided, no ſuch Appeal ſhall be made againſt any Conviction for any Penalty or Forfeiture, unleſs the Perſon convicted ſhall, at the Time of ſuch Conviction, be preſent, if not, within Six Days after, give Notice of Intention to appeal, and enter into Recognizance with ſufficient Sureties to pay ſuch

Penalty or Forfeiture, in caſe of Affirmance; and upon giving ſuch Security, the further Proceeding for ſuch Penalty, *&c.* ſhall be ſuſpended until Appeal determined.

By *ſect.* 81. If any Action or Suit ſhall be commenced againſt any Perſon for any Thing done in purſuance of the Act; the ſame ſhall be commenced or proſecuted within Three Calendar Months after the Fact committed; and ſhall be brought within the County where the Fact was committed; and the Defendant may plead the General Iſſue, and give the Act, and the Special Matter, in Evidence: And if the ſame ſhall appear to have been ſo done, or if any ſuch Action ſhall be brought after the Time limited, or be laid in any other Place, then the Jury ſhall find for the Defendant; or if the Plaintiff ſhall become nonſuit, or diſcontinue his Action, after the Defendant ſhall have appeared, or if, upon Demurrer, Judgement ſhall be given againſt the Plaintiff, the Defendant ſhall recover Treble Coſts.

Several Acts are repealed; there is an Exception as to *Briſtol*, and a Proviſion that the Act ſhall not extend to the Pariſh of *Saint Mary Matfelon*, otherwiſe *Whitechapel*, and *Saint John of Wapping*, in the County of *Middleſex*; and the Powers of Commiſſioners of Sewers are not abridged.]

[There is a Schedule containing the Forms of Proceedings, which, with a Table, may be had with the Statute and the Turnpike Act, in a ſmall Pocket Volume, containing an Index.]

Clergymen are within the Statute, in reſpect of their ſpiritual Poſſeſſions, as much as any other Perſons in reſpect of any other Poſſeſſions; for the Words are general, and there is no kind of Intimation, that any particular Perſons ſhall be exempted more than others. Hawk. P. C. cap. 76. ſect. 15. *p.* 204 by Stat. 30. Geo. 2. cap. 25. S. 23. Perſons ſerving for themſelves as private Men in the Militia, ſhall during the Time of ſuch Service be exempted from perſonally doing any Highway Duty, commonly called Statute Work. Notwithſtanding the Words of the Statute only extend to the Occupiers of Land, yet if the Owner neither occupy them, nor let them, but ſuffer them to lie freſh, he ſhall be charged as much as if he had occupied them; for there is no Reaſon that the Public ſhould ſuffer for his Negligence. Hawk. P. C. cap 76. ſect. 17. *p.* 204.

It is no Excuſe for the Inhabitants of a Pariſh, being indicted at common Law, for not repairing the Highways, that they have done all that is required of them by Statute; for ſince the Statute is wholly in the Affirmative, and made in Aid of the common Law, and to ſupply the Defects thereof, it ſhall not be conſtrued to Abrogate any Proviſion thereby made for theſe Purpoſes. Hawk. P. C. 204. So that, at all Events, the Pariſh may be compelled to make their Ways good.

The following is the Subſtance of the 13*th* Geo. 3. cap. 84. *whereby the general Laws for repealing the* Turnpike Roads *are reduced into One Act.*

THIS Statute enacts, by *ſect.* 1. That it ſhall be lawful for all Truſtees appointed by any Act of Parliament, for the Repair of any Turnpike Road within that Part of *Great Britain* called *England*, or any Five or more of them, at ſome public Meeting, at any or as many Gate or Gates, Bar or Bars, for the receiving of any Toll, or upon any Part of the Road within their reſpective Juriſdictions, and at ſuch a Diſtance from any Turnpike-bar or Toll-gate as they reſpectively ſhall think requiſite and expedient, to erect a Crane, Machine, or Engine, proper for the weighing of Carts, Waggons, or Carriages, conveying of any Goods or Merchandiſe whatever; and by Writing, ſigned by any Five or more of them, to order any ſuch Carriage which ſhall paſs loaded through any ſuch Gate or Bar, to be weighed, together with the Loading; and

and to take, over and above the Tolls granted, or to be granted, Twenty Shillings for every Hundred Weight of One Hundred and Twelve Pounds to the Hundred, which every Waggon or Cart after deſcribed, together with the Loading, ſhall weigh over and above the Weights after allowed to each of them reſpectively; (that is to ſay,) To every Waggon or Four-wheel Carriage, having the Fellies or Rollers of the Wheels of the Breadth of Sixteen Inches, Eight Tons in Summer, and Seven in Winter; to every Waggon or Wain, having the Axletrees thereof of ſuch different Lengths that the Diſtance from Wheel to Wheel of the nearer Pair of the ſaid Wheels be not more than Four Feet Two Inches, to be meaſured at the Ground, and that the Diſtance from Wheel to Wheel of the other Pair thereof be ſuch, that the fore and hind Wheels of ſuch Waggons and Wains ſhall roll only One ſingle Surface or Path of Sixteen Inches wide at the leaſt, on each Side of the ſaid Waggons or Wains, and having the Fellies thereof of the Breadth of Nine Inches from Side to Side at the Bottom or Sole thereof, Six Tons Ten Hundred in Summer, and Six Tons in Winter; to every Waggon or Four-wheel Carriage, having the Sole or Bottom of the Fellies of the Wheels of the Breadth of Nine Inches, Six Tons in Summer, and Five Tons Ten Hundred in Winter; to every Cart, having the Fellies of the ſame Dimenſions, Three Tons in Summer, and Two Tons Fifteen Hundred in Winter; to every Waggon, having the Sole or Bottom of the Fellies of the Wheels of the Breadth of Six Inches, Four Tons Five Hundred in Summer, and Three Tons Fifteen Hundred in Winter; and to every ſuch Waggon ſo conſtructed as to roll and actually rolling a Surface of Eleven Inches, by the Wheels thereof, Five Tons Ten Hundred in Summer, and Five Tons in Winter; to every Cart having Fellies of the Wheels of the ſame Dimenſions, Two Tons Twelve Hundred in Summer, and Two Tons Seven Hundred in Winter; to every Waggon, having the Sole or Bottom of the Fellies of the Wheels of leſs Breadth than Six Inches, Three Tons Ten Hundred in Summer, and Three Tons in Winter; and to every Cart, having the Fellies of the Wheels of the ſame Dimenſions, One Ton Ten Hundred in Summer, and One Ton Seven Hundred in Winter; and that, for the ſeveral Purpoſes aforeſaid, it ſhall be deemed Summer from the Firſt Day of *May* to the Thirty-firſt Day of *October*, both Days incluſive, and Winter from the Firſt Day of *November* to the Thirtieth Day of *April*, both Days incluſive: Which ſaid additional Toll or Duty ſhall be levied and recovered upon any Perſon liable, or his Goods or Chattels, who ſhall, after Demand made, refuſe or neglect to pay the ſame, in ſuch Manner as any other Toll or Duty, payable at the ſame Turnpike-gate or Bar, is or ſhall be by Law to be levied and recovered; and the Money ariſing from ſuch additional Duty ſhall be applied to the Repair of the Turnpike Road where the ſame ſhall be collected.

By *ſect.* 2. That the Keeper of every ſuch Toll-gate or Bar, where any ſuch Weighing Engine ſhall be erected, or any other Perſon appointed by the Truſtees, or any Five or more of them, to the Care of ſuch Weighing Engine, ſhall weigh all ſuch Waggons and Carts liable to be weighed, which ſhall paſs loaded through ſuch Gates or Bars reſpectively, and which he ſhall have Reaſon to believe carry greater Weights than are allowed to paſs without paying the additional Toll: And if any Gate-keeper, or Perſon ſo appointed, ſhall permit any ſuch Waggon or Cart to paſs through any ſuch Toll-gate with greater Weights than are allowed, without weighing, and receiving ſuch additional Tolls, he ſhall, for every ſuch Offence, forfeit Five Pounds.

By *ſect.* 3. It ſhall be lawful for any Truſtee, Creditor, Clerk, Treaſurer, or Surveyor, of ſuch Turnpike Road, if he ſhall ſuſpect any ſuch Connivance or Neglect, to cauſe any Carriage, liable to be weighed,

which ſhall have paſſed through any Toll-gate where ſuch Weighing Engine ſhall be erected, and ſhall not have paſſed above Three Hundred Yards beyond, to return to ſuch Weighing Engine, and be there weighed, with the Loading, which paſſed through ſuch Gate, in the Preſence of ſuch Truſtee, Creditor, Clerk, Treaſurer, or Surveyor, upon requiring the Driver thereof to Drive ſuch Carriage back, and upon paying or tendering to him One Shilling for ſo doing; which One Shilling ſhall be returned to the Perſon paying the ſame, if upon weighing ſuch Carriage and Loading, the ſame ſhall be found above the Weight.

By *ſect.* 4. The Surveyors ſhall make convenient Places for turning ſuch Carriages upon every ſuch Turnpike Road, where ſuch Weighing Engine ſhall be erected, within Three Hundred Yards of ſuch Toll-gate, on each Side thereof, if the Ground will admit of the ſame; and there ſhall be a Liſt of the Names of all the Truſtees and Creditors, and alſo of the Clerk, Treaſurer, and Surveyor, of ſuch Turnpike Road, put up in the Houſe or Building where ſuch Weighing Engine ſhall be placed, to be inſpected by the Owner or Driver of every ſuch Carriage; and if the Driver of any ſuch Carriage, being ſo requeſted to return with his Carriage to ſuch Weighing Engine, ſhall neglect or refuſe ſo to do, he ſhall forfeit Forty Shillings; and it ſhall be lawful for any Peace Officer, or other Perſon, being then preſent, upon ſuch Neglect or Refuſal, to drive and take ſuch Carriage back to ſuch Weighing Engine, in order to be weighed.

By *ſect.* 5. All and every Act of Parliament, made for repairing and amending Turnpike Roads, the Truſtees whereof ſhall, within Twelve Calendar Months after the Commencement of this Act, have cauſed to be erected and uſed thereupon ſuch Weighing Engine purſuant to the Direction and true Intent and Meaning of this Act, ſhall be continued, and be in full Force for Five Years, to be computed from the ſeveral Ends and Expirations of all and every ſuch Act, and ſubject to all the Tolls and Duties, Penalties, Forfeitures, Remedies, Powers, Authorities, Clauſes, Rules, Directions, Payments, and Proviſions reſpectively made, and enacted by any of the ſaid Acts of Parliament, now or heretofore made for repairing and amending Turnpike Roads.

By *ſect.* 6. The Regulations of Weighing herein-before mentioned ſhall not extend, to any Waggons, Carts, or other Carriages, employed only in Huſbandry, or carrying only Manure for Land, Hay, Straw, Fodder, or Corn unthraſhed; and that where Lime or other Manure is or ſhall, by any particular Turnpike Act, be permitted to paſs through any Turnpike-gate Toll-free, or upon paying leſs Toll than is required to be paid for other Goods, it ſhall be liable to be weighed at all the Weighing Engines upon ſuch Turnpike Road, together with the Carriages in which ſuch Lime or Manure ſhall be conveyed, and ſhall pay ſuch additional Toll for Overweight.

By *ſect.* 7. It ſhall be lawful for the Juſtices of the Peace, within the Limits of every County, Riding, Diviſion, Hundred, or Precinct, at any General Quarter Seſſions of the Peace, upon Complaint made to them by any Juſtice of the Peace, or by any Two Creditors, or any Two Truſtees of any Turnpike Road within the ſaid Limits of which they are Creditors, or Truſtees, that ſuch Turnpike Road is much damaged by exceſſive Weights, and that no Weighing Engine hath been erected, or ordered by the Truſtees to ſummon the Clerk, Surveyor, and Treaſurer, of ſuch Turnpike Road, to appear before the Juſtices, at their then next General Quarter Seſſions, to ſhew Cauſe why a Weighing Engine or Engines ſhould not be erected at or near ſuch Gate or Gates, upon ſuch Turnpike Roads; and if ſome or One of them, ſhall not appear, or, appearing, ſhall not ſhew ſufficient Cauſe againſt the ſame, it ſhall be lawful for the Juſtices, if they think fit, at ſuch Quarter Seſſions, to order One or more

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Weighing Engine or Engines to be erected upon ſuch Turnpike Road, at ſuch Place or Places as they ſhall think proper; a Copy of which Order ſhall be forthwith delivered to the Clerk of ſuch Turnpike Road; and the Truſtees are required, at their next Meeting, to be held after their Clerk ſhall have been ſerved with ſuch Copy of the Order, as aforeſaid, to contract with ſome proper Perſon for the making and erecting thereof with all convenient Speed; and the Treaſurer of ſuch Turnpike Road to pay the Expences out of the Money which ſhall then be or next come into his Hands from the Tolls.

By *ſect.* 8. When Two or more Turnpike Roads meet at or near the ſame Place, it ſhall be lawful for the Truſtees of ſuch Turnpike Roads, reſpectively, to fix upon ſome convenient Place to erect a Weighing Engine upon, which will accomodate all ſuch Turnpike Roads; and, by Agreement, to proportion the Expences, and likewiſe the Money ariſing from Forfeitures amongſt all ſuch Turnpike Roads.

By *ſect.* 9. It ſhall not be lawful for the Truſtees of any Turnpike Road, their Leſſee or Leſſees, to make Compoſition for Tolls, for or in reſpect of any Waggon, Wain, Cart, or Carriage, or Horſes or Beaſts of Draught, drawing the ſame, unleſs ſuch Waggons, Wains, Carts, and Carriages, have the Fellies of the Wheels thereof of the Breadth or Gauge of Six Inches or more.

By *ſect.* 10. If any Perſon ſhall unload any Goods, Wares, or Merchandiſes, from any Cart, Waggon or other Carriage, (except ſuch Carriages as are before excepted), at, or before the ſame ſhall come to any Turnpike Gate or Weighing Engine, or ſhall load or lay upon ſuch Carriage, (except as aforeſaid), after the ſame ſhall have paſſed any ſuch Turnpike or Weighing Engine, any Goods, Wares, or Merchandiſes, taken or unloaden from any Horſe, Cart, or other Carriages, belonging to or hired, or borrowed by the ſame Waggoner or Carrier, in order to avoid the Payment of the ſaid reſpective Duties of Twenty Shillings *per* Hundred; or if any Perſon ſhall ſo unload, in order to carry conſiderable Quantities of Goods through any Turnpike-gate, in One and the ſame Day, and thereby pay leſs Toll at ſuch Turnpike-gate than would have been paid if ſuch Goods, Wares, or Merchandiſes, had not been ſo unloaden; each and every Perſon ſo offending, in any of the Caſes aforeſaid, and being thereof lawfully convicted before One or more Juſtice for the Limit where the Offence ſhall be committed, upon the Oath of One or more credible Witneſs, ſhall forfeit and pay Five Pounds; to be levied upon the Goods and Chattels of the Owner of ſuch Cart, Waggon, or other Carriage; and each and every Driver, not being the Owner of ſuch Waggon or Carriage, ſo offending, and being thereof convicted, as aforeſaid, ſhall be committed to the Houſe of Correction for the Space of One Month.

By *ſect.* 11. If the Owner of any Waggon, Cart, or Carriage, or other Perſon, being the Driver, travelling on any Turnpike Road, where any Toll-gate or Weighing Engine is erected, ſhall drive or turn out of the ſame into any other Road, in order to avoid being weighed, or to avoid paying of Toll, and ſhall afterwards proceed with ſuch Carriage into and on the ſame Turnpike Road, on Conviction before One or more Juſtice, upon the Oath of One or more credible Witneſs, ſhall forfeit, if Owner, any Sum not exceeding Five Pounds, nor leſs than Twenty Shillings; and if Driver, and not Owner, any Sum not exceeding Fifty Shillings, nor leſs than Ten Shillings, for every Offence.

By *ſect.* 12. No Carriage, liable to be weighed, ſhall paſs along any Turnpike Road, being above Twenty Miles from the Cities of *London* or *Weſtminſter*, unleſs ſo conſtructed, that no Pair of ſuch Wheels wider than Four Feet Six Inches from Inſide to Inſide, (except Wheels having the Soles of the Fellies of the Breadth of Nine Inches, which ſhall be ſo con-

conſtructed as to roll a Surface of Sixteen Inches; and that the wider Pair of ſuch Wheels ſhall not be more than Five Feet Eight Inches from Inſide to Inſide, to be meaſured on the Ground,) and that the Diſtance from the Centre of the Fore Wheel to the Centre of the Hind Wheel of any Waggon or Four-wheeled Carriage, not being uſed for the Carriage of Timber only, but not above Nine Feet, to be meaſured from the Centre of the Axletrees at the Ends, on Pain of the Owner forfeiting Five Pounds for every Offence: And the Surveyor, or Gate-keeper, is required to meaſure every ſuch Waggon, *&c.*

By *ſect.* 13. No Waggon, Wain, or other Four-wheeled Carriage, having the Sole or Bottom of the Fellies of the Wheels of the Breadth or Gauge of Nine Inches, ſhall paſs on any Turnpike Road with more than Eight Horſes; nor any Cart or other Two-wheeled Carriage, having Wheels of the Breadth aforeſaid, ſhall paſs upon any Turnpike Road, with more than Five Horſes; and that the Horſes in ſuch reſpective Carriages ſhall draw in Pairs, (except an odd Horſe in any Team, and except where the Number of Horſes ſhall not exceed Four); and no Waggon, Wain, or other Four-wheeled Carriage, having the Sole or Bottom of the Fellies of the Wheels of the Breadth of Six Inches, ſhall paſs on any Turnpike Road with more than Six Horſes; no Cart, or other Two-wheeled Carriage, having Wheels of the Breadth laſt mentioned, ſhall be drawn on any Turnpike Road with more than Four Horſes; no Waggon, Wain, or other Four-wheeled Carriage, having the Fellies of the Wheels of leſs Breadth than Six Inches, ſhall paſs on any Turnpike Road with more than Four Horſes; and no Cart or other Two-wheeled Carriage, having the Fellies of the Wheels of leſs Breadth than Six Inches, ſhall paſs or be drawn on any Turnpike Road with more than Three Horſes; and the Owner ſhall forfeit Five Pounds; and the Driver, not being the Owner, Twenty Shillings, for every Offence, to any Perſon who ſhall ſue for the ſame.

By *ſect.* 14. All Carriages moving upon Rollers of the Breadth of Sixteen Inches on each Side, with flat Surfaces, are allowed to be drawn with any Number of Horſes, or other Cattle.

By *ſect.* 15. No Proſecution ſhall be commenced before a Juſtice of Peace, by way of Information, for any Forfeiture incurred by the Owner or Driver of any Carriage having a greater Number of Horſes therein than are allowed by this Act, unleſs laid within Three Days after the Offence committed; and no Action, unleſs within One Calender Month, and neither, unleſs Notice ſhall be given by the Informer to the Driver, on the Day the Offence of an Intention to complain; and if the Offender lives ſo remote as to make it inconvenient to ſummon him to appear before ſuch Juſtice, he may diſmiſs the Complaint, and leave the Informer to his Remedy by Action.

By *ſect.* 16 It ſhall be lawful for any Waggon, Wain, Cart, or Carriage, to be drawn with any Number of Horſes upon any Turnpike Road where a Weighing Engine ſhall be erected, provided ſuch Carriage ſhall be weighed: And in order that the Owner or Driver of every ſuch Carriage may be furniſhed with proper Evidence of the Facts, if any Proſecution ſhould be commenced for uſing a greater Number of Horſes than allowed, the Perſon who ſhall have the Care of ſuch Weighing Engine ſhall, on Demand by the Driver, give a Ticket, certifying that ſuch Carriage was weighed, and the Weight, with the Loading.

By *ſect.* 17. If any Perſon ſhall take of any Horſe, or other Beaſt of Draught, from any Waggon, or other Carriage; or ſhall alter the Diſtance of the Wheels at or before the ſame ſhall come to any of the Gates or Turnpikes, with Intent to avoid any Toll, Forfeiture, or Penalty, for drawing with a greater Number of Horſes, or Beaſts of Draught, or in any other Manner than allowed, every Perſon ſo offending, and being convicted

convicted before One or more Juſtice, upon the Oath of one or more credible Witneſs, ſhall forfeit Five Pounds.

By *ſect.* 18. If it ſhall appear to the Truſtees of any Turnpike Road, or any Seven of them, at any of their publick Meetings, by the Oath of One or more Witneſs experienced in levelling, that any Part of the Riſe of any Hill upon ſuch Turnpike Road ſhall be more than Four Inches in a Yard; in ſuch Caſe it ſhall be lawful for the Truſtees, or any Seven, to allow ſuch Number of Horſes as they ſhall judge neceſſary, not exceeding Ten for Waggons with Nine Inch Wheels, nor Six for Carts with Nine Inch Wheels; and not exceeding Seven for Waggons with Six Inch Wheels, nor Five for Carts with Six Inch Wheels; and not exceeding Five for Waggons with Wheels of leſs Breadth than Six Inches, nor Four for Carts with Wheels of leſs Breadth than Six Inches: And in caſe it ſhall appear to the Truſtees, that the whole Riſe of any Hill taken together ſhall be more than Four Inches in a Yard upon an Average, it ſhall be lawful to allow ſuch Number of Horſes as they ſhall think fit to be uſed in ſuch Waggons and Carts reſpectively, for the Purpoſe only of drawing the ſame up ſuch Hill, the Length and Extent of ſuch Hill to be ſpecified in ſuch Order of Allowance, and the Termination at each End thereof to be marked by a Poſt or Stone, to be erected at ſuch reſpective Boundaries; and the Order of Allowance ſhall be certified by the Truſtees, or their Clerk, to the next General Quarter Seſſions: And if the Facts be proved upon the Oath of One or more creditable Witneſs, to the Satisfaction of the Juſtices on the Bench, or the major Part of them, the Order of Allowance ſhall be confirmed and filed among the Records of Seſſions, or otherwiſe ſhall be quaſhed: And from and after ſuch Confirmation and Filing, no Perſon ſhall be liable to any Penalty or Forfeiture for uſing ſuch Number of Horſes as ſhall be ſo allowed; and it ſhall be lawful for the Juſtices, at any ſubſequent Quarter Seſſions, to re-conſider the Order of Allowance, and to diſcharge the ſame, if they think fit.

By *ſect.* 19. If it ſhall appear, upon the Oaths of credible Witneſſes, to the Satisfaction of any Juſtice of the Peace, or of any Court of Juſtice, authoriſed to enforce the Execution of the Act, that any Waggon, Cart, or Carriage, could not, by reaſon of deep Snow or Ice, be drawn with the reſpective Weights, and by the Number of Horſes or Beaſts of Draught allowed; then it ſhall be lawful to ſtop all Proceedings for the Recovery of any Penalty or Forfeiture.

By *ſect.* 20. It ſhall not be lawful for any Waggon, Wain, or Cart, having the Sole or Bottom of the Fellies of the Wheels of leſs Breadth or Gauge than Nine Inches, to paſs upon any Turnpike Road, or through any Turnpike Gate or Bar, if the ſame ſhall be drawn by Horſes in Pairs, other than and except ſuch Waggons, Wains, or Carts, having the Fellies of the Wheels thereof of the Breadth of Six Inches, as ſhall be authoriſed to be drawn in any other Manner by Order of the Truſtees of any Turnpike Road within their Diſtrict, made at a public Meeting, conſiſting of Seven Truſtees, or more, (which Order it ſhall be lawful for the ſaid Truſtees to revoke at any ſubſequent Meeting, and afterwards to make a new One,) and fixed in Writing upon every Toll-gate within ſuch Diſtrict, and except Carriages drawn by Two Horſes only.

By *ſect.* 21. In caſe any Perſon ſhall, upon any Turnpike Road, drive any Waggon, Cart, Wain, or Carriage, not being marked, or drawn by more than the Number of Horſes, or Beaſts of Draught, it ſhall be lawful for any Conſtable, Tithingman, Surveyor, or any other Perſon, to apprehend and take ſuch Perſon before One or more Juſtice or Juſtices of the Peace, and, upon Conviction, either by Confeſſion, or by

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the Oath of One or more credible Witneſs before ſuch Juſtice, the Offender ſhall forfeit, for every ſuch Offence, a Sum not exceeding Five Pounds, nor leſs than Ten Shillings.

By *ſect.* 22. It ſhall be lawful for the Truſtees, or any Five or more of them, within their reſpective Diſtricts, and they are required, at the Firſt Meeting after the Commencement of the Act, to reduce the high and extraordinary Tolls and Duties, for and in reſpect of ſuch Waggons, or other wheeled Carriages only, having the Wheels of the Breadth or Gauge of Six Inches, in ſuch Manner as no greater Toll in reſpect to Waggons be taken, than is directed by the Acts reſpectively to be taken for Waggons, and other Four-wheeled Carriages, drawn by Four Horſes, or Beaſts of Draught; and that no greater Toll be taken for Carts, having the Fellies of their Wheels of the Breadth of Six Inches, than is directed by ſuch Acts reſpectively to be taken for Carts drawn by Three Horſes; and the Truſtees within their reſpective Diſtricts, or any Five or more of them reſpectively, are required to give Directions, in Writing, to the ſeveral Collectors to take and receive ſuch Tolls, and no other.

By *ſect.* 23. The Truſtees, or any Perſon authoriſed by them, are required to take, for every Waggon, Wain, Cart, or Carriage, having the Fellies of the Wheels thereof of leſs Breadth than Six Inches from Side to Side at the leaſt, at the Bottom or Sole, and for the Horſes, or Beaſts of Draught, drawing the ſame, One Half more than the Tolls or Duties which are or ſhall be payable for the ſame reſpectively; and for every Waggon, Wain, Cart, or Carriage, having the Fellies of the Wheels of leſs Breadth than Six Inches from Side to Side, at the leaſt, at the Bottom or Sole, and for the Horſes, or Beaſts of Draught, drawing the ſame, from and after the Twenty-ninth Day of *September*, One thouſand ſeven hundred and ſeventy-ſix, Double the Tolls or Duties which are or ſhall be payable for the ſame, by any Act of Parliament, before any ſuch Waggon, Wain, Cart, or Carriage, ſhall be permitted to paſs through any Turnpike Gate, *&c.* where Tolls ſhall be payable.

By *ſect.* 24. No Perſon ſhall have Claim, or take the Benefit or Advantage of any Exemption from Toll, or Part of Tolls, or to pay leſs Toll for or in reſpect of any Waggon, Wain, Cart, or other Carriage, or Horſe drawing the ſame, and carrying any particular Kind of Goods, than other Carriages of the like Nature, carrying other Goods, ought to pay; unleſs ſuch Waggon, *&c.* have the Sole of the Bottom of the Fellies of the Wheels of the Breadth of Six Inches, or upwards, (other than and except Carts and Carriages employed in carrying Corn or Grain in the Straw, Hay, Straw, Fodder, Dung, Lime for the Improvement of Land, or other Manure, or any Implements of Huſbandry only); but that the Toll required by the Acts, together with the additional Tolls hereby required to be taken for or in reſpect of every ſuch Waggon, *&c.* having the Sole or Bottom of the Fellies of the Wheels of leſs Breadth than Six Inches, and for and in reſpect of Horſes, or Beaſts of Draught, drawing the ſame, (except as before excepted), ſhall be paid in the ſame Manner, to all Intents and Purpoſes, as if no Exemption, or leſs Toll, had been enacted or allowed by any of the Acts, and as fully as all other Waggons, Wains, Carts, and Carriages, and Horſes drawing the ſame, ought reſpectively to pay, which are not intitled to any Exemption from Toll, in the Whole or Part; or to pay a leſs Toll than other Waggons, Wains, Carts, and Carriages.

By *ſect.* 25. No Perſon allowed to take the Benefit of any ſuch Exemptions, or to have the Privilege of compounding in reſpect of any Carriage having the Fellies of the Wheels of the Breadth of Six Inches, or upwards, unleſs the Fellies, and the Tire upon ſuch Fellies, ſhall lie flat.

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By *ſect.* 26. All Waggons, Carts, or Carriages, moving upon Rollers, of the Breadth of Sixteen Inches on each Side, with flat Surfaces, permitted to paſs upon any Turnpike Road, Toll-free, for the Term of One Year, to be computed from *Michaelmas*, One thouſand ſeven hundred and ſeventy-three; and after the Expiration of the ſaid Term, all ſuch Waggons, *&c.* ſhall paſs, upon paying only ſo much of the Tolls and Duties as ſhall not exceed One Half of the full Toll or Duty payable by this or any Turnpike Act, for all Waggons, *&c.* having the Fellies of the Wheels of the Breadth of Six Inches, or for the Horſes or Beaſts of Draught drawing the ſame, and not rolling a Surface of Sixteen Inches on each Side; and that no more than Half Toll ſhall be paid in reſpect of Waggons having the Fellies of the Wheels of the Breadth of Nine Inches, and rolling a Surface of Sixteen Inches on each Side, from and after the Commencement of the Act.

By *ſect.* 27. Nothing herein before contained to extend to any Chaiſe-marine, Coach, Landau, Berlin, Chariot, Chaiſe, Chair, Calaſh, or Hearſe; or to the Carriage of ſuch Ammunition or Artillery as ſhall be for His Majeſty's Service; or to any Cart or Carriage drawn by One Horſe or Two Oxen, and no more; or to any Carriage, having the Sole or Bottom of the Fellies of the Wheels of the Breadth of Nine Inches, which ſhall be laden with One Block of Stone, One Piece of Marble, One Cable Rope, One Piece of Metal, or One Piece of Timber.

By *ſect.* 28. If any Perſon ſhall take the Benefit of any Exemptions, under or by virtue of this or any other Act, in any fraudulent or colluſive Manner, ſuch Perſon ſhall forfeit, for every ſuch Offence, a Sum not exceeding Five Pounds, nor leſs than Forty Shillings, at the Diſcretion of the Juſtice or Juſtices before whom ſuch Offender ſhall be convicted.

By *ſect.* 29. It ſhall be lawful for the Truſtees, or any Seven or more, at a Meeting to be held for that Purpoſe, of which One Calendar Month's Notice ſhall be given in Writing, to be affixed on all Turnpike Gates, and in ſome public Newſpaper circulated in that Part of the Country, from Time to Time, to reduce all or any of the Tolls, for ſuch Time as they ſhall think proper; and afterwards, if they ſhall ſee Occaſion, to advance all or any of the Tolls ſo leſſened to any Sum, not exceeding the ſeveral Rates granted.

By *ſect.* 30. Where the whole Money, borrowed on the Credit of the Tolls, ſhall not have been paid and diſcharged, no ſuch Tolls ſhall be reduced without the Conſent of the Perſon or Perſons intitled to Five-ſixths of the Money remaining due upon ſuch reſpective Tolls.

By *ſect.* 31. It ſhall be lawful for the Truſtees, or any Seven, at a public Meeting, to let to farm the Tolls of the ſeveral Gates; and whenever any Tolls ſhall hereafter be let to farm, the Truſtees ſhall cauſe Notice to be given of the Time and Place for letting, at leaſt One Month before the Day appointed, by affixing the ſame upon every Toll-gate belonging to ſuch Turnpike Road, and alſo upon the Market-croſs of the Market-town neareſt to the Place where the Tolls are to be let, and alſo in ſome public News-paper circulated in that Part of the Country, and ſpecifying in every ſuch Notice the Sum which the Tolls produced in the preceding Year, clear of the Salary for collecting the ſame, (in caſe any hired Collector was appointed,) and that they will let ſuch Tolls by Auction to the beſt Bidder, on his producing ſufficient Sureties for Payment of the Money, monthly or quarterly, as ſhall be required by the Truſtees; and that they will be put up at the Sum which they were let for or produced in the preceding Year, clear of the Salary of the Collector; and the Truſtees are to provide a Minute Glaſs, by which the Letting is to be made, and the laſt Bidder ſhall be the Renter of the Tolls, and ſhall forthwith enter into a proper Agreement for the taking thereof, and paying the

Money

Money in caſe no Bidder ſhall offer, the Truſtees may appoint a Collector, or fix ſome future Day for the letting, and ſhall, in that Caſe, put them up at ſuch Sum as they ſhall think fit: And if the Perſon who ſhall be the Renter ſhall take a greater or leſs Toll from any Perſon than what authoriſed, he ſhall, for every Offence, forfeit Five Pounds, and the Contract for renting the Tolls, if the ſaid Truſtees ſhall think fit to vacate the ſame; and every other Gate-keeper authoriſed to collect the Tolls, who ſhall take a greater or leſs Toll, ſhall, for every ſuch Offence, forfeit Forty Shillings.

By *ſect.* 32. The Surveyors of all Turnpike Roads ſhall cauſe the Statute duty, and the Compoſitions, to be performed, laid out, and expended upon the Turnpike Road lying within the Pariſh, *&c.* from which ſuch Duty ſhall be required, and not elſewhere, and ſhall forfeit Forty Shillings for every Miſapplication; and where there are Two or more Turnpike Roads under ſeveral Acts of Parliament within the ſame Pariſh, *&c.* and the Statute-duty directed by all ſuch Acts to be taken or applied for the Repair of ſuch Turnpike Roads within ſuch Pariſh, *&c.* ſhall exceed Three Days Duty in the Whole; then it ſhall be lawful for Two more Juſtices of the Peace of the Limit where, *&c.* and they are required, or ſome Special Seſſions, to adjuſt and proportion the Statute-duty, having Regard to the Extent and Condition of the ſeveral Roads and Highways, and to the Tolls, the Juſtices previouſly ſummoning the Clerks and Surveyors, and the Surveyors of the Highways for ſuch Pariſh, *&c.* who are reſpectively required to attend the Juſtices upon ſuch Summons.

By *ſect.* 33. When the Inhabitants of any Pariſh, *&c.* ſhall be indicted or preſented for not repairing any Highway, being Turnpike Road, and the Court ſhall impoſe a Fine, the ſame ſhall be proportioned, together with the Coſts, between the Inhabitants of ſuch Pariſh, *&c.* and the Truſtees; and it ſhall be lawful for ſuch Court to order the Treaſurer of ſuch Turnpike Road to pay the Sum proportioned, in caſe it ſhall appear to ſuch Court, from the Circumſtances of ſuch Turnpike Debts and Revenues, that the ſame may be paid without endangering the Security of the Creditors.

By *ſect.* 34. No Toll-gate ſhall be erected on the Side of any Turnpike Road, unleſs ordered by the Truſtees, at a Meeting, of which Twenty-one Days public Notice ſhall have been given in Writing, affixed upon all the Toll-gates erected on ſuch Roads, and alſo in ſome public Newspaper circulated in that Part of the Country, ſpecifying the Place where ſuch Side-gate is propoſed to be erected, and unleſs Nine Truſtees at leaſt (being a Majority of thoſe preſent,) ſhall ſign the Order; and that no Perſon ſhall be liable to pay Toll at any Toll-gate erected, or to be erected, acroſs or on the Side of any Turnpike Road, or be ſubject to any Penalty for any Carriage, Horſe or Beaſt, which ſhall only croſs ſuch Road, and ſhall not paſs above One Hundred Yards thereon, except over ſome Bridge erected at a conſiderable Expence by the Truſtees of ſuch Turnpike Road.

By *ſect.* 35. If any Perſon ſhall agree to advance any Money, to be employed in the making or repairing any Turnpike Road, or Highway intended to be made Turnpike, and ſhall ſubſcribe his Name to any Writing for that Purpoſe, every ſuch Perſon ſhall be liable to pay every Sum ſubſcribed; and in Default within Twenty-one Days after payable, and demanded by the Perſon to whom payable; or if no Perſon named then by the Treaſurer it ſhall be lawful for every ſuch Treaſurer, or other Perſon, to ſue for and recover the ſame in any of His Majeſty's Courts of Record, by Action of Debt, or on the Caſe, Bill, Suit, or Information.

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By *ſect.* 36. On every Turnpike Road where a ſufficient Quantity of Stone, Gravel, Chalk, or other Materials, cannot be provided and carried by the Labourers and Teams required to perform Statute-duty, the Surveyor, with the Approbation of the Truſtees, ſhall contract for getting and carrying thereof, at ſome Time and Place to be fixed for that Purpoſe, of which Ten Days Notice in Writing ſhall be given, by fixing the ſame on the Door of the Church or Chapel of ſuch Pariſh, *&c.* or, if there be no Church or Chapel, at the moſt public Place there, which Notice ſhall ſpecify the Work to be done, and the Time and Place for letting thereof: And if any Surveyor ſhall have any Part, Share, or Intereſt, directly or indirectly, in any ſuch Contract or Bargain, for Work or Materials, to be made, done, or provided, on Account of any of the Highways, *&c.* under his Care or Management; or ſhall, upon his own Account, directly or indirectly, let to hire any Team, or ſell or diſpoſe of any Timber, Stone, or other Materials, to be uſed or employed in making or repairing ſuch Roads, *&c.* unleſs a Licence in Writing for the Sale of any ſuch Materials, or for letting to hire any ſuch Team, be firſt obtained from the Truſtees; he ſhall forfeit, for every Offence, Ten Pounds, and be for ever after incapable of being employed as a Surveyor.

By *ſect.* 37. If the Surveyor, or other Perſon, having Care of any Turnpike Road, ſhall knowingly ſuffer to be or remain, for the Space of Four Days, in any Part thereof, within Ten Feet on either Side of the Middle of ſuch Road, any Poſt or Poſts, Heap or Heaps of Stones, Rubbiſh, or Earth, ſet up, or raiſed in or above the Surface of the ſaid Road, by which the Paſſage may be obſtructed, *&c.* (other than and except Poſts, Blocks, Stones, or Banks of Earth, fixed in the Ground, or raiſed for ſecuring Horſe or Foot Roads, or Paſſages for Water, and alſo Direction-poſts and Stones,) he ſhall forfeit Forty Shillings.

By *ſect.* 38. If any Perſon ſhall incroach, by making any Hedge, Ditch, or other Fence, on any Turnpike Road, within Thirty Feet from the Centre; or ſhall plough, harrow, or break up the Soil of any Land or Ground; or, in ploughing or harrowing the adjacent Lands, ſhall turn his Plough or Harrow in or upon any Ground, within Fifteen Feet from the Centre; every Perſon ſo offending ſhall forfeit, for every ſuch Offence, Forty Shillings, to ſuch Perſon as ſhall make Information: And it ſhall be lawful for the Truſtees who have the Care of any ſuch Road, or any Five or more of them, to cauſe ſuch Hedge, Ditch, or Fence, to be taken down or filled up at the Expence of the Perſon to whom the ſame ſhall belong; and any One or more Juſtice or Juſtices of the Peace of the Limit where ſuch Offence ſhall be committed, upon Proof thereof to him or them made upon Oath, may levy as well the Expences of taking down ſuch Hedges, as the ſeveral and reſpective Penalties impoſed, by Diſtreſs and Sale of the Offender's Goods and Chattels, rendering the Overplus to the Owner on Demand.

Sect. 39. recites, That whereas in ſome Places it may be found neceſſary, and the Truſtees are required, to ſecure Horſe Cauſeways, and Foot Cauſeways, to travel upon, in public Highways, by Poſts, Blocks, or great Stones, fixed in the Ground, or by Banks of Earth caſt up, or otherwiſe, from being broken up and ſpoiled with Waggons, Wains, Carts, or Carriages; and foraſmuch as ſeveral evil-diſpoſed Perſons may wilfully or wantonly pull up, cut down, and remove or damage the ſaid Poſts, Blocks and great Stones, and drive Carriages upon ſuch Banks and Cauſeways, or againſt the Sides, and alſo dig or cut down the Banks; and ſuch evil-diſpoſed Perſons may break, damage, or throw down the Stones, Bricks, or Wood, fixed upon the Parapets or Battlements of Bridges, and may pull down, deſtroy, obliterate, or deface, any

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Mile-ſtone, or Poſt, Graduated or Direction-poſt or Stone: For Prevention thereof, it is enacted, That every Perſon guilty of any ſuch Offence, ſhall, upon Complaint to any Juſtice of the Peace of the Limit, by the Oath of any One credible Witneſs, or upon View of the Juſtice himſelf, forfeit, for every Offence, any Sum not exceeding Five Pounds, nor leſs than Ten Shillings; and, in Default of Payment, ſhall be committed to be whipped and kept to hard Labour for any Time not exceeding One Calendar Month, nor leſs than Seven Days, at the Diſcretion of ſuch Juſtice, unleſs the ſame be ſooner paid.

By *ſect.* 40. If the Driver of any Cart, Car, Dray, or Waggon, ſhall ride upon any ſuch Carriage, in any Street or Highway, not having ſome other Perſon on Foot, or on Horſeback, to guide the ſame, (ſuch Carriages as are conducted by ſome Perſon holding the Reins of the Horſe or Horſes drawing the ſame excepted;) or if the Driver ſhall, by Negligence or wilful Miſbehaviour, cauſe any Hurt or Damage to any Perſon or Carriage; or ſhall quit the Highway, and go on the other Side the Hedge or Fence incloſing the ſame; or wilfully be at ſuch Diſtance from ſuch Carriage, or in ſuch a Situation, whilſt it ſhall be paſſing, that he cannot have the Direction and Government of the Horſes or Cattle; or ſhall, by Negligence or wilful Miſbehaviour, prevent, hinder, or interrupt the free Paſſage of any other Carriage, or of His Majeſty's Subjects; or if the Driver of any empty or unloaded Waggon, Cart, or other Carriage, ſhall refuſe or neglect to turn aſide and make Way for any Coach, Chariot, Chaiſe, loaded Waggon, Cart, or other loaded Carriage; or if any Perſon ſhall drive, or act as the Driver of, any ſuch Coach, Poſt Chaiſe, or other Carriage let for Hire, or Waggon, Wain, or Cart, not having the Owner's Name, as required, painted thereon; or ſhall refuſe to diſcover the true Chriſtian and Surname of the Owner of ſuch reſpective Carriage; every ſuch Driver, ſo offending in any of the Caſes aforeſaid, being convicted of any ſuch Offence, either by his own Confeſſion, the View of a Juſtice of Peace, or by the Oath of One or more credible Witneſs, before any Juſtice of the Limit, ſhall, for every ſuch Offence, forfeit any Sum not exceeding Ten Shillings, in caſe ſuch Driver ſhall not be the Owner of ſuch Carriage; and in caſe the Offender be the Owner of ſuch Carriage, then any Sum not exceeding Twenty Shillings; and in either of the ſaid Caſes, ſhall, in Default of Payment, be committed for any Time not exceeding One Month, unleſs ſuch Forfeiture ſhall be ſooner paid; and every ſuch Driver, offending in either of the ſaid Caſes, may, with or without any Warrant, be apprehended by any Perſon who ſhall ſee ſuch Offence committed, and ſhall be immediately delivered to a Conſtable, or other Peace Officer, in order to be conveyed before ſome Juſtice, to be dealt with according to Law; and if any ſuch Driver, in any of the Caſes aforeſaid ſhall refuſe to diſcover his Name, it ſhall be lawful for the Juſtice to commit him for any Time not exceeding Three Months, or to proceed againſt him for the Penalty, by a Deſcription of his Perſon and the Offence, and expreſſing, in his Proceedings, that he refuſed to diſcover his Name.

By *ſect.* 41. The Truſtees ſhall direct the Surveyor where ſeveral Highways meet, and there is no ſufficient Direction-poſt or Stone already fixed or erected, forthwith to erect, in the moſt convenient Place where ſuch Ways meet, a Stone or Poſt, with an Inſcription thereon, in large Letters, containing the Name of, and Diſtance from, the next Market Town or Towns, or other conſiderable Place or Places to which the ſaid Highways reſpectively lead, and alſo at the ſeveral Approaches or Entrances to ſuch Parts of any Highways as are ſubject to deep or dangerous Floods, graduated Stones or Poſts, denoting the Depth of Water in the deepeſt Part of the ſame, and likewiſe ſuch Direction-poſts or Stones,

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as the Truſtees ſhall judge to be neceſſary, for the guiding of Travellers, in the beſt and ſafeſt Tract, through the Floods or Waters; and alſo ſhall order the ſaid Surveyor to erect Mile-ſtones or Poſts upon ſuch Turnpike Road, with proper Inſcriptions and Figures thereon, denoting the Names and Diſtances from the principal Towns or Places on each reſpective Road, and from Time to Time to repair ſuch Stones and Poſts, and keep and continue legible the Inſcriptions thereon reſpectively; and the Surveyor ſhall be reimburſed the Expences out of the Tolls; and in caſe any Surveyor ſhall, by the Space of Three Months after ſuch Direction given, neglect or refuſe ſo to do, every ſuch Offender ſhall forfeit the Sum of Twenty Shillings.

By *ſect.* 42. If any Perſon ſhall, by Day or Night, wilfully or maliciouſly pull down, pluck up, throw down, level, or otherwiſe deſtroy any Turnpike-gate, or any Poſt, Rail, Wall, or any Chain, Bar, or other Fence belonging to any Turnpike-gate, or any other Chain, Bar, or Fence, of any Kind whatſoever, ſet up or erected, or hereafter to be ſet up or erected, to prevent Paſſengers from paſſing by without paying any Toll, laid, or directed to be paid by any Act for that Purpoſe, or any Houſe erected, or to be erected, for the Uſe of any ſuch Turnpike-gate, or any Crane, Machine, or Engine, for weighing Waggons, Carts, or Carriages, or ſhall forcibly reſcue any Perſon, lawfully in Cuſtody of any Officer or other Perſon, for any of the Offences before mentioned; in any of the ſaid Caſes, every Perſon ſo offending, being thereof lawfully convicted, ſhall be adjudged guilty of Felony, and ſhall be tranſported for Seven Years, or ſhall be committed to Priſon for any Time not exceeding Three Years, at the Diſcretion of the Judge or Court; and any Indictment may be tried and determined, in any adjacent County, within that Part of *Great Britain* called *England*, as if the Facts had been therein committed.

By *ſect.* 43. The Inhabitants of every Hundred, within which ſuch Offence ſhall be committed, of pulling down or deſtroying any ſuch Turnpike Gate, or Poſt, Rail, Wall, Chain, Bar, Fence, Houſe, Crane, Machine, or Engine, ſhall make full Satisfaction for the Damages, which may be recovered by Action of Debt, Bill, Plaint, or Information, in any of His Majeſty's Courts of Record, by and in the Name of the Clerk of the Peace of the County, without naming the Chriſtian or Surname of the Clerk of the Peace; and ſuch Action ſhall not be abated or diſcontinued by the Death or Removal of any ſuch Clerk, but may be ſued and proſecuted by his Succeſſors; and the Damages recovered ſhall be to the only Uſe of the Truſtees, to be by them diſpoſed of to the ſeveral Uſes as the ſeveral Tolls; and every Inhabitant of ſuch Hundred ſhall be rateably taxed toward an equal Contribution, for the Relief of ſuch Inhabitant againſt whom Execution ſhall be levied, to be raiſed by ſuch Means as Damages recovered againſt Inhabitants of Hundreds, in caſe of Robberies: Provided, that upon Conviction of any ſuch Offender, within Twelve Months after the Offence, any Hundred, or the Inhabitants liable to make and having made ſuch Satisfaction, ſhall be repaid out of the Tolls.

By *ſect.* 44. No Perſon capable of acting as a Truſtee, unleſs in his own Right, or in the Right of his Wife, in the actual Poſſeſſion or Receipt of the Rents and Profits of Lands, *&c.* of the clear yearly Value of Forty Pounds; or poſſeſſed of, or intitled to, a Perſonal Eſtate to the Value of Eight hundred Pounds; or ſhall be Heir-apparent of a Perſon poſſeſſed of an Eſtate in Land of the clear yearly Value of Eighty Pounds; and unleſs he hath taken, or ſhall, (not being ſuch Heir-apparent), before he acts, take and ſubſcribe the Oath to the Purport aforeſaid, before any Two of the Truſtees, otherwiſe for every ſuch Offence to forfeit

forfeit Fifty Pounds to any Perſon who ſhall ſue for the ſame; to be recovered in any of His Majeſty's Courts of Record, by Action of Debt or on the Caſe, or by Bill, Suit, or Information; and ſuch Perſon ſo ſued ſhall prove that he is qualified, or otherwiſe ſhall pay the ſaid Fifty Pounds, without any other Proof or Evidence on the Part of the Plaintiff or Proſecutor than that ſuch Perſon hath acted as a Truſtee.

By *ſect.* 45. Clerks, Treaſurers, *&c.* to deliver up their Accounts when required by the Truſtees, or ſhall forfeit Twenty Pounds for every Neglect.

By *ſect.* 46. No Perſon keeping a Public Houſe ſhall be a Truſtee, or hold a Place of Profit; but he may farm the Tolls.

By *ſect.* 47. Truſtees may direct Proſecutions for Nuiſances, and pay the Expences out of the Turnpike Revenues.

By *ſect.* 48. Informations for Penalties, in order to favour the Offender, are deemed fraudulent and void.

By *ſect.* 49. If a ſufficient Number of Truſtees do not appear at the Firſt or any adjourned Meeting, the Clerk may fix the Day, and give proper Notice thereof.

By *ſect.* 50. No Meeting to be adjourned for more than Three Months. No Buſineſs to be done before Ten, nor any Adjournment made to an Hour later than Two in the Afternoon.

By *ſect.* 51. If Truſtees cauſe Gates to be erected contrary to their Power, the Juſtices at their Quarter Seſſions may order them to be removed.

By *ſect.* 52. Mortgagees, in Poſſeſſion of the Tolls, are to account upon Oath when required by the Truſtees, or forfeit Ten Pounds.

By *ſect.* 53. If Mortgagee keeps Poſſeſſion after he has received the Money due, he ſhall forfeit Double the Sum and Treble Coſts.

By *ſect.* 54. On the Death of a Gate-keeper, Two Truſtees may nominate another until the next Meeting of the Truſtees. If the Gate-keeper, who is diſcharged, refuſes to deliver up Poſſeſſion of the Houſe, *&c.* the Juſtices may, by Warrant, order him to be removed, with his Goods.

By *ſect.* 55. Gate keepers and Surveyors to account upon Oath, when required by the Truſtees, or forfeit Five Pounds.

By *ſect.* 56. No Gate-keeper to be removed as a Pauper, unleſs actually chargeable to the Pariſh, *&c.* nor ſhall gain a Settlement by renting the Tolls, nor be aſſeſſed for the Toll-houſe or Tolls.

By *ſect.* 57. If any Toll gatherer or Gate-keeper ſhall permit any Waggon, *&c.* to paſs upon any Turnpike Road, within his View or Knowledge, or to paſs through any Toll-gate or Bar with any greater Number of Horſes or Beaſts of Draught, or with any Carriage conſtructed or drawn in any other Manner than directed, or without ſuch Names and Deſcriptions painted thereon as directed, and ſhall not within the Space of One Week proceed for the Recovery of the Forfeiture or Penalty, he ſhall forfeit and pay, for every ſuch Neglect, the Sum of Forty Shillings.

By *ſect.* 58. The Juſtices of the Peace, at any Special Seſſions, upon Application to them made by the Surveyor of any Pariſh, *&c.* in the Situation before deſcribed, may ſummon the Clerk and Surveyor of ſuch Turnpike Road to appear at ſome other Special Seſſions, and to produce a State of the Revenues and Debts belonging to ſuch Turnpike Road, and ſuch Juſtices may enquire into the State and Condition of the Repairs thereof, and alſo of ſuch other Highways; and if it ſhall appear to them, upon full and clear Evidence, that the Whole, or any Part of ſuch Statute-duty, may be conveniently diſpenſed with from ſuch Turnpike Road, without endangering the Securities for the Money advanced upon the

the Credit of the Tolls, and that ſuch Statute-duty is wanted for the Repairs of the other Highways within ſuch Pariſh, &c. then they may order the Whole, or Part, of ſuch Statute-duty to be performed upon the Highways, not being Turnpike, within ſuch Pariſh, &c. under the Direction of the Surveyor.

By *ſect.* 59. Juſtices in *Wales*, at their *Michaelmas* Quarter Seſſions, may allow an additional Number of Horſes, when they think fit.

By *ſect.* 60. No Toll to be paid for Carriages employed in carrying Materials for Turnpike Roads or Highways.

By *ſect.* 61. No Surveyor to gather Stones from the common Fields or incloſed Lands of any Perſon without his Conſent, or a Licence from a Juſtice of Peace.

By *ſect.* 62. Power for Truſtees of Turnpike Roads to agree with Perſons liable by Tenure to repair any Part of ſuch Road, concerning the future Repair of it.

By *ſect.* 63. Perſons liable to repair old Highways turned or ſtopped up, ſhall be liable to repair a Part of the new Highway equal to the Burthen of the old One; and if the Parties cannot agree, it ſhall be viewed and ſettled by Two Juſtices of the Peace. A groſs or annual Sum may be paid, if the Parties agree thereto.

By *ſect.* 64. In all Caſes where any Action ſhall be brought by or againſt any Truſtee of any Turnpike Road, Evidence of ſuch Truſtee having acted as ſuch, together with the Act of Parliament by which he was appointed, or the Order, or a Copy of the Order, for his Appointment or Election, where appointed or elected by the Truſtees, ſhall be ſufficient Proof of his being a Truſtee.

By *ſect.* 65. Treaſurers and Surveyors who have not already given Security, ſhall give Bond with Surety to the Truſtees, for the duly paying and applying the Money in their Hands.

By *ſect.* 66. Truſtees to put on every Toll-gate a Table of the Tolls, and alſo of the Weights allowed to each Carriage, and the Truſtees to examine, or cauſe to be examined, the Weighing Engines, to ſee they are kept in good Order.

By *ſect.* 67. Two Oxen to be conſidered as One Horſe.

By *ſect.* 68. The Owner of every Waggon, Wain, or Cart, and alſo of every Coach, Poſt-chaiſe, or other Carriage, let to hire, ſhall paint, upon ſome conſpicuous Part of his Waggon, Wain, or Cart, and upon the Pannels of the Doors of all ſuch Coaches, Poſt-chaiſes, or other Carriages, before the ſame ſhall be uſed upon any Turnpike Road, his Chriſtian and Surname, and the Place of his Abode, in large legible Letters, and continue the ſame thereupon, ſo long as ſuch Waggon, Cart, Coach, Poſt-chaiſe, or other Carriage, ſhall be uſed upon any ſuch Turnpike Road; and the Owner of every Common Stage Waggon or Cart, employed in travelling Stages from Town to Town, ſhall over and above his Chriſtian and Surname, paint on the Part, and in the Manner aforeſaid, the following Words, COMMON STAGE WAGGON, (or CART, as the Caſe may be); and every Perſon uſing any ſuch Carriage, upon any Turnpike Road, without the Names and Deſcriptions, or who ſhall paint any falſe or fictitious Name, or Place of Abode, ſhall forfeit, for every ſuch Offence, a Sum not exceeding Five Pounds, nor leſs than Twenty Shillings.

By *ſect.* 69. After *Michaelmas* 1776, the Tire of all Waggons, &c. ſhall be flat, and the Nails ſunk ſo as not to riſe above the Surface.

By *ſect.* 70. Where the Powers for providing Materials, enlarging and turning Turnpike Roads, making Drains, pruning Hedges and Trees, and calling forth the Statute-duty, are ineffectual, and where more ample Powers for theſe Purpoſes are given by the Highway Act, the Surveyor of Turnpike Roads, with the Approbation of the Truſtees, may execute and

and enforce these Powers upon and for the Benefit of the Turnpike Roads, upon the Terms, and under the Reſtrictions, in the Highway Act.

Sect. 71. But Satisfaction ſhall be made by the Truſtees of the Turnpike Roads for all ſuch Materials as are got in ſeveral or incloſed Lands or Grounds.

Sect. 72. The Forms of Proceedings contained in the Schedule to be uſed, and no Objection or Advantage ſhall be taken for want of Form.

Sect. 73. Conſtables, Surveyors, and all Perſons employed with Salaries, refuſing to execute the Act, and wilfully neglecting to proſecute Offenders for one Week after the Offence committed, forfeit Ten Pounds.

By *ſect.* 74. No Conviction ſhall be had by Virtue of the Act, unleſs upon Confeſſion of the Party accuſed, or upon the Oath of One or more credible Witneſs or Witneſſes; and any Inhabitant of any Pariſh, *&c.* in which any Offence ſhall be committed, ſhall be deemed a competent Witneſs; and any Juſtice of the Peace may act in the Execution of the Act, notwithſtanding he may be a Creditor, or a Truſtee.

By *ſect.* 75. In caſe any Perſon ſhall reſiſt, or make forcible Oppoſition againſt, any Perſon employed in the due Execution of this Act, or any particular Act made for amending any particular Highway, or ſhall aſſault any Collector of the Tolls in the Execution of his Office; or ſhall paſs through any Turnpike Gate, Rail, Chain, or other Fence ſet up by Authority of Parliament, without paying the Toll; or ſhall hinder, or attempt to prevent or obſtruct, any ſuch Perſon, in the meaſuring the Wheels of any Carriage, or make any Reſcue of Cattle or other Goods, diſtrained; or if any Conſtable, Headborough, or Tithingman, ſhall refuſe or neglect to execute any Warrant; every ſuch Perſon, being convicted, ſhall, for every ſuch Offence, forfeit any Sum not exceeding Ten Pounds, nor leſs than Forty Shillings, at the Diſcretion of the Juſtice or Juſtices; to be paid to the Surveyor, and laid out in the Repairs. And in caſe he do not forthwith pay, or ſecure to be paid, the Forfeiture; it ſhall be lawful for ſuch Juſtice or Juſtices to commit for any Time not exceeding Three Months, unleſs the Forfeiture ſhall be ſooner paid.

By *ſect.* 76. All Penalties and Forfeitures by this Act impoſed for any Offence againſt the ſame, and all Coſts and Charges, (the Manner of levying and recovering of which is not hereby otherwiſe particularly directed,) ſhall be levied by Diſtreſs and Sale of the Goods and Chattels of the Offender, or Perſon liable or ordered to pay the ſame, by Warrant under the Hand and Seal of ſome Juſtice of the Peace for the Limit, and ſuch Order for Payment of ſuch Coſts ſhall be made, rendering the Overplus, if any, to the Party, after deducting the Charges, which Warrants ſuch Juſtice is required to grant, upon Conviction of the Offender, by Confeſſion, or upon the Oath of One or more credible Witneſs or Witneſſes, or upon Order made, as aforeſaid; and the Penalties and Forfeitures, Coſts and Charges, when ſo levied, ſhall be paid, the One Half to the Informer, and the other Half to the Surveyor, to be employed towards the Repair, unleſs otherwiſe directed by this Act: If no Diſtreſs, the Offender to be committed. If the Offender lives out of Juriſdiction of the Juſtice, the Juſtices where he lives may proceed, having a Copy of the Conviction duly proved.

By *ſect.* 77. No Warrant of Diſtreſs to be iſſued till Six Days after the Conviction.

By *ſect.* 78. Forfeitures recovered, on the Evidence of the Surveyor or other Officer employed by the Truſtees with Salaries, ſhall be applied to the Uſe of the Roads.

By

By *ſect.* 79. Proſecutors may recover Forfeitures under Forty Shillings, by Information only before a Juſtice, but above Forty Shillings by Information, or by Action, *&c.* in which it ſhall be ſufficient to declare that the Defendant is indebted to the Plaintiff in the Sum of being forfeited by an Act, paſſed in the Thirteenth Year of the Reign of His preſent Majeſty, intituled, *An Act to explain, amend, and reduce into one Act of Parliament, the general Laws now in being for regulating the Turnpike Roads in that Part of* Great Britain *called* England, *and for other Purpoſes*; and the Plaintiff, if he recovers in any ſuch Action, ſhall have full Coſts: Provided, that there ſhall not be more than one Recovery for the ſame Offence; and that Ten Days Notice in Writing be given to the Party offending, previous to the Commencement of ſuch Action; and that the ſame be brought and commenced within one Calendar Month after the Offence.

By *ſect.* 80. Diſtreſs not unlawful, nor the Party making it a Treſpaſſer, for want of Form, or Irregularity in the Proceedings; but the Party aggrieved may recover Satisfaction for the ſpecial Damage.

By *ſect.* 81. Plaintiff not to recover for any Irregularity in the Proceedings, if Tender of Amends be made before the Action brought. Defendant may pay Money into Court, before Iſſue joined.

By *ſect.* 82. Any Perſon aggrieved may appeal to the Juſtices of the Peace, at any General Quarter Seſſions of the Peace to be held for the Limit wherein the Cauſe of ſuch Complaint ſhall ariſe; upon giving Six Days Notice after the Cauſe of Complaint aroſe; and entering into Recognizance to try the Appeal, and pay the Coſts. Juſtices, to whom Notice of Appeal ſhall be given, are to return all the Proceedings to the Quarter Seſſions. Juſtices at Quarter Seſſions are to hear and determine the Complaints, and award Coſts. No Proceeding to be removed by *Certiorari*.

By *ſect.* 83. No Appeal to be made againſt a Conviction, unleſs the Party give Notice thereof at the Time of Conviction, if preſent; if not, within Six Days after, and enter into Recognizance as above.

By *ſect.* 84. Juſtices and Truſtees have Power to adminiſter Oaths.

By *ſect.* 85. If Action be commenced for any Thing done under this Act, it ſhall be brought within Three Months after the Offence committed, and in the County where the Defendant reſides, or the Fact was done. Defendant may plead the General Iſſue, and give the Act and Special Matter in Evidence. If Plaintiff proceeds in any other Manner, the Jury are to find for the Defendant, and he is to have Treble Coſts.

By *ſect.* 86. The Statute of 7 *Geo.* 3. is repealed.

This Act commenced on the 29th Day of *September*, 1773.

This Act is bound up with the *Highway Act*, contains a Schedule of Forms, and hath a Table annexed.

By the 14th of *Geo.* 3. *cap.* 36. it is declared, That the Proviſion made by the Act of the Twenty-eighth of his late Majeſty, for continuing the ſeveral Acts, made for repairing and amending Turnpike Roads for Five Years, ſhall be and continue in full Force, and be as effectual, to all Intents and Purpoſes, as the ſame ought to have been, if the Acts of the Seventh and Thirteenth Years of His preſent Majeſty's Reign, or either of them, had not been made.

And that every Perſon who hath received, or ſhall receive, any Tolls, or other Duties, at any Turnpike or Toll-gate; or who hath acted, or ſhall act, in any other Reſpect under the Authority of, and in Execution of any of the Powers of, any Act or Acts of Parliament ſo continued, or intended to be continued, by the Twenty-eighth of his late Majeſty, ſhall be indemnified.

By the 14th of *Geo.* 3. *cap.* 57. reciting the Clauſe in the 13th, whereby it is provided, That no Perſon ſhall be liable to pay Toll at any Toll-gate erected, or to be erected, acroſs or on the Side of any Turnpike Road, or be ſubject to any Penalty for any Carriage, Horſe, or Beaſt, which ſhall only croſs ſuch Road, and ſhall not paſs above One hundred Yards thereon, except over ſome Bridge erected at a conſiderable Expence by the Truſtees of ſuch Turnpike Road; which Proviſion, as it takes away or leſſens the Tolls of certain Toll-gates erected by the Authority or Direction of former Acts of Parliament, at certain Places in ſuch Acts ſpecified for that Purpoſe, is detrimental to many Turnpike Roads, and highly injurious to Perſons who have lent Money on the Security of ſuch Tolls; it is enacted, That the recited Proviſion ſhall be repealed, ſo far as the ſame affects any Toll-gate directed or authoriſed to be ſet up at any Place particularly ſpecified and mentioned in any Act of Parliament, for repairing any Highway or Road, paſſed before the making of the ſaid Act of the Thirteenth Year of his preſent Majeſty's Reign.

By the 14th of *Geo.* 3. *cap.* 82. reciting another Part of 13 *Geo.* 3. it is enacted, That ſo much of the recited Act, as impowers the Truſtees of any Turnpike Road to receive and take the Additional Toll of Twenty Shillings for every Hundred Weight, which any Waggon, Cart, or Carriage, together with its Loading, ſhall weigh, at any Weighing Engine, over and above the Weight allowed thereby; and alſo ſo much thereof as permits any Waggon, Cart, or Carriage, after having been weighed as aforeſaid, to be drawn by an unlimited Number of Horſes; ſhall be, and is hereby repealed.

And that it ſhall be lawful for all Truſtees, appointed by any Act, for the Repair of any Turnpike Road within that Part of *Great Britain* called *England*, or any Five or more of them, or for any Perſon properly impowered by any Five or more, to receive, over and above the Tolls already granted, or hereafter to be granted, the following Sums of Money, as additional Tolls for every Hundred Weight of One Hundred and Twelve Pounds to the Hundred, which any Waggon, Cart, or Carriage, together with the Loading thereof, ſhall weigh, at any Weighing Engine, over and above the Weights by the before recited Act allowed to each of them reſpectively; that is to ſay, For the Firſt and Second Hundred of ſuch Over-weight, the Sum of Three-pence for each Hundred; for every Hundred of ſuch Over-weight above Two Hundred, and not exceeding Five hundred, the Sum of Sixpence: For every Hundred of ſuch Over-weight above Five Hundred, and not exceeding Two hundred, the Sum of Two Shillings and Sixpence: For every Hundred of ſuch Over-weight above Ten hundred, and not exceeding Fifteen hundred, the Sum of Five Shillings: And for every Hundred of ſuch Over-weight above Fifteen hundred, the Sum of Twenty Shillings: Which ſaid additional Toll or Duty hereby granted and made payable at any Weighing Engine, as aforeſaid, ſhall and may be levied and recovered in any of the Caſes aforeſaid, upon any Perſon liable thereto, or upon his or her Goods or Chattels, who ſhall, after Demand made thereof, refuſe or neglect to pay the ſame, in ſuch Manner as any other Toll or Duty payable at the ſame Toll-gate or Bar, where any ſuch Engine ſhall be erected, is or ſhall be by Law to be levied and recovered; and the Money ariſing from ſuch additional Toll or Duty ſhall be applied to the Repairs of the Turnpike Road where the ſame ſhall be collected.

And, that no Waggon, Cart, or Carriage, employed only in Huſbandry, or carrying only Manure or Lime for the Improvement of Land, or Hay, Straw, Fodder, or Corn unthreſhed, (excepting Hay or

Straw

Straw carried for Sale), ſhall be weighed at any Weighing Engine now erected, or hereafter to be erected.

And, That the Truſtees of the ſeveral Turnpike Roads within Ten Miles of the Cities of *London* and *Weſtminſter*, and the Borough of *Southwark*, may, at their General or Quarterly Meetings, lower the ſeveral additional Tolls hereby directed to be taken for Over-weight.

And reciting, that whereas the Exemption from Toll in the before recited Act, given to Waggons, Carts, and Carriages, moving upon Rollers of the Breadth of Sixteen Inches on each Side thereof, with flat Surfaces, during the Term of One Year only, is found not to be a ſufficient Encouragement to induce Perſons to erect and make uſe of the ſame, it's enacted, That all ſuch Waggons, Carts, and Carriages, ſhall, for and during the Term of Five Years, to be computed from the Twenty ninth Day of *September*, One thouſand ſeven hundred and ſeventy-four, be permitted to paſs or be drawn upon any Turnpike Road Toll-free: And from and after the Expiration of ſuch Term, then to pay half Toll only, as directed by the before recited Act.

By 16 *Geo.* 3. *cap.* 39. the Clauſe in 13 *Geo.* 3. whereby it's enacted, That the Tire of the Wheels of all Waggons, Wains, Carts, and other Carriages, to be uſed on any Turnpike Road, ſhall be counterſunk, by placing the ſame upon the Fellies in ſuch Manner that the Nails ſhall not riſe above the Surface, and that the the Sole or Surface of the Wheels ſhall be quite flat, is repealed.

And reciting, that whereas by the ſaid Act it is provided, That no Perſon ſhall be allowed to take the Benefit of certain Exemptions in the ſaid Act, or have the Power of compounding for Tolls, in reſpect of Carriages having the Fellies of the Wheels thereof of the Breadth or Gauge of Six Inches, or upwards, unleſs the Fellies, and the Tire upon ſuch Fellies, ſhall lie flat: And reciting, That whereas Doubts may ariſe concerning the Conſtruction of the Proviſion, which, according to the ſtrict Senſe of the Words, cannot be complied with, it's enacted, That all Wheels of the Breadth or Gauge of Six Inches, or upwards, the Fellies or Tire whereof ſhall not deviate more than One Inch from a flat Surface, ſhall be deemed and taken to be flat.

And the 16th of *Geo.* 3. *cap.* 44. reciting a Clauſe in 13 *Geo.* 3. whereby it's enacted, That Double Toll ſhall be paid for the Paſſage through Turnpike-gates of all Carriages having the Fellies of the Wheels thereof of leſs Breadth or Gauge than Six Inches from Side to Side, it enacts, That ſo much of the Act, as enacts that the Truſtees, or ſuch Perſon or Perſons as are authoriſed by them, ſhall demand and take, for every Waggon, Wain, Cart, or Carriage, having the Fellies of the Wheels thereof of leſs Breadth or Gauge than Six Inches from Side to Side, at the leaſt, at the Bottom or Sole thereof, and for the Horſes or Beaſts of Draught drawing the ſame, from and after the Twenty-ninth Day of *September*, One thouſand ſeven hundred and ſeventy-ſix, Double the Tolls or Duties which are or ſhall be payable for the ſame reſpectively, by any Act before any ſuch Waggon, Wain, Cart, or Carriage reſpectively, ſhall be permitted to paſs through any Turnpike Gate or Gates, Bar or Bars, where Tolls ſhall be payable by virtue of any ſuch Acts, ſhall be ſuſpended until the Twenty-ninth Day of *September*, One thouſand ſeven hundred and ſeventy-eight.

And that it ſhall be lawful for ſuch Truſtees, and they are required, to releaſe all Leſſees of Tolls within their reſpective Juriſdictions, from their reſpective Contracts, at the End of the current Year, if ſuch Leſſees ſhall deſire the ſame.]

* Page 60 (H) **How the Parties obliged to repair are to be proceeded againſt, and what Defence they may make.**

Keilw. 34. Crom. 131. Dalt. c. 26. 5 H. 7. 4. a. Dyer 13. b. 14. pl. 64. Keb. 256. 829, 991. 2 Keb. 715, 728. Raym. 182.

IT ſeems clear, that no one ought to be puniſhed for any Offence againſt the Highways, without being firſt called upon to anſwer for himſelf, except in the Caſe of a Preſentment in a Court-Leet, and, as (*a*) ſome ſay, in the Caſe of a Preſentment by a Juſtice of Peace on his View; and even in the Caſe of a Preſentment in a Court-Leet, if it touch a Man's Freehold, as by charging him with being bound to Repairs in reſpect of the Tenure of his Land, it may ſo far be traverſed in the King's Bench, being removed thither by *Certiorari*; alſo it may be traverſed where the Defendant in Treſpaſs juſtifies under it.

(*a*) So held by *Holt*; (but the other Juſtices *cont.*) becauſe ſuch a Preſentment cannot be a greater Eſtoppel than the finding of a Grand Jury, who are upon Oath. Carth. 212, 213.

Hawk. P. C. 219.

Upon a Certificate and Affidavit that the Highway is in good Repair, Exceptions to the Form of the Indictment may be taken, but not eaſily without ſuch Certificate and Affidavit; and the Exceptions of this Kind are:

2 Rol. Abr. 81. pl. 18. Palm. 389, 420. 2 Keb. 715, 728. Brownl. 6.

1. That the Indictment doth not certainly ſhew a *Locus a quo*, and a *Locus ad quem*, but there is no Need to ſhew that a Highway leads to a Market-Town.

2 Rol. Abr. 81. 3 Keb. 644.

2. That it is repugnant to itſelf, in ſhewing where the Nuſance was done; as where it ſets forth, that a Man ſtopped a Way at *D.* leading from *D.* to *E.*

Cro. Jac. 324. 2 Rol. Abr. 80, 81.

3. That it doth not certainly ſhew to what Part of the Highway the Nuſance extended; as where it only ſays, that a certain Part of the King's Highway at *K* was ſtopped, without ſhewing how much; or where it ſays, the Place nuſanced contained ſo many Feet in Length, and ſo many in Breadth, by Eſtimation.

Salk. 359. pl. 8. 2 Ld. Raym. 1174. 6 Mod. 255. Cro. Eliz. 63. Vent. 208. Poph. 206. 2 Keb. 728.

4. That it doth not ſhew, with ſufficient Certainty, that the Place nuſanced was a Way common to all the King's People; as where it only calls it a Horſeway, or having called it a common Footway to the Church of *D.* adds, for all the Inhabitants of *D.*

Noy 93. 3 Keb. 855.

5. That an Indictment for not Repairing a Highway, which the Defendant ought to repair *ratione tenuræ*, doth (*b*) omit the Word *ſuæ*.

(*b*) But this Exception hath been of late over-ruled. Hawk. P. C. 220.

3 Keb. 58.

6. That an Indictment againſt *J. S.* Biſhop of *A.* for not Repairing a Highway, *&c.* doth not ſhew in what Capacity he ought to do it.

And. 234.

7. That the Nuſance is not expreſſed in proper Terms; as where the Indictment is, that the Defendant diverted the Highway, which cannot be, becauſe a Highway cannot be diverted, muſt always continue in the ſame Place where it was, howſoever it be obſtructed, and a new Way made in another Place.

8. That

8. That an Indictment againſt ſeveral Perſons for not Repairing, is laid jointly and ſeverally; but it is no Exception, that a Preſentment of ſuch a Highway's being out of Repair by the Default of the Inhabitants, *&c* doth not name any Perſons in certain; or that a Preſentment againſt a Man for Stopping a Highway in his own Land, which is well proved by the Evidence of Ploughing it, doth not lay the Offence *vi & armis*. 2 Rol. Abr. 79, 81. Vent. 4.

* 9. That the Defendants cannot plead *quod non debent reparare*, without ſhewing who ought. * Page 61 Sid. 140; Carth. 203. S.P. agreed. Salk. 358. 6 Mod. 163.

And note; the Defendant ſhall not be diſcharged by ſubmitting to a Fine, but a *Diſtringas* ſhall go *ad infinitum*, till he repair the Way.

HUE AND CRY.

HUE and Cry is the Purſuit of an Offender from Town to Town till he be taken, which all who are preſent when a Felony is committed, or a dangerous Wound given, are by the (*a*) Common Law, as well as by Statute, bound to (*b*) raiſe againſt the Offenders who eſcape, on pain of Fine and Impriſonment. 3 Inſt. 116, 117. 2 Inſt. 172. *Dalt. Juſtice.* c. 28. 109. Fitz. Coron. 395.

Cro. Eliz. 654. Crompt. 178. (*a*) That it is the old Common Law Proceſs after Felons and ſuch as have dangerouſly wounded any Perſon. 2 Hal. Hiſt. P. C. 98.——And therefore *Bracton* ſays, *Quod omnes tam milites quam alii, qui ſunt quindecim annorum & amplius, jurare debent quod Utlagatos, Murdritores, Robbatores & Burglatores non receptabunt, nec iis conſentirent, nec eorum receptatoribus, & ſi quos tales noverint eos attachiari facient, & hoc vicecomiti & ballivi ſui monſtrabent, & ſi huteſium vel clamorem de talibus audiverint, ſtatim audito clamore ſequentur ct ſuum facie. milia & hominibus de terra ſua.* Bract. lib. 3. c. 1. (*b*) May be by a Horn or by the Voice. 2 Inſt. 172.

As the Raiſing of Hue and Cry is enjoined by the Common Law, which may be called a Raiſing of it at the Suit of the King, as well as by ſeveral Acts of Parliament, which may be called a Raiſing of it at the Suit of a private Perſon, in as much as thoſe Statutes make the Hundred anſwerable to the Party robbed, if they neglect to purſue the Hue and Cry, and apprehend the Robbers; therefore we ſhall conſider,

(A) Hue and Cry at the Common Law, or Suit of the King. 62.

And herein,

1. By whom Hue and Cry is to be levied. 62.
2. In what Manner it is to be levied. 63.
3. In what Manner to be purſued. 63.
4. What the Perſons may juſtify doing who purſue it. 63.

5. How

5. How the Omiſſion or Neglect of not doing it is puniſhed. 65.

(B) Of Raiſing Hue and Cry purſuant to the ſeveral Statutes which declare in what Manner the Hundred ſhall be chargeable. 65.

And herein,

1. What Kind of Robbery it muſt be ſo as to make the Hundred liable, and how far it is neceſſary that it be done on the Highway. 66.
2. On what Day, or Time of the Day, it muſt be committed. 67.
* Page 62 * 3. What Hundred ſhall be ſaid to be liable. 68.
4. What Perſon is to bring the Action, and make Oath of the Robbery. 69.
5. Of the Notice to be given of the Robbery. 70.
6. Where the Party muſt give Bond for Payment of Coſts, in caſe he does not prevail. 71.
7. Of the Oath to be taken of the Robbery, and before whom the ſame muſt be. 72.
8. At what Time the Action is to be brought. 73.
9. What Evidence will maintain it; and therein of the Witneſſes for and againſt it. 73.
10. What ſhall excuſe the Hundred; and therein of apprehending the Robbers. 74.
11. How the Money is to be levied, and each Hundredor to contribute to the Charges. 75.

(A) Hue and Cry at Common Law, or Suit of the King: And herein,

1. By whom Hue and Cry is to be levied.

2 Inſt. 172. 3 Inſt. 116. Hal. Hiſt. P. C. 464. IT ſeems to be clearly agreed, that a private Perſon who hath been robbed, or who knows that a Felony hath been committed, is not only authoriſed to levy Hue and Cry, but is alſo bound to do it under pain of Fine and Impriſonment.

2 Hal Hiſt P. C. 99. From hence it follows, that although it is a good Courſe, as my Lord *Hale* ſays, to have a Precept or Warrant from a Juſtice of Peace for raiſing of Hue and Cry, yet it is neither of abſolute Neceſſity, nor ſometimes convenient,

venient, for the Felons may eſcape before the Juſtice can be found; alſo Hue and Cry was part of the Law before the Statute of 1 *E.* 3. *cap.* 16. which firſt inſtituted Juſtices of the Peace.

And although alſo, ſays he, it is eſpecially incumbent upon Conſtables to purſue Hue and Cry, when called upon, and they are ſeverely puniſhable if they neglect it; and it prevents many Inconveniencies if they be there, for it gives a greater Authority to their Purſuit, and enables the Purſuants, in his Aſſiſtance, to plead the General Iſſue upon the Statutes of 7 *Jac.* 1. *cap.* 5. & 21 *Jac.* 1. *cap.* 12. without being driven to ſpecial Pleading; and therefore to prevent Inconveniences that may happen by Unrulineſs, it is moſt adviſable that the Conſtable be called to this Action; yet upon a Robbery, or other Felony committed, Hue and Cry may be raiſed by the (*a*) Country, in the Abſence of the Conſtable; and in this there is no Inconveniency, (*b*) for if Hue and Cry be raiſed without Cauſe, they that raiſe it are puniſhable by Fine and Impriſonment.

2 Hal. Hiſt. P. C. 99, 100.

(*a*) And is therefore called *Cry de pais*, 2 Hal. Hiſt. P. C. 100.——Of the Manner of Raiſing it according to the Law of the Foreſt, *vide* 4 Inſt. 294.

(*b*) 29 E. 3. 39. Fitz. Treſpaſs 252. Cromp. 179. 21 H. 7. 28. a.—As Diſturbers of the King's Peace. 2 Inſt. 172.

* 2. In what Manner it is to be levied. *Page 63

The regular Method of levying Hue and Cry, is for the Party to go to the Conſtable of the next Town and declare the Fact, and (*c*) deſcribe the Offender, and the Way he is gone; whereupon the Conſtable ought immediately, whether it be Night or Day, to raiſe his own Town, and make Search for the Offender; and upon the not finding him, to ſend the like Notice, with the utmoſt Expedition, to the Conſtables of all the Neighbouring Towns, who ought in like manner to ſearch for the Offender, and alſo to give Notice to their Neighbouring Conſtables, and they to the next, till the Offender be found.

3 Inſt. 116. *Dalt. Juſtice.* c. 28. Cromp. 178. 2 Hawk. P. C. 75.

(*c*) Ought, if he knows it, to tell his Name, deſcribe his Perſon, Habit, Horſe, and ſuch other Circumſtances, that he knows, which may conduce to his Diſcovery. 2 Hal. Hiſt. P. C. 100.

3. In what Manner to be purſued.

The Conſtable is not only to make Search in his own Vill, but is alſo to raiſe all the Neighbouring Vills, who are all to purſue the Hue and Cry with Horſemen as well as Footmen until the Offender be taken.

2 Hal. Hiſt. P. C. 101.

4. What the Perſons may juſtify doing who purſue it.

For the Underſtanding hereof we ſhall here inſert what my Lord Chief Juſtice *Hale* apprehends to be the Law in this Matter.

1. That in caſe of Hue and Cry once raiſed and levied upon Suppoſal of a Felony committed, though in Truth there was no Felony committed; yet thoſe, who purſue Hue and Cry, may arreſt and proceed as if a Felony had been really committed.

2 Hal. Hiſt. P. C. 101.

And therefore the Juſtification of an Impriſonment by a Perſon upon Suſpicion, and by a Perſon, eſpecially a Conſtable, upon Hue and Cry levied, do extremely differ; for in the former there muſt be a Felony averred to be done, and it is iſſuable; but in the latter, *viz.* upon Hue and Cry, it need not be averred, but the Hue and Cry levied upon Information of a Felony is ſufficient, though perchance the Information was falſe; and therefore an Averment of a Felony committed, in caſe of a Juſtification of

5 H. 7. 5. a. 21 H. 7. 28. a. *per Rede.* 2 E. 4. 8 & 9. 29 E. 3. 39. 2 Inſt. 173. 2 Hal. Hiſt. P. C. 102.

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an Impriſonment upon Hue and Cry, is not neceſſary; the Reaſons whereof are, 1. Becauſe the Conſtable cannot examine the Truth or Falſhood of the Suggeſtion of him who firſt levied it, for he cannot adminiſter him an Oath; and if he ſhould forbear his Purſuit of the Hue and Cry till it be examined by a Juſtice of Peace, the Felon might eſcape, and the Purſuit would be loſt and fruitleſs. 2. By ſeveral Acts of Parliament he is compellable to purſue Hue and Cry, and is puniſhable, as thoſe of the Vill, if they do it not. 3. Becauſe he that raiſed a Hue and Cry where no Felony is committed, *viz.* the Perſon that giveth the falſe Information, is ſeverely puniſhable by Fine and Impriſonment, if the Information be falſe; and therefore if he raiſe a Hue and Cry upon a Perſon that is innocent, yet they that purſue the Hue and Cry may Juſtify the Impriſonment of that innocent Perſon, and the Raiſer is puniſhable; and by the ſame Reaſon, if he give Notice of a Felony committed when there was in Truth none.

* Page 64
2 Hal. Hiſt. P. C. 102.

* 2. If Hue and Cry be raiſed againſt a Perſon certain for Felony, though poſſibly he is innocent, yet the Conſtables, and thoſe that follow the Hue and Cry, may arreſt and impriſon him in the common Gaol, or carry him to a Juſtice of the Peace.

7 E. 3. 16. b.
2 Hal. Hiſt. P. C. 102.

3. If the Perſon purſued by Hue and Cry be in a Houſe, and the Doors are ſhut, and refuſed to be opened upon Demand of the Conſtable, and Notice given of his Buſineſs, he may break open the Doors; and this he may do in any Caſe where he may arreſt, though it be only a Suſpicion of Felony, for it is for the King and Commonwealth, and (*a*) therefore a virtual *Non omittas* is in the Caſe; and the ſame Law is upon a dangerous Wound given, and a Hue and Cry levied upon the Offender.

(*a*) 5 Co. 92. *Semain's* Caſe.

Hal. Hiſt. P. C. 102.

And it ſeems in this Caſe, that if he cannot be otherwiſe taken, he may be killed, and the Neceſſity excuſeth the Conſtable.

Dalt. c. 28.
2 E. 4. 8. b.
Cromp. de pace 178.
2 Hal. Hiſt. P. C. 103.

4. Upon Hue and Cry levied againſt any Perſon, or where any Hue and Cry comes to a Conſtable, whether the Perſon be certain or uncertain, the Conſtable may ſearch in ſuſpected Places within his Vill, for the apprehending of the Felons.

2 Hal. Hiſt. P. C. 103.

But though he may ſearch ſuſpected Places or Houſes, yet his Entry muſt be *per oſtia aperta*, for he cannot break open Doors barely to ſearch, unleſs the Perſon againſt whom the Hue and Cry is levied be there, and then it is true he may; therefore in caſe of ſuch a Search, the breaking open the Door is at his Peril, *viz.* juſtifiable if he be there; but it muſt be always remembered, that in caſe of Breaking open a Door, there muſt firſt be a Notice given to them within of his Buſineſs, and a Demand of Entrance, and a Refuſal, before the Doors can be broken.

2 Hal. Hiſt. P. C. 103.

5. If the Hue and Cry be not againſt a Perſon certain, but by Deſcription of his Statute, Perſon, Cloaths, Horſe, *&c.* the Hue and Cry doth juſtify the Conſtable, or other Perſon, following it, in apprehending the Perſon ſo deſcribed, whether innocent or guilty, for that is his Warrant; it is a Kind of Proceſs that the Law allows, (not uſual in other Caſes) *viz.* to arreſt a Perſon by Deſcription.

2 Hal. Hiſt. P. C. 103.

6. But if the Hue and Cry be upon a Robbery, Burglary, Manſlaughter, or other Felony committed, but the Perſon that did the Fact is neither known nor deſcribable by Perſon, Cloaths, or the like, yet ſuch a Hue and Cry is good, as hath been ſaid, and muſt be purſued, though no Perſon certain be named or deſcribed.

2 E. 4. 8. b.
2 Hal. Hiſt. P. C. 103.

And therefore in this Caſe, all that can be done is, for thoſe who purſue the Hue and Cry, to take ſuch Perſons as they have probable Cauſe to ſuſpect; as for Inſtance, ſuch Perſons as are Vagrants, that cannot give an Account where they live, whence they are, or ſuch ſuſpicious Perſons

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as come late into their Inn or Lodging, and give no reaſonable Account where they had been, and the like.

And here the Juſtification of the Impriſonment is mixed, partly upon the Hue and Cry, and partly upon their own Suſpicion; and therefore, 1. In reſpect that it is upon Hue and Cry, there needs no Averment that the Felony was done; yet it muſt be averred that an Information was given that the Felony was done; if the Arreſt be by that Conſtable that firſt received the Information, and ſo raiſed the Hue and Cry; or if the Arreſt were made by that Conſtable, or thoſe Vills to whom the Hue and Cry came at the ſecond Hand, it muſt be averred that ſuch a Hue and Cry came to them, purporting ſuch a Felony to be done; but 2. Alſo in as much as the Hue and Cry neither names nor deſcribes the Perſon of the Felon, but only the Felony committed; and therefore the Arreſt of this or that particular Perſon, and ſo applied, is left to the Suſpicion and Diſcretion of the Conſtable, or the People of the ſecond or third Vill; he, that arreſts any Perſon upon ſuch general Hue and Cry, muſt aver that he ſuſpected, and ſhew a reaſonable Cauſe of Suſpicion. 2 Hal. Hiſt. P. C. 104.

* But now by the Statute of 7 *Jac.* 1. *cap.* 5. the Conſtable, or any that come in to his Aſſiſtance, even in this Caſe of Hue and Cry, may plead the general Iſſue, and gave the whole Matter of the Juſtification in Evidence; for the Purſuit of Hue and Cry, though performed by others as well as the Conſtable, is principally the Act of the Conſtable of the Vill, and the others are but his Deputies or Aſſiſtants within the Precincts of his Conſtable-wick. * Page 65 2 Hal. Hiſt. P. C. 104.

5. How the Omiſſion or Neglect of not doing it is puniſhed.

There can be no Doubt but that both by the Common Law, as alſo by the ſeveral Statutes which injoin the Levying of Hue and Cry, they who neglect to levy one, (whether Officers of Juſtice, or others) or who neglect to purſue it when rightly levied, are puniſhable by (*a*) Indictment, and may be fined and impriſoned for ſuch Neglect. 2 Hal. Hiſt. P. C. 4.

(*a*) That it is one of the Offences which may be inquired of and puniſhed in the Sheriff's Torn or Leet. *Dalt. Sheriff*, 394. 2 Hawk. P. C. 67.

And now by the 8 *Geo.* 2. *cap.* 16. it is enacted, "That every Conſtable of the Hundred, and every Conſtable, Boſholder, Headborough, or Tythingman of any Town, Pariſh, Village, Hamlet, or Tything, within the Hundred, or the Franchiſes within the Precinct thereof, wherein the Robbery ſhall happen, as ſoon as the ſame ſhall come to his Knowledge, either by Notice from the Party or Parties robbed, or from any other Perſon or Perſons, to whom Notice ſhall be given thereof, purſuant to this or any other Statute, ſhall, with the utmoſt Expedition, make and cauſe to be made, freſh Suit and Hue and Cry after the Felon or Felons by whom ſuch Robbery ſhall be committed; and if any Conſtable, Boſholder, Headborough, or Tythingman, ſhall offend in the Premiſſes, by refuſing or neglecting to make, or cauſe to be made, ſuch freſh Suit and Hue and Cry, every ſuch Offender ſhall, for every ſuch Refuſal or Neglect, forfeit 5 *l.*"

(B) Of raiſing Hue and Cry purſuant to the ſeveral Statutes which declare in what Manner the Hundred ſhall be chargeable for Robberies.

THE Levying of Hue and Cry is, as has been already obſerved, injoined by ſeveral Acts of Parliament, and to this Purpoſe it is enacted by (*a*) *Weſtm.* 1. *cap.* 9. "That all be ready and apparelled at the "Summons of the Sheriff & *a cry de pais*, to purſue and arreſt Felons, "as well within Franchiſes as without; and if they do it not, and be "thereof Attaint, *le Roy prendra a eux grevement*, they are to be indicted "and fined for the Neglect."

(*a*) That tho' ſome imagined that Hue and Cry was grounded on this Statute, yet my Lord *Coke* ſays, that it was uſed long before, as appears even by this Statute, which, inſtead of introducing a new Law, enforces Obedience to that which was founded on the ancient Laws of the Realm. 2 Inſt. 171.

* Page 66 * By the Statute of 4 *E.* 1. *de officio Coronatoris*, "Hue and Cry ſhall "be levied for all Murders, Burglaries, Men ſlain or in Peril to be ſlain, "as otherwhere is uſed in *England*; and all ſhall follow the Hue and "Steps as near as they can; and he that doth not, and is convict thereof, "ſhall be attached to be before the Juſtices in Eyre."

By the Statute of *Winton*, or 13 *E.* 1. *cap.* 1. it is enacted, "That "from thenceforth every Country ſhall be ſo well kept, that immediately "upon Robberies and Felonies committed freſh Suit ſhall be made from "Town to Town, and from Country to Country." And *cap.* 2. of the ſaid Statute, "If the Country will not anſwer for the Bodies of ſuch "manner of Offenders, the Pain ſhall be ſuch, that every Country, that "is to wit, the People dwelling in the Country, ſhall be anſwerable for "the Robberies done, and alſo the Damages; ſo that the whole Hundred "where the Robbery ſhall be done, with the Franchiſes being within the "Precinct of the ſame Hundred, ſhall be anſwerable for the Robberies "done: And if the Robbery be done within the Diviſion of two Hun-"dreds, both the Hundreds, and the Franchiſes within them, ſhall be "anſwerable: And after that the Felony or Robbery is done, the Country "ſhall have no longer Space than (*b*) Half a Year, within which Half-"Year it ſhall behove them to agree for the Robbery or Offence, or elſe "that they will anſwer for the Bodies of the Offenders."

(*b*) My Lord *Coke* ſays, that this Statute expreſly gives Half a Year, and not forty Days, as mentioned in an Edition of the Statutes then lately publiſhed; but that the forty Days are given by the Statute 28 E. 3. c. 11. 2 Inſt. 569.——But in 3 Lev. 320. it is ſaid, that upon Search of the Parliament Roll it appears that the Statute of *Winton* gives only forty Days to the Country, and that the Statute 28 *E.* 3. is but a Confirmation thereof; and accordingly it was adjudged, where the Plaintiff brought an Action on the Statute of *Winton*, and declared that he was robbed, and none of the Robbers taken within forty Days, according to the ſaid Statute; and with this the modern Precedents agree, as Raſt. Ent. 406. Co. Ent 351. Herne 215. The. Brev. 141. 2 Sand. 376.

(*c*) That this is not a penal Law, ſo that the Statutes of Jeofails extend to Actions brought thereupon, but is a Law made for the Peace of the Kingdom, and Advancement of Juſtice, Cro. Jac. 496. 12 Mod. 242.

The (*c*) Statute of *Winton* (*d*) gives the Action againſt the Hundred; but by ſubſequent Statutes, ſuch as 27 *Eliz. cap.* 13. 8 *Geo.* 2. *cap.* 16. ſeveral Alterations and Additions have been made therein, which we ſhall conſider under the following Heads.

(*d*) And therefore the beſt Way for the Plaintiff to conclude his Declaration is *contra Formam Statuti*, becauſe the Statute of *Winton* only gives the Action, Cro. Jac. 187, 118. Yelv. 116. Noy 125. Show. 94. Andr. 115, 117. Comb. 160, 161.

1. What Kind of Robbery it muſt be ſo as to make the Hundred liable, and how far it is neceſſary that it be committed on the Highway.

It ſeems to be admitted, that no Kind of Robbery will make the Hundred liable, but that which is done openly, and with Force and Violence; and that therefore the (*d*) private Stealing or taking any Thing from the Party, does not come within the Statutes which make the Hundred liable, becauſe the Hundred is not liable becauſe they did not prevent the Robbery, but becauſe they did not apprehend the Robbers, which in private Felonies, and of which they had no Notice, it would be difficult, if not impoſſible for them to do. 7 Co. 6, 7. 2 Salk. 614. pl. 4. (*d*) Where a Carrier's Son and Servant conſpired to rob him. Styl. 427.

Alſo it hath been adjudged and is admitted in all the Books which ſpeak of this Matter, that a Robbery in a Houſe, whether it be by Day or by Night, does not make the Hundred liable: The Reaſons whereof are, that every Man's Houſe is in Law eſteemed his Caſtle, which he himſelf is obliged to defend, and into which no Man can enter, to ſee what is doing there, without his Leave; alſo being done in a Houſe, the Inhabitants of the Hundred cannot be preſumed to have Notice of it, ſo as to be able to apprehend the Offenders. 7 Co. 6, 7. *Sendill's* Caſe. Moor 620. 3 Leon. 262. Cro. Jac. 496. Cro. Eliz. 753.

Bulſ. 146. 2 Inſt. 569. 2 Salk. 614. pl. 4.

* But if a Perſon be aſſaulted in the Highway, and carried into a Houſe, and there robbed, it ſeems the Hundred ſhall be liable; for otherwiſe the Proviſion made by the Statute would be eluded †. * Page 67 Sid. 263. *& vide* Salk. 614. pl. 4. 7 Mod. 157.

† The Caſe in Sid. does not warrant the Text, neither does Salk. yet there is ſome Mention of ſuch a Caſe in 7 Mod. 160. ſuppoſing it to be an empty Waſte Houſe, but no Opinion as to this Point.

Alſo it does not ſeem neceſſary that the Robbery ſhould be committed in the Highway, nor alledged to have been ſo by the Plaintiff in his Declaration. 7 Mod. 159. may be in a private Way,

——may be in a Coppice; and in both Caſes the Hundred ſhall be chargeable. 2 Salk. 614. pl. 4.

Therefore where upon the Statute of Hue and Cry the Plaintiff declared, *quod quædam Perſonæ ignotæ, &c. apud quendam locum ex Auſtrali parte cujuſdam Januæ vocat'* Fair-Mile Gate, *infra Parochiam, &c. vi & armis* aſſaulted him, and robbed him of ſo much Money, and there being a Verdict for the Plaintiff, it was moved in Arreſt, that *apud quendam Locum* might be meant of a Robbery committed in a Houſe, Garden, or Wood, for which the Hundred is not liable, being only obliged to guard the Highways: But it was held, that the Declaration was good, eſpecially after Verdict, becauſe it muſt be intended that this was given in Evidence, otherwiſe the Plaintiff would have been nonſuited: Alſo the Court held, that without the Help of a Verdict, this Declaration had been good, and that it was not neceſſary for the Plaintiff to alledge, that the Robbery was committed on the Highway, more than that it was committed by Day, and not by Night, and that all the antient Precedents were accordingly. Carth. 71. 3 Mod. 258. Show. 60. Comb. 150. S. C. adjudged between *Young* and the Inhabitants of the Hundred of *Tolſcomb.* Wil. Rep. 412, 437. 2 Ld. Raym. 828. 11 Mod. 8. pl. 3. 2 Stra. 1011.

2. On what Day or Time of the Day it muſt be committed.

It hath been reſolved by three Judges againſt one, that a Robbery on the Sabbath Day ſhould charge the Hundred, and that the Purſuing of Robbers who violate the Sabbath was ſo far from being a Profanation of that Day, that Cro. Jac. 496. *Waite* verſus *the Hundred of Stoke.*

Brown 156. S. P. admitted.

that it was a Work of Charity and Juſtice; alſo that ſeveral Perſons, ſuch as Phyſicians, Chirurgeons, Midwives, &c. were neceſſitated to travel on that Day, and it was but reaſonable that they ſhould be protected in their Journey.

(a) This Statute does not ſeem to extend to Perſons in the Country riding or going to Church, nor to Phyſicians, Chirurgeons, &c. who are under a Neceſſity of travelling on this Day Stra. 406. Comyns 345. pl. 175.

But now by the 29 *Car.* 2. *cap.* 7. *par.* 5. it is enacted, "That if any "Perſon or Perſons whatſoever, which ſhall (*a*) travel upon the Lord's "Day, ſhall be then robbed, that no Hundred, or the Inhabitants thereof, "ſhall be charged with, or anſwerable for, any Robbery ſo committed; "but the Perſon or Perſons ſo robbed ſhall be barred from bringing any "Action for the ſaid Robbery; any Law to the contrary notwithſtanding. Nevertheleſs the Inhabitants of the Counties and Hundreds (after "Notice of any ſuch Robbery to them or ſome of them given, or after "Hue and Cry for the ſame to be brought.) ſhall make or cauſe to be "made freſh Suit and Purſuit after the Offenders with Horſemen and "Footmen, as by the 27 *Eliz. cap.* 13. is provided; upon pain of forfeiting to the King's Majeſty, his Heirs and Succeſſors, as much Money as might have been recovered againſt the Hundred by the Party robbed, if this Law had not been made."

7 Co. 6. b. *Milborn*'s Ca. 2 Inſt. 569.

It is clearly agreed, that for a Robbery committed in the Night, the Hundred is not chargeable, becauſe they cannot be preſumed to have Notice thereof, ſo as to be able to apprehend the Robbers.

7 Co. 6. a. *Aſtpele*'s Caſe. Cro. Jac. 106. And. 158. Leon. 57. Savil 83.

But yet it is not neceſſary that the Robbery ſhould be committed after Sun-riſe, and before Sun-ſet, and that therefore if there be as much Day-light at the Time that a Man's Countenance might be diſcerned thereby, though it be before Sun-riſe or after Sun-ſet, the Hundred ſhall be liable.

* Page 68 Carth. 71. Comb. 150. 3 Mod. 258.

Alſo it is not neceſſary for the Plaintiff to alledge in his Declaration, that the Robbery was committed in the Day time, and not in the Night: * But it ſeems, that if upon the Evidence it turns out to have been committed in the Night, he cannot have a Verdict.

and ſee the Authorities to third Paragraph above. Show. 62. S. P. admitted.

Sid. 263. 7 Mod. 159. 3 Mod. 258. Comb. 150. Carth. 71.

Alſo it hath been held, that if Robbers drive or oblige the Waggoner to drive his Waggon from the Highway by Day, but do not rob or take any Thing till Night, that yet this is a Robbery in the Day-time ſo as to charge the Hundred.

3. What Hundred ſhall be ſaid to be liable.

By the Statute of *Winton* it is enacted, "That if the Robbery be done "within the Diviſion of two Hundreds, both the (*b*) Hundreds and the "Franchiſes within them ſhall be anſwerable.

(*b*) An Action may be brought againſt the Inhabitants *in Dimidio Hundredi de* W. and this Half Hundred the Court will intend a Hundred of itſelf, eſpecially after Verdict; and that if it were otherwiſe, it ſhould have been ſo pleaded or given in Evidence; and that it is the ſame Thing as an Action brought againſt the Inhabitants of the Hundred of *W.* commonly called the Half Hundred of *W.* Hob. 246. pl. 310. *Conſtable*'s Caſe. Brown. 156. S. C.

Hutton 125. *Dean*'s Caſe, *per Cur.*

If Robbers aſſault a Perſon with an Intent to rob him in one Hundred, and he eſcapes and flies into another, whither he is purſued by the Robbers, and there robbed, the laſt Hundred ſhall be liable.

2 Salk. 614. pl. 4. 7 Mod 157. S.C. *Cowper*

So where by ſpecial Verdict it was found, that the Plaintiff was travelling in the Highway in the Hundred of *A.* where he was ſet upon and carried into the Hundred of *B.* and robbed in a Copſe in the Highway of this Hun-

Hundred; and it was adjudged that the Hundred of *B.* ſhould be liable, for that there the Robbery was committed, and not before. verſus. *The Hundred of Baſingſtoke.*

2. Ld. Raym. 826. and ſee 3 Salk. 184. Show. 60. 3 Mod. 258, 287. 2 Saund. 379, 423. 1 Mod. 8. pl. 3.

If one be taken in the Hundred of *A.* and carried into the Hundred of *B.* into a Houſe there, *viz.* a Manſion-Houſe, and robbed, or taken in the Day-time in *A.* and carried to *B.* and there robbed in the Night, it is ſaid that there is no Remedy againſt either Hundred; theſe Caſes not being provided for by the Statute. 2 Salk. 615.

By the 27 *Eliz. cap.* 13. *par.* 2. reciting that the Inhabitants of Hundreds do not proſecute the Hue and Cry brought to them, becauſe thoſe Hundreds only are liable in which the Robberies have been committed, it is enacted, "That the Inhabitants and Reſiants of every or any ſuch "Hundred (with the Franchiſes within the Precinct thereof,) wherein "Negligence, Fault or Defect of Purſuit and freſh Suit after Hue and "Cry made ſhall happen to be, ſhall anſwer and ſatisfy the one Moiety "or Half of all and every ſuch Sum or Sums of Money and Damages, "as ſhall be recovered or had againſt or of the ſaid Hundred, with the "Franchiſes therein, in which any Robbery or Felony ſhall at any Time "hereafter be committed or done; and that the ſame Moiety ſhall and "may be recovered by Action of Debt, Bill, Plaint or Information in "any of the Queen's Majeſty's Courts of Record at *Weſtminſter*, by and "in the Name of the Clerk of the Peace for the Time being, of or in "every ſuch County within this Realm, where any ſuch Robbery and "Recovery by the Party or Parties robbed ſhall be, without naming the "Chriſtian Name or Surname of the ſaid Clerk of the Peace; which "Moiety ſo recovered ſhall be to the only Uſe and Behoof of the Inhabitants of the ſaid Hundred where any ſuch Robbery or Felony ſhall be "committed or done."

* 4. What Perſon is to bring the Action, and make Oath of the Robbery. * Page 69

If a Servant be robbed, in the Abſence of his Maſter, of his Maſter's Money, it is clear that the Maſter may maintain an Action for it againſt the Hundred; but then the Servant muſt make Oath that he knew not any of the Robbers. 2 Salk. 613. pl. 2. Comb. 263. 4 Mod. 303. 12 Mod. 54. Cro Car. 31.

Raymond ver. *Hundred of Oking*, adjudged. Cro. Car. 336. S. P. adjudged, and that the Servant was the proper Perſon to make the Oath. Styl. 156. S. P. admitted. Latch 127. S. P. and that the Maſter or Servant may bring the Action.—But the Oath muſt be by the Servant, when robbed in the Abſence of his Maſter. Cro. Eliz. 142. *Green*'s Caſe adjudged. Leon. 323. S. C. adjudged.—For the Statute of 27 Eliz. c. 13. which requires that the Party robbed ſhall make Oath within twenty Days next before the Action brought, that he knew not the Robbers, * *&c.* was made, *1ſt*, That the Perſon robbed ſhould enter into a Recognizance to proſecute the Robbers, if he knew them, or any of them. *2dly*. That the Hundred might be excuſed upon the Conviction of ſuch Perſon or Perſons. *3dly*, To prevent a Robbery by Fraud. 3 Mod. 288.—For if the Robbery be by Combination, the Party cannot recover. Show. 94. Carth. 145. Holt. 460. pl. 1. * See *infra*, 70, 72.

Alſo the Servant, being robbed in his Maſter's Abſence, may himſelf maintain an Action againſt the Hundred, and may (*a*) declare that he was poſſeſſed *ut de Bonis ſuis propriis, &c.* And though the Jury find that he was 2 Salk. 613. pl. 1. 4 Mod. 303. 11 Mod. 8. pl. 3. 12 Mod. 54.

2 Ld. Raym. 904. Comb. 263. S. C. *Combs* ver. *The Hundred of Bradley* S. C. 2 Sid. 45. The ſame Law if a Carrier be robbed. (*a*) Where a Carrier being robbed declared of Goods and Chattels taken out of his Poſſeſſion; and for want of alledging that he had a Property in them, adjudged that as to thoſe Goods he could not recover. 2 Sand. 379. *Pinkney* ver. *The Inhabitants of Eaſt Hundred, in Com' Rotel.*

was robbed of his Maſter's Money, yet he ſhall recover; for the Servant is poſſeſſed *ut de Bonis propriis* againſt all, and in reſpect of all, but him that hath the very Right.

Brown. 155. 3 Mod. 289. S. C. cited.

The Servant being robbed, may bring an Action againſt the Hundred: And though the Jury find that Part of the Things belonged to the Maſter, and Part to the Servant, yet ſhall he recover the Whole.

2 Salk. 613. pl. 1. *per Cur.*

If a Servant be robbed in the Preſence of the Maſter, the Maſter muſt ſue; and the Oath of the Maſter is ſufficient.

Carth. 145. 2 Salk. 613. pl. 1. Show. 94. 3 Mod. 287. S. C. *Aſhcomb* verſus *The Hundred of Elthorn.* 2 Ld. Raym. 829.

By ſpecial Verdict it was found, that the Plaintiff ſent his Servant to *Smithfield* Market with fat Cattle, where he ſold them for 108 *l.* and ſealed up 106 *l.* in four Bags, and delivered them to *J. S.* a Quaker, who travelled with him towards home, and they were both robbed; that the Servant made Oath of the Robbery, according to the Statute; but that the Quaker refuſed to be ſworn; and in an Action brought by the Maſter it was held, that as to the 40 *s.* taken from the Servant, he ſhould recover; but that as to the 106 *l.* taken from the Quaker, he could not, for want of an Oath according to the Statute; and that the Oath being enjoined merely for the Benefit of the Hundreds, who were oppreſſed by pretended Robberies, the Court could not depart from the expreſs Words of the Statute.

Carth. 146. *per Holt* C. J. which in *Carth.* is ſaid to have been done according to the

But it ſeems, the Servant who delivered the 106 *l.* to the Quaker, and was preſent at the Robbery, might maintain the Action in his own Name for all the Money; and that his own Oath would be ſufficient; and that he might declare upon the taking away the Money from the Quaker as his Servant, who, in Truth, was ſo for this Time.

Chief Juſtice's Advice; but in 3 Mod. 288-9 though the S. P. is admitted, yet it is ſaid that it could not have been done, becauſe the Year was expired within which the Action muſt be brought.

Carth. 146. *Jones* verſus *Hundred of Bromley* cited.

One *Jones*, and his Wife and Servant, travelling together, were all robbed of his Money, and *Jones* alone brought the Action for the whole Money againſt the Hundred, as well for what was taken from his Wife and Servant as from his own Perſon, and he alone, without his Wife or Ser-

* Page 70

* vant, made Oath of the Robbery; all which Matter being found on a ſpecial Verdict, it was adjudged, that his Oath alone was ſufficient within the Intent of the Statute; and although it was further found, that the Servant of *Jones*, who was robbed with his Maſter, knew one of the Robbers, whoſe Name was *Lenoe*, yet *Jones* had his Judgment.

Carth. 147. *Bird* verſus *Hundred of Oſſulſtrue* cited.

So where one *Bird*, a Laceman of *Colliton* in *Devonſhire*, in coming to *London* with his Servant, they left the uſual great Road between *Brentford* and *Hammerſmith*, and rode through a By-lane near Serjeant *Maynard*'s Houſe to avoid the Duſt, and in that Lane the Servant was robbed, in the Preſence of his Maſter, of a Box of Lace which was behind him on the Back of the Horſe, to the Value of 1200 *l.* and *Bird* the Maſter alone made Oath of the Robbery, and brought the Action; and by the Opinion of the C. J. *Holt*, the Oath of the Maſter was ſufficient, becauſe being preſent the Goods were in his Poſſeſſion; for the Poſſeſſion of the Servant in the Preſence of his Maſter is the Maſter's Poſſeſſion; and in this Caſe *Bird* recovered 1000 *l.* and had Execution.

Dyer 370. a. pl. 59. Com. Rep. 327. pl. 166.

If *A.* and *B.* travelling together are robbed of a Sum of Money to which they are both jointly intitled, they may both join in an Action againſt the Hundred; *ſecus* if they had ſeparate and diſtinct Intereſts.

It ought to appear that the Plaintiff has the Whole Property in the Money, of which the Robbery was committed.

5. Of

5. Of the Notice to be given of the Robbery.

By the 27 *Eliz. cap.* 13. *par.* 11. it is enacted, "That no Perſon or "Perſons, that ſhall happen to be robbed ſhall have or maintain any Ac- "tion, or take any Benefit of the Statutes which makes the Hundred lia- "ble, except the ſame Perſon and Perſons ſo robbed ſhall, with as much "convenient Speed as may be, give Notice and Intelligence of the ſaid Fe- "lony or Robbery ſo committed unto ſome of the Inhabitants of ſome "Town, Village or Hamlet, near unto the Place where any ſuch Robbery "ſhall be committed."

In the Conſtruction of this Clauſe of the Statute it hath been holden,

That if a Perſon be robbed in the Highway *in Diviſis Hundredorum*, he need not give Notice to the Inhabitants of each Hundred, but Notice to either of them is ſufficient. Cro. Jac. 675. *Foſter* verſus *The Hundreds of Specker* and *Iſleworth* adjudged.

That alledging Notice to have been given at a Village near to where the Robbery was committed is ſufficient, though ſuch Village happens to be in a different (*a*) County; for that Strangers are not obliged to take Notice of the Diviſion of Counties. Cro.Car. 41. adjudged. (*a*) Or in a different Hundred. Cro. Car. 379. adjudged.

That though it be the beſt Courſe to alledge, that Notice was given at the Place where the Robbery was committed, or at ſome Village near the Place, yet that Notice near the Hundred, or near the Diviſion of the Hundreds where the Robbery was committed, is ſufficient; and that this ſhall not be intended the moſt remote Part of the Hundred, eſpecially after a Verdict. Cro.Car.41. adjudged.

If ſeveral Perſons are in Company at the Time of the Robbery, it is ſaid, that Notice given by any one of them is ſufficient. Show. 94.

It hath been reſolved, that though the Notice given be five Miles from the Place where the Robbery was committed, that it is ſufficient; the Reaſon whereof is, becauſe that the Party, who is a Stranger to the Country, cannot have Conuzance of the neareſt Place or Town. March 11. Sir *John Compton*'s Caſe.

Alſo if the Party robbed give Notice with as much convenient Speed as may be, though he be otherwiſe remiſs in (*b*) not purſuing the Robbers, or refuſes to lend his Horſe for that Purpoſe, yet ſhall he not loſe his Action for this, nor the Hundred be excuſed. (*b*) March 11. 2 Leon. 82. S. P. agreed *per Cur.*

* And now by the 8 *Geo.* 2. *cap.* 16 it is further enacted, "That no "Perſon ſhall have or maintain any Action againſt any Hundred, or take "any Benefit by Virtue of the Statutes of *Winton*, or 27 *Eliz. cap.* 13. or "either of them, unleſs he, ſhe, or they ſhall, over and beſides the Notice "already required by the laſt of the above-mentioned Statutes to be given "of any Robbery, with as much convenient Speed as may be, after any "Robbery on him, her, or them committed, give Notice thereof to one "of the Conſtables of the Hundred, or to ſome Conſtable, Borſholder, "Headborough, or Tithingman of ſome Town, Pariſh, Village, Ham- "let, or Tithing, near unto the Place wherein ſuch Robbery ſhall happen, "or ſhall leave Notice in Writing of ſuch Robbery at the Dwelling-houſe "of ſuch Conſtable, *&c.* † deſcribing in ſuch Notice to be given or left "as

* Page 71

The Court of C. P. was equally divided, whether where a Part only of what was loſt was well deſcribed, the Party

robbed ought to recover for what was well deſcribed in the Advertiſement. *Vide* 2 Barnes 371, 372, 458. † The Action lies, tho' the Plaintiff, after the Robbery, paſſes by a Place where there are two Conſtables, without giving Notice, if he did not know of them, tho' he did not enquire. *Semb. Wilſ.* 105, 109.—If a Man is robbed ſoon after Six, rides through a Village without giving Notice,

" as aforeſaid, ſo far as the Nature and Circumſtances of the Caſe will ad-
" mit, the ‡ Felon or Felons, and the Time and Place of the Robbery, and
" alſo ſhall, within the Space of twenty Days next after the Robbery com-
" mitted, cauſe public Notice to be given thereof in the *London Gazette*,
" therein likewiſe deſcribing, ſo far as the Nature and Circumſtances of
" the Caſe will admit, the Felon or Felons §, and the Time and Place of
" ſuch Robbery, together with the || Goods and Effects whereof he, ſhe,
" or they was or were robbed."

‡ Deſcription of one of the Robbers whoſe Eye-brows were ſworn to be red (on the Trial) was not taken Notice of in the Gazette, held to be material for the Defendant, and Judgment for him thereupon. 2 Wilſ. 113. ——§ If a material Deſcription of one of the Robbers is not mentioned in the Gazette, as that he had *particular large red Eye-brows*, it ſeems the Action will not lie. 2 Wilſ. 105, 109.——|| It ſeems the Action will not lie, if the whole Sum of which the Plaintiff is robbed is not mentioned in the Gazette. 2 Wilſ. 105, 109.

6. Where the Party muſt give Bond for Payment of Coſts, in caſe he does not prevail.

Where it is ſet out, that the Party went before S. C. Secondary, without the Word *(then)* ſufficient; eſpecially after Verdict. Andr. 116.

To this Purpoſe by the 8 *Geo.* 2. *cap.* 16. it is enacted, " That before
" any Action commenced the Party ſhall go before the chief Clerk, or
" Secondary, or the Filazer of the County wherein ſuch Robbery ſhall
" happen, or the Clerk of the Pleas of that Court wherein ſuch Action is
" intended to be brought, or their reſpective Deputies, or before the
" Sheriff of the County wherein the Robbery ſhall happen, and enter into
" a Bond to the High Conſtable or High Conſtables of the Hundred in
" which the Robbery ſhall be committed, in the penal Sum of 100*l.* with
" two ſufficient Sureties to be approved of by ſuch chief Clerk, Secondary,
" Filazer, or Clerk of the Pleas, or their reſpective Deputies, or the
" Sheriff of the ſaid County, with Condition for ſecuring to ſuch High
" Conſtable or High Conſtables (who are hereby impowered and required
" to enter or cauſe to be entered an Appearance, and alſo to defend ſuch
" Action) the due Payment of his or their Coſts, after the ſame ſhall be
" taxed by the proper Officer, in caſe that he, ſhe, or they (the Plaintiff
" or Plaintiffs in ſuch Action) ſhall happen to be nonſuited, or ſhall diſ-
" continue his, her, or their Action, or in caſe that Judgment ſhall be given
" againſt ſuch Plaintiff or Plaintiffs on Demurrer, or that a Verdict ſhall
" be given againſt him, her, or them."

Where the Bond is ſet out to be given before S. C. Secondary of *E. V.* chief Clerk to inrol Pleas: this is a good Deſcription, tho' this Statute uſes the Word (Secondary) only. Andr. 115. It is ſufficient to ſay, that the Bond was given to *J. H.* High Conſtable, without averring that there was but one. Andr. 116.

And it is further enacted by the ſaid Statute, " That when any ſuch
" Bond as abovementioned ſhall be entered into before the ſaid Sheriff,
" ſuch Sheriff ſhall immediately certify the ſame in Writing to the chief
" Clerk or Secondary in the Court of King's Bench, or his or their Deputy,
" or to the Filazer of that County wherein ſuch Robbery ſhall be com-
" mitted, or his Deputy, in caſe the Action be intended to be brought in
" the Court of Common Pleas; or, if in the Court of Exchequer, to the
" Clerk of the Pleas, or his Deputy; which Certificate ſhall be delivered
" by the Party or Parties robbed, to the ſaid chief Clerk or Secondary, or
" his or their Deputy, or to ſuch Filazer, or his Deputy, before any Pro-
" ceſs ſhall iſſue for the Commencement of ſuch Suit as aforeſaid; and ſuch
" chief Clerk, Secondary, Filazer, or Clerk of the Pleas, or their reſpec-

tice, tells Men on the Road, at Seven gives Notice to an Ink-keeper at a Town two Miles and an Half off, and then gives Notice to the High Conſtable three Miles off, between Eight and Nine o'Clock, it is good Notice within 8 Geo. 2. c. 16. Stra. 1170.

" tive

" tive Deputies, or the ſaid Sheriff, ſhall not take any greater Fee or Re-
" ward for making ſuch Bond than five Shillings over and above the Stamp-
" Duties; nor ſhall any Sheriff take any greater Fee or Reward for making,
" *nor ſhall any ſuch chief Clerk, Secondary, Filazer or Clerk of the Pleas, * Page 72
" or their reſpective Deputies, take any greater Fee or Reward for re-
" ceiving and filing ſuch Certificate, than two Shillings and Sixpence; and
" ſuch chief Clerk, Secondary, Filazer, or Clerk of the Pleas, or their
" reſpective Deputies, and Sheriff as aforeſaid, are hereby required to de-
" liver over *gratis* (upon reaſonable Requeſt made for that Purpoſe) all
" and every ſuch Bonds to be by them reſpectively taken purſuant to this
" preſent Act, to the High Conſtable or High Conſtables to whoſe Uſe
" the ſame ſhall be taken as aforeſaid."

7. Of the Oath to be taken of the Robbery, and before whom the ſame muſt be.

By the 27 *Eliz. cap.* 13. *par.* 11. it is enacted, " That the Party
" robbed ſhall not have any Action except he or they ſhall firſt, within
" twenty Days next before ſuch Action to be brought, be examined upon
" his or their corporal Oath, to be taken before ſome Juſtice of the Peace
" of the County where the Robbery was committed, or near unto the ſame,
" whether he or they do know the Parties that committed the ſaid Rob-
" bery, or any of them †; and if, upon Examination, it be confeſſed that † *Vide ante* 69, 70.
" he or they do know the Parties that committed the ſaid Robbery, or
" any of them, that then he or they ſo confeſſing ſhall, before the ſaid
" Action be commenced or brought, enter into ſufficient Bond by Recog-
" nizance before the ſaid Juſtice before whom the ſaid Examination is had,
" effectually to proſecute the ſame Perſon or Perſons ſo known to have
" committed the ſaid Robbery, by Indictment or otherwiſe, according to
" the due Courſe of the Laws of this Realm."

In the Conſtruction of this Clauſe of the Statute the following Points have been holden,

That if the Party does not know the Robbers at the Time of the Rob- March 11.
bery committed, though he happens to know them afterwards, it is not material.

It was holden by three Judges againſt one, that the Party's ſwearing that Noy 21.
he did not know the Robbers, without adding, nor any of them, is not *Bateman's* Caſe.
ſufficient, becauſe not purſuant to the Statute, and becauſe on ſuch equi- 3 Lev. 328.
vocal Oath the Party cannot be puniſhed for Perjury. S. P. by *J. Powel* verſus *J. Rokeſby*, who held, that if a Perſon ſwears that he was robbed by four Perſons unknown to him, all the four muſt be unknown to him.

It hath been adjudged, that the Oath may be taken before a Juſtice of Cro. Car.
the County, though not in the County at the Time of adminiſtring it; as 211. pl. 3.
where a Robbery was committed in *Berks*, and a Juſtice of that County Jones 239.
reſiding in *London*, the Party was ſworn before him according to the Sta- *Helier* verſus *Hundred de Benhurſt.*
tute, in *London*, and it was held ſufficient; for the Juſtice acts only as (*a*)
a miniſterial Officer, and as appointed by the Statute, and not in a judicial Capacity as a Juſtice of the Peace.

(*a*) And as his Office herein is purely miniſterial, it is ſaid, that if he refuſes to take the Oath of Examination of the Party, an Action on the Caſe will lie againſt him. Leon. 323. Sid. 209.

If in an Action on the Statute of Hue and Cry it be alledged, that the *Vide* 2 Sid.
Oath was taken before a Juſtice of Peace of *Yorkſhire*; this will be ſufficient, 45.

although objected, that there is no ſuch Juſtice, becauſe that in every Riding they have ſeveral Commiſſions.

* 8. At what Time the Action is to be brought.

* Page 73

(a) By 8 G. 2. c. 16. ſ. 14. no Action can be brought but within 6 Months.

By the 27 *Eliz. cap.* 13. *par.* 9. it is enacted, "That no Perſon or "Perſons robbed ſhall take advantage of the Statutes, to charge any Hun- "dred where any ſuch Robbery ſhall be committed, except he or they ſo "robbed ſhall commence his or their Suit or Action within (*a*) one Year "next after ſuch Robbery committed."

In the Conſtruction whereof it hath been holden;

Hob. 139, 140. Moor 878. pl. 1233. Brownl. 156. S. C. *Norris* verſus *Hundred of Gawtry.*

That if a Perſon be robbed the 9th of *Octob.* 13 *Jac.* and ſo laid, and the Teſte of the Writ be the 9th of *Octob.* 14 *Jac.* that this is not purſuant to the Statute; and that in this Action, which is Penal againſt the Hundred, there is no Reaſon to exclude the Day on which the Fact was done, nor to make ſuch Conſtruction as is done in Protections and the Inrolment of Deeds, which have always received a benign Interpretation.

Sid. 139. pl. 12. Keb. 495. S. C. *Newman* ver. *Inhabitants of Strafford.*

In an Action on the Statute of Hue and Cry, the Plaintiff made Oath according to the Statute, and within twenty Days brought a Writ, and becauſe it was vicious, let it fall; and after the twenty Days took out a new one, without making any Oath a-new, or entering any Continuances between the ſaid Writ and that; and the Court held clearly, that the ſecond Writ was not brought according to the Statute; for ſo they ſaid, that Proviſion in the Statute would be to no Manner of Purpoſe.

3 Lev. 347. *Bearecroft* ver. *Hundred of Burnham* and *Stone.*

An Action was brought by the Maſter, on the Statute of *Winton*, for a Robbery committed on his Servant, in which he declared of an Aſſault and Battery done to himſelf, (though then fifty Miles from the Place,) alſo that he made Oath that he did not know any of the Perſons; the Iſſue was entred of Record, and the Jury appeared at the Bar ready to try it; but being for other Buſineſs adjourned to another Day, the Plaintiff, obſerving his Miſtake, moved to amend, by declaring of a Robbery on his Servant, *&c.* and it apppearing that the Year in which the Action muſt be brought was expired, and conſequently the Action muſt be loſt if not allowed, the Court after long Debate and Conſideration of former Precedents admitted him to amend †.

† The Robbery was the Giſt of the Action.

9. What Evidence will maintain the Action; and therein of the Witneſſes for and againſt it.

2 Leon. 12. 1 Mod. 193. Forteſc Rep. 246. Gilb. Caſ. 113. 12. Vin. Abr. 13.

It ſeems that from the Neceſſity of the Caſe, the Party himſelf that was robbed is to be admitted as a Witneſs, but then his Teſtimony muſt be corroborated by collateral Proof and Circumſtances, and ſuch as may induce a Jury to believe that a Robbery was actually committed, that the Party loſt what he declared for.

Vent. 351. 713. pl. 92. Mod. 73.

But it was held, that in an Action againſt the Hundred, no Inhabitant of the Hundred could be a Witneſs, becauſe he was concerned in Intereſt.

But now by the 8 *Geo.* 2. *cap.* 16. reciting, that by the Laws then in being, the Perſon or Perſons robbed may be admitted in any Action to be brought againſt the Hundred, as a Witneſs to prove the Robbery, and the Money, Goods or Effects whereof he, ſhe, or they, was or were robbed; and

and yet no Perſon inhabiting within the ſaid Hundred can be admitted as a Witneſs for or on behalf of the ſaid Hundred, by reaſon of the Intereſt he or ſhe may have in the Conſequences of the ſaid Action, which is commonly very inconſiderable; therefore it is enacted, "That in any Action already *Page 74
"brought, or to be brought, againſt any Hundred, any Perſon inhabiting "within the ſaid Hundred, or any Franchiſe thereof, ſhall be admitted as "Witneſs for or on behalf of the ſaid Hundred, in the ſame Manner as if "he or ſhe were not an Inhabitant thereof, but reſided in any other Hun-"dred whatſoever."

10. What ſhall excuſe the Hundred; and therein of apprehending the Robbers.

By the Statutes of *Winton* 13 *E.* 1. *cap.* 1. and 28 *E.* 3. *cap.* 11. the Robbers muſt be taken within forty Days after the Robbery committed; alſo by the ſaid Laws it was neceſſary that all the Robbers ſhould be taken, to excuſe the Hundred. 2 Inſt. 569. 3 Lev. 320. Dyer 370. a. 7 Co. 7. Sid. 11.

But now as to this latter Matter, by the 27 *Eliz. cap.* 13. *par.* 8. it is enacted, "That where any Robbery is or ſhall be hereafter committed by "two or a greater Number of Malefactors, and that it happen any one "of the ſaid Offenders to be apprehended by Purſuit, to be made accord-"ing to the ſaid former mentioned Laws and Statutes, or according to this "Act, that then, and in ſuch Caſe, no Hundred or Franchiſe ſhall in any "wiſe incur or fall into the Penalty, Loſs, or Forfeiture mentioned either "in this preſent Act, or in any the ſaid former Statutes, although the Re-"ſidue of the ſaid Malefactors ſhall happen to eſcape, and not be appre-"hended; any Thing in this Statute, or in the ſaid former Statutes, to "the contrary notwithſtanding"

If a Robbery be committed, and Hue and Cry made, and afterwards, within the forty Days, an Inhabitant of the Hundred finds one of the Robbers in the Preſence of a Juſtice of the Peace, who charges him with the Robbery, and the Juſtice promiſes that he ſhall appear and be forth-coming, this is a Taking within the Statute; for being in the Preſence of the Juſtice, it muſt be underſtood that he was in his Cuſtody and Power, and therefore not neceſſary to lay hold on him. Vent. 118, 325. Raym. 221. 2 Lev. 4. S.C. *Methwin* ver. *Hundred of Thiſtlewerth.*

If Hue and Cry be made towards one Part of the County, and an Inhabitant of the Hundred apprehends one of the Robbers within another, this is a Taking within the Statute. Vent. 118, 119. *per Hale*, C. J.

By the 8 *Geo.* 2. *cap.* 16. it is enacted, "That no Hundred, or Fran-"chiſe therein, ſhall be chargeable, by Virtue of any of the Statutes, if any "one or more of the Felons, by whom ſuch Robbery ſhall be committed, "be apprehended within the Space of forty Days next after public Notice "given in the *London Gazette*, as by the Statute is provided." But this muſt be pleaded, and not given in Evidence on the General Iſſue.

And by the ſaid Statute 8 *Geo.* 2. to the Intent that Hue and Cry may be made with more Diligence and Effect, and other Perſons encouraged to take ſuch Felon or Felons, it is enacted, "That any Perſon or Perſons who ſhall "apprehend ſuch Felon or Felons within the Time herein before limited "for that Purpoſe, whereby the Hundred hath been actually indemnified or "diſcharged from any ſuch Action as aforeſaid, ſhall, upon due Proof "thereof, upon Oath made before two Juſtices of the Peace, (which Oath "the ſaid Juſtices are hereby alſo empowered and required to adminiſter,) "be intitled to the Reward of 10*l.* which Sum ſhall be raiſed upon the "Hundred by a Taxation and Aſſeſſment, to be made and to be levied, "and collected in the ſame Manner as the other Sums of Money, by this "preſent Act appointed to be raiſed upon the Hundred, are directed to be "aſſeſſed, levied and collected; and ſuch Sum of 10*l.* which ſhall be ſo

" rated, aſſeſſed, levied and collected as aforeſaid, ſhall be paid unto ſuch " two Juſtices of the Peace, within ten Days next after the ſame ſhall be " ſo levied and collected, to the Uſe of the Perſon or Perſons who ſhall be " thereunto intitled, as a Reward for having ſo apprehended ſuch Felon or
* Page 75 " * Felons, as aforeſaid; and ſuch Juſtices ſhall, upon reaſonable Requeſt " made for that Purpoſe, pay over and deliver the ſaid Sum to ſuch Per- " ſon or Perſons accordingly, in ſuch Shares and Proportions as the ſaid " Juſtices ſhall think reaſonable; Provided always, that ſuch Perſon or " Perſons, ſo intitled to ſuch Reward, ſhall not thereby be rendered un- " capable to be a Witneſs in any ſuch Action."

11. How the Money is to be levied, and each Hundredor to contribute to the Charges.

By the 27 *Eliz. cap.* 13 *par.* 14. reciting, that although the whole Hundred, where Robberies and Felonies are committed, with the Liberties within the Precinct thereof, are charged by the former Statutes with the anſwering to the Party robbed his Damages; yet nevertheleſs the Recovery and Execution, by and for the Party or Parties robbed, is had againſt one or a very few Perſons of the ſaid Inhabitants, and he and they ſo charged have not heretofore had any Means or Ways to have any Contribution of or from the Reſidue of the ſaid Hundred where the ſaid Robbery is committed, to the great Impoveriſhment of them againſt whom ſuch Recovery or Execution is had;

By *Par.* 5. of the ſaid Statute it is enacted, " That, after Execution of " Damages by the Party or Parties ſo robbed had, it ſhall and may be law- " ful (upon Complaint made by the Party or Parties ſo charged) to and for " two Juſtices of the Peace (whereof one to be of the *Quorum*) of the ſame " County, inhabiting within the ſaid Hundred, or near unto the ſame where " any ſuch Execution ſhall be had, to aſſeſs and tax rateably and propor- " tionably, according to their Diſcretions, all and every the Towns, Pa- " riſhes, Villages and Hamlets, as well of the ſaid Hundred where any " ſuch Robbery ſhall be committed, as of the Liberties within the ſaid " Hundred, to and towards an equal Contribution, to be had and made " for the Relief of the Inhabitant or Inhabitants, againſt whom the Party " or Parties robbed before that Time had his or their Execution; and that " after ſuch Taxation made, the Conſtables or Conſtable, Headboroughs " or Headborough, of every ſuch Town, Pariſh, Village and Hamlet, " ſhall, by Virtue of this preſent Act, have full Power and Authority, " within their ſeveral Limits, rateably and proportionably to tax and aſſeſs, " according to their Abilities, every Inhabitant and Dweller in every ſuch " Town, Pariſh, Village and Hamlet, for and towards the Payment of " ſuch Taxation and Aſſeſſment, as ſhall be ſo made: And that if any " Inhabitant ſhall obſtinately refuſe and deny to pay the ſaid Taxation and " Aſſeſſment, ſo taxed and aſſeſſed, that then it ſhall and may be lawful " to and for the ſaid Conſtables and Headboroughs, and every of them, " within their ſeveral Limits and Juriſdictions, to diſtrain all and every " Perſon and Perſons ſo refuſing and denying, by his and their Goods and " Chattels, and the ſame Diſtreſs to ſell, and the Money thereof coming " to retain to the Uſe aforeſaid; the Surplus, if any, ſhall be delivered " unto the ſaid Perſon or Perſons ſo diſtrained."

And it is further enacted, by *Par.* 6. " That all and every the ſaid Conſta- " bles and Headboroughs, after that they have, within their ſeveral Limits " and Juriſdictions, levied and collected their ſaid Rates and Sums of Money " ſo taxed, ſhall, within ten Days after ſuch Collection, pay and deliver the " ſame over unto the ſaid Juſtices of Peace, or one of them, to the Uſe and

" Behoot

" Behoof of the ſaid Inhabitant or Inhabitants, for whom ſuch Rate, * Page 76
" Taxation, and Aſſeſſment ſhall be had or made, as aforeſaid; which Mo-
" ney ſo paid ſhall, by the Juſtices or Juſtice ſo receiving the ſame, be de-
" livered over (upon Requeſt made) unto the ſaid Inhabitant or Inhabitants,
" to whoſe Uſe the ſame was collected."

And it is further enacted, *par.* 7. " That the like Taxation, Aſſeſſment,
" Levying by Diſtreſs, and Payment, as aforeſaid, ſhall be had and done
" within every Hundred where Default or Negligence of Purſuit; and freſh
" Suit ſhall be for and to the Benefit of all and every Inhabitant and Inha-
" bitants of the ſame Hundred where ſuch Default ſhall be, that ſhall at
" any Time hereafter, by Virtue of this preſent Act, have any Damages
" or Money levied of them, for or to the Payment of the one Moiety, or
" Half of the Money recovered againſt the ſaid Hundred where any Rob-
" bery ſhall be committed."

It hath been adjudged, that a Perſon occupying Lands in an Hundred, al- 2 Sand. 423. *Leigh* ver. *Chapman.*
though he hath no Houſe nor Dwelling there, is an Inhabitant within the Meaning of the Statute, for that otherwiſe the Statute might be eluded.

It is ſaid that a Perſon, though not an Inhabitant at the Time of the Robbery committed, but becoming one before the Judgment, ſhall contribute to the Charges. March 11. but Hut. 125. S. P. *cont.*

And now, for the more equal Rating and Levying the Money, for which the Hundreds are chargeable, by the 8 *Geo.* 2. *cap.* 16. it is enacted, " That
" no Proceſs for Appearance in any Action be brought upon the ſaid Sta-
" tutes, or either of them, againſt any Hundred, ſhall be ſerved on any
" Inhabitant thereof, ſave only upon the High Conſtable, or High Con-
" ſtables, of the Hundred wherein the Robbery ſhall happen, who is and
" are hereby required to cauſe public Notice thereof to be given in one
" of the principal Market-Towns within ſuch Hundred, on the next
" Market-Day, after he or they ſhall be ſerved with ſuch Proceſs; or if
" there ſhall happen to be no Market-Town within ſuch Hundred, then
" in ſome Pariſh-Church within the Hundred, immediately after Divine
" Service, on the *Sunday* next after his or their being ſerved with ſuch
" Proceſs; and he or they is and are alſo empowered and required to en-
" ter, or cauſe to be entered, an Appearance in the ſaid Action, and alſo
" to defend the ſame for and on behalf of the Inhabitants of the ſaid
" Hundred, as he or they ſhall be adviſed; and in caſe the Plaintiff or
" Plaintiffs in ſuch Action ſhall recover and obtain Judgment therein,
" that then no Proceſs of Execution ſhall be ſerved on any particular In-
" habitant or Inhabitants of the ſaid Hundred, or any Franchiſe within
" the Precincts thereof, nor on the ſaid High Conſtable or High Con-
" ſtables; but the Sheriff, or his Officer, ſhall, upon the Receipt of any
" Writ or Writs of Execution to him directed, in purſuance of the ſaid
" Judgment, (inſtead of ſerving the ſaid Writ or Writs on any Inhabitant
" or Inhabitants) cauſe the ſame to be produced, and ſhewn *gratis*, unto
" two Juſtices of the Peace of the County, Riding or Diviſion, (whereof
" one to be of the *Quorum*) and reſiding within the ſaid Hundred, or
" near unto the ſame, who ſhall thereupon, with all convenient Speed,
" cauſe ſuch Taxation and Aſſeſſment to be made, and to be levied and
" collected in ſuch Manner as is preſcribed in and by the Statute 27 *Eliz*
" *cap.* 13. in which Taxation and Aſſeſſment there ſhall be provided for
" and included, over and above what the Coſts and Damages, recovered by
" the Plaintiff or Plaintiffs in ſuch Action, ſhall amount to, all ſuch juſt
" and neceſſary Expences which any High Conſtable, or High Conſtables
" of any Hundred, hath or have been or ſhall be at, in having defended
" any ſuch Action as aforeſaid, Claim being made thereto by ſuch High Con-

By Stat. 22 Geo. 2. c. 46. ſ. 4. No Writ of Execution againſt the Inhabitants of any Hundred, on any Judgment obtained by Virtue of any Act of Parliament, ſhall be levied on any particular Inhabitant of ſuch Hundred; but the Sheriff ſhall, on Receipt of any ſuch Writ, cauſe the ſame to be produced to two Juſtices of the Peace, as is directed by 8 Geo. 2. c. 16. ſ. 4. and thereupon the ſaid Juſtices ſhall, as is directed by the ſaid Act, cauſe a Taxation to be made and collected for paying the Coſts and Damages

recovered by the Plaintiff, and all ſuch neceſſary Expences as any Inhabitant of ſuch Hundred ſhall have been at in defending ſuch Action; the ſame being firſt proved on Oath, and the Attorney's Bill being firſt taxed; and the Sums ſo collected ſhall, within the Time by the ſaid Act limited, be paid to the Sheriff, and by him paid over to the Perſons intitled to the ſame, without Deduction or Fee.

* Page 77 " * Conſtable, or High Conſtables, before the ſaid Juſtices, upon due No-
" tice being given to him or them by the ſaid Juſtices for that Purpoſe;
" and the Sums of Money ſo to be levied and collected ſhall be paid over
" and delivered, (by ſuch Officer or Officers as by the ſaid Statute 27 *Eliz.*
" *cap.* 13. are to levy and collect the ſame,) within ten Days after ſuch
" Collection, to the Sheriff of the County wherein the Robbery ſhall hap-
" pen, to the Uſe and Behoof of the Plaintiff or Plaintiffs in ſuch Action,
" for ſo much as the Coſts and Damages by him, her, or them recovered
" ſhall amount to, and to the Uſe and Behoof of the ſaid High Conſta-
" ble or High Conſtables, for ſo much as his or their Expences in defend-
" ing the ſaid Action ſhall amount to, of which the ſaid High Conſtable
" or High Conſtables ſhall give in an Account, and make due Proof up-
" on Oath, to the Satisfaction of the ſaid Juſtices, before any ſuch Tax-
" ation and Aſſeſſment ſhall be made for the Reimburſing ſuch High
" Conſtable or High Conſtables, (which Oath the ſaid Juſtices are hereby
" impowered and required to adminiſter,) and ſhall in ſuch Expences have
" no further Allowance towards paying an Attorney to defend the ſaid
" Action, than what ſuch Attorney's Bill ſhall be taxed at by the proper
" Officer of that Court where ſuch Action ſhall be brought, which the
" ſaid High Conſtable or High Conſtables ſhall cauſe to be taxed for
" that Purpoſe."

And it is further enacted by the ſaid Statute, " That the Sum or Sums
" of Money which ſhall be paid over and delivered to the Sheriff of the
" County, as herein before mentioned, ſhall (upon reaſonable Requeſt
" made) be by him paid and delivered over to the ſeveral Parties who
" ſhall be intitled to receive the ſame, without any Deduction, Fee, or
" Reward whatſoever."

And that ſufficient Time may not be wanting for ſuch Taxation and Aſſeſſment to be duly made, and for the Money to be collected and levied thereupon, after ſuch Writ or Writs of Execution ſhall be ſhewn to ſuch Juſtices, and before the Sheriff ſhall be obliged to make a Return thereof, it is enacted, " That no Sheriff ſhall be called upon or required to make
" any Return to any ſuch Writ or Writs of Execution, as ſhall iſſue or
" be made out upon any Judgment which ſhall be recovered in any Action
" brought againſt any Hundred by virtue of the above-mentioned Statutes,
" or either of them, until after the Expiration of ſixty Days next after the
" Day whereupon ſuch Writ or Writs ſhall be delivered to the ſaid Sheriff,
" who is hereby required to endorſe on the Back thereof the Day on which
" he received the ſame."

And whereas it is reaſonable that the ſaid High Conſtable or High Con-
See Fitzgib. 296. pl. 4. ſtables ſhould be indemnified as to all Charges, which he or they ſhall neceſſarily expend in defending any Suit in purſuance of this preſent Act, and that Proviſion ſhould be made for reimburſing him or them not only of ſuch Expences as ſhall be over and above the taxed Coſts to be paid by the Plaintiff or Plaintiffs, in caſe of a Nonſuit, Diſcontinuance, or Judgment on Demurrer againſt him, her or them, or Verdict for the Defendants as aforeſaid, but even ſuch taxed Coſts alſo, in caſe the Plaintiff or Plaintiffs, and his, her, or their Sureties who ſhall be bound for the Payment thereof, ſhall happen to become inſolvent; it is therefore enacted, " That if any Plaintiff or Plaintiffs in an Action to be
" brought againſt any Hundred ſhall be nonſuited, or ſhall diſcontinue his,
" her, or their Action, or ſhall have a Judgment on Demurrer given, or
" a Verdict paſs againſt him, her, or them, it ſhall and may be lawful
" for any two Juſtices of the Peace, (ſuch as herein before mentioned)
" upon Complaint to them made for that Purpoſe, and upon an Account
" given in by ſuch High Conſtable or High Conſtables, and Proof made
" upon Oath, to the Satisfaction of the ſaid Juſtices, at the Expences
" neceſ-

" neceſſarily laid out as aforeſaid, (which Oath the ſaid Juſtices are " hereby impowered and required to adminiſter), to make and cauſe ſuch " Taxation and Aſſeſſment to be made, and to be levied and collected " * in ſuch Manner as is directed in and by the abovementioned Statute of* Page 78 " 27 *Eliz. cap.* 13. in order thereby to reimburſe ſuch High Conſtable or " High Conſtables all ſuch Charges, as he or they ſhall have neceſſarily " expended in defending ſuch Action, wherein ſuch Plaintiff or Plaintiffs " ſhall have been nonſuited, or ſhall have diſcontinued his, her, or their " Action, or againſt whom Judgment ſhall have been given upon Demur- " rer, or a Verdict ſhall have been given, over and above the Coſts in thoſe " Caſes to be taxed as aforeſaid; and in caſe it ſhall be made appear upon " Oath to the ſaid Juſtices of the Peace, (which Oath the ſaid Juſtices " are hereby alſo impowered and required to adminiſter,) to their Satiſ- " faction, that ſuch Plaintiff or Plaintiffs, and alſo his or their Sureties, is " and are inſolvent, ſo that the ſaid High Conſtable or High Conſtables " can have no Relief as to ſuch taxed Coſts by them expended in ſuch " Defence as aforeſaid, (ſave only by the Power herein after given to the " ſaid Juſtices,) it ſhall and may be lawful to and for ſuch two Juſtices of " the Peace to make and cauſe a Taxation and Aſſeſſment to be made, " and to be levied and collected in the ſame Manner, as is directed in " and by the aforeſaid Statute made 27 *Eliz. cap.* 13. in order thereby to " reimburſe ſuch High Conſtable or High Conſtables ſuch taxed Coſts, " as by reaſon of ſuch Inſolvency he or they ſhall not be able to recover " and receive of and from the Plaintiff or Plaintiffs in the Action, or his " or their Sureties, as aforeſaid."

And it is further enacted, " That the ſeveral Sum or Sums of Money, " which ſhall be ſo rated and aſſeſſed, and levied and collected as afore- " ſaid, for the Reimburſement of the Expences neceſſarily ſuſtained by " any High Conſtable or High Conſtables in Defence of any Action " brought againſt the Hundred upon the Statutes above mentioned, or " either of them, in caſe of any Judgment given againſt the Plaintiff or " Plaintiffs, ſhall be paid within ten Days after ſuch Collection, unto the " ſaid Juſtices, or one of them, to the Uſe and Behoof of ſuch High " Conſtable or High Conſtables, to whom the ſaid Juſtices ſhall, upon " Requeſt, pay and deliver over the ſame."

And it is further enacted, " That the Juſtices of Peace, by whom " ſuch Taxations and Aſſeſſments as aforeſaid ſhall, in purſuance of the " ſaid Statute made 27 *Eliz. cap.* 13. and alſo of this preſent Act, be made, " ſhall limit and appoint, at their Diſcretion, ſome certain reaſonable " Time within which ſuch Taxations and Aſſeſſments ſhall be levied and " collected, which Time ſhall not exceed thirty Days; and alſo that if " any ſuch Officer or Officers, who are to levy and collect ſuch Taxations " and Aſſeſſments as aforeſaid, ſhall refuſe or neglect to levy and collect " the ſame within ſuch Time as ſhall be limited and appointed by the " ſaid Juſtices of the Peace for their doing thereof, or ſhall refuſe or " neglect to pay and deliver over the Sums of Money ſo levied and col- " lected to the ſaid Sheriff, and alſo to the ſaid Juſtices, in ſuch Manner " as the ſame in the ſeveral Caſes herein before mentioned are reſpectively " directed to be paid, within the reſpective Times herein before limited " for ſuch Payment thereof, every ſuch Officer ſhall, for every ſuch Re- " fuſal or Neglect, forfeit double the Sum appointed to be by him levied " and collected as aforeſaid."

By (1) Stat. 22 *Geo.* 2. *cap.* 24. " No Perſon ſhall recover againſt the " Hundred, in any Action on any of the Statutes of Hue and Cry, more

(1) The Caſe of *Chandler* an Attorney at Law, who ſued the Hundred of *Sunning* in *Berks*, in the Year 1748. was attended with ſo many Suſpicions, and being for a very large Sum of Money, occaſioned the paſſing of the above Act of Parliament.

" than

(2) By ſtat. 30 Geo. 2. c. 3. ſ. 11. & 4 Geo. 3. c. 2. ſ. 118. "than 200 *l.* unleſs at the Time of the Robbery there be two (2) preſent "at the leaſt, to atteſt the Truth of his or their being ſo robbed." Receivers of the Land-Tax ſhall not ſue the County for a Robbery, unleſs there were three Perſons in Company carrying the Money.

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*Page 79

* Ideots and Lunaticks.

(A) What Perſons are eſteemed ſuch, ſo as to come within the Protection of the Law. 79.
(B) How they are to be found ſuch. 80.
(C) Who hath an Intereſt in, and Juriſdiction over them; and herein of appointing them proper Curators and Committees, and the Power and Duty of ſuch Committees. 81.
(D) How far their Want of Underſtanding ſhall be ſaid to be prejudicial to them in Civil Reſpects. 84.
(E) How far the Want of Underſtanding will excuſe in Criminal Caſes. 85.
(F) How far their Acts are good, void, or voidable: And of the late Proviſions by Statute-Law. 86.
(G) How they are to ſue and defend. 90.

(A) What Perſons are eſteemed ſuch, ſo as to come within the Protection of the Law.

Co. Lit. 246. 4 Co. 124. Skin. 177. pl. 7. Co. Lit. 247. 4 Co. 124. *Vide* 1 Hale Hiſt. P. C. 30 to 37.

THE more general Deſcription of a Perſon, who, from his Want of Reaſon and Underſtanding, comes within the Protection of the Law, is that of *Non compos mentis.*

There are, ſays my Lord *Coke*, four Kinds of Men who may be ſaid to be *Non Compos:* 1. An Ideot, who is *Non Compos* from his Nativity. 2. One made ſuch by Sickneſs. 3. A Lunatick, *quia aliquando gaudet lucidis Intervallis*, who is *Non Compos* only for the Time that he wants Underſtanding. 4. One that is drunk; which laſt is ſo far from coming within the Protection of the Law, that his Drunkenneſs is an (*a*) Aggravation of whatever he does amiſs.

(*a*) Plow. 19. *Omne crimen ebrietas incendit & detegit.*

1. An

1. An Ideot is a Fool or Madman from his Nativity, and one who never has any lucid Intervals; therefore, the King has the Protection † of him, and his Eſtate, during his Life, without rendering any Account; becauſe it cannot be preſumed that he will be ever capable of taking care of himſelf or his Affairs: And ſuch a one is deſcribed a Perſon that cannot number twenty, tell the Days of the Week, does not know his Father or Mother, his own Age, *&c.* But theſe are mentioned as Inſtances only; for Ideot or not, being a Queſtion of Fact, muſt be tried by Jury, or Inſpection. Dyer. 25. Moor. 4. pl. 12. Bro. *Ideot* 1. F.N.B. 233. †Scetheſtat. 17 Ed. 2. ſtat. 1. c. 9. as to the King's Prerogative with reſpect to the Cuſtody of the Lands of Ideots; and c. 10. as to the providing for Lunaticks. *Vide infra* 82.

But though an Ideot muſt be ſo *a Nativitate*, yet if by Inquiſition it be found that *A.* is an Ideot not having any lucid Intervals *per ſpatium octo Annorum*, this is a ſufficient Finding; for the Inquiſition having found the Party an Ideot, the Adding *per ſpatium octo Annorum* is Surpluſage, and ſhall be rejected. 3 Mod. 43, 44. 2 Show. 171. pl. 164. Eq. Abr. 276. pl. 1, 2. 2 Chan. caſ. 70. Skin. 5. 177. pl. 7. S. C. *Prodgers* and Lady *Frazier*. Vern. 9, 105, 155, 262. 2 Vern. 192, 414. Chan. Preced. 203. 9 Mod. 98. Wil. Rep. 701. pl. 204. 2 Wil. Rep. 103, 118, 265, 544. pl. 176, 638. 3 Wil. Rep. 108, 111, 389. 2 Stra. 915, 1104, 1208.

* 2. One made ſuch by Sickneſs, which my Lord *Hale* calls *Dementia accidentalis vel adventitia*, and which he again diſtinguiſhes into a total and a partial Inſanity, from its being more or leſs violent, is ſuch a Madneſs as excuſeth in Criminal Caſes; and though the Party, in every Thing elſe, be intitled to the ſame Protection with an Ideot, and though his Diſorder ſeem permament and fixed, yet as he had once Reaſon and Underſtanding, and as the Law ſees no Impoſſibility but what he may be reſtored to them again, it makes the King only a Truſtee for the Benefit of ſuch a one, without giving him any Profit or Intereſt in his Eſtate. * Page 80 Hale Hiſt. P. C. 30.

3. A Lunatick; this is alſo *Dementi accidentalis vel adventitia*, and takes its Name from the great Influence which the Moon has in all Diſorders of the Brain; and though ſuch a one hath Intervals of Reaſon, yet during his Phrenzy he is intitled to the ſame Indulgence as to his Acts, and ſtands in the ſame Degree with one whoſe Diſorder is fixed and permanent. 4 Co. 125. Co. Lit 247. Hale Hiſt. P. C. 31.

4. One made mad by Drunkenneſs, which is called *Dementia effectata*; and though, as hath been ſaid, ſuch a Perſon be not intitled to the Protection of the Law, yet if a Perſon by the Unſkilfulneſs of his Phyſician, or by the Contrivance of his Enemies, eat or drink ſuch a Thing as cauſeth Phrenzy, this puts him in the ſame Condition with any other Phrenzy, and equally excuſeth him; alſo if by one or more ſuch Practices an habitual or fixed Phrenzy be cauſed, though this Madneſs was contracted by the Vice and Will of the Party, yet this habitual and fixed Phrenzy thereby cauſed, puts the Man in the ſame Condition, as if the ſame was contracted involuntarily at firſt. Plow. 19. a. Cromp. Juſt. 29. a. Co. Lit. 247. Hale Hiſt. P. C. 32.

But though this Subject of Madneſs may be ſpun out to a greater Length, and branched into ſeveral Kinds and Degrees, yet it appears that the prevailing Diſtinction herein, in Law, is between Ideocy and Lunacy; the firſt a Fatuity *a Nativitate, vel Dementia naturalis*, which excuſeth the Party as to his Acts, and intitles the King to the Receipt of the Rents and Profits of his Eſtate during his Life, without being obliged to render any Account for the ſame; the other accidental or adventitious Madneſs, which, whether permanent and fixed, or with lucid Intervals, goes under the Name of Lunacy, and *(a)* equally excuſeth with Ideocy, as to Acts done during the Phrenzy; but herein they differ, that in the latter (a) 4 Co. 123. a.

Caſe

Caſe the King, as hath been ſaid, is only a Truſtee for the Lunatick, and accountable to him, if he happens to be reſtored to his Underſtanding, or to his Repreſentatives, if it happen otherwiſe: But in what Things they further differ, will be ſeen by that which follows.

[If a Man loſes his Speech by an Apoplectic Fit, though he ſhews ſome Signs of Senſe, a Commiſſion may be granted againſt him. *Pitt*'s Caſe, *Hardw.* 52.]

(B) How they are to be found ſuch.

Hale Hiſt. P. C. 33. EVERY Perſon of the Age of Diſcretion is in Law preſumed to be of ſound Mind and Memory, unleſs the contrary appear; and this Rule holds as well in Civil, as Criminal Caſes.

9 Co. 31. a. 4 Co. 126. And for this Writ of *Idiota inquirendo*, *vide Fitz. N.B.* 232,3. The Trial of Ideocy, Madneſs, or Lunacy in Civil Caſes, and in order to the Commitment or Cuſtody of the Perſon and his Eſtate, which belongs to the King, either to his own Uſe and Benefit, as in caſe of Ideocy, or to the Uſe of the Party, in caſe of accidetal Madneſs or Lunacy, is by Writ or Commiſſion to the Sheriff, or Eſcheator, or particular Commiſſioners, both by their own Inſpection and by Inquiſition to inquire, and return their Inquiſition into the Chancery; and thereupon a Grant or Commitment of the Party and his Eſtate enſues: And in caſe the Party, or his Friends, find themſelves injured by the finding him a Lunatick or Ideot, a ſpecial Writ may iſſue to bring the Party before

* Page 81

* the Chancellor, or before the King, to be inſpected; and if, on Examination, it appear that the Party is no (*a*) Ideot, the whole Commiſſion and Office ſhall be diſcharged without any Traverſe or *Monſtrans de Droit*.

(*a*) That Ideocy may be tried by Inſpection, becauſe it may be diſcerned; but not Lunacy without taking out a Commiſſion of Lunacy. Skin. 5.

Skin. 178. Alſo the Party found an Ideot or Lunatick may traverſe the Inquiſition, as may any other Perſon having a Title to the Land; and therefore it is ſaid that by the Statute 18 *H.* 6. *cap.* 7. there ought to be a Month's Time between the Return of the Inquiſition and the Grant of the Cuſtody and Lands, in order for the Parties to come in and tender ſuch Traverſe.

2 Sid. 124. *Suſan Thornver. Coward.* If by Inquiſition a Perſon be found a Lunatick, and the Cuſtody granted to *J. S.* and the Party thus found brings a *Scire facias* to ſet aſide the Inquiſition, the Committee of the Lunatick cannot plead, nor join Iſſue in ſuch *Scire facias*; for he can have no Intereſt in the Eſtate of the Lunatick, being only in the Nature of a Bailiff to the King; and therefore his Duty is to inform the King's Attorney General of the Nature of the Affair, who is the proper Perſon to conteſt the Matter in Behalf of the King.

36 Aſſ. pl. 27. Bro. Cor. 101. And. 107, 154. Sav. 50, 57. Hawk. P. C. 2. *Hale*'s Hiſt. P. C. 35. As to Ideocy, Lunacy or Madneſs, which excuſes in capital Caſes, it is not neceſſary that it was found by Inquiſition that the Party was a Madman, Ideot or Lunatick, previous to the Commitment of the Fact; for if he was actually mad at the Time of the Fact committed, this ſhall excuſe; and this regularly is to be tried by an Inqueſt of Office to be returned by the Sheriff of the County wherein the Court ſits for the Trial of the Offence; and if it be found that he was actually mad, he ſhall be diſcharged without any other Trial; but if they find that the Party only feigns

feigns himſelf mad, and he refuſes to anſwer or plead, he ſhall be dealt with as one who ſtands mute †.

† *Sed qu.* If the Jury, who try the Indictment, may not enquire of the Fact of Lunacy, on the Priſoner's Defence, and acquit him, if actually mad, without the Form and Trouble of an Inqueſt of Office? See the next Caſe.

Alſo in caſe a Man in a Phrenzy happen by ſome Overſight, or by means of the Gaoler, to plead to his Indictment, and is put upon his Trial, and it appears to the Court upon his Trial that he is mad, the Judge in Diſcretion may diſcharge the Jury of him, and remit him to Gaol to be tried after the Recovery of his Underſtanding, eſpecially in caſe any Doubt appear upon the Evidence touching the Guilt of the Fact, and this *in Favorem Vitæ*; and if there be no Colour of Evidence to prove him guilty, or if there be a pregnant Evidence to prove his Inſanity at the Time of the Fact committed, then upon the ſame Favour of Life and Liberty, it is fit it ſhould be proceeded in the Trial, in order to his Acquittal and Enlargement. *Hale's* Hiſt. P.C. 35, 36.

So if a Perſon during his Inſanity commit a capital Offence, and recover his Underſtanding, and being indicted and arraigned for the ſame, pleads Not guilty, he ought to be acquitted; for, by reaſon of his Incapacity, he cannot act *felleo animo*. *Hale's* Hiſt. P. C. 36.

(C) Who hath an Intereſt in, and Juriſdiction over them: And herein of appointing them proper Curators and Committees, and the Power and Duty of ſuch Committees.

IT ſeems to be agreed at this Day, that the King as *Parens Patriæ* hath the Protection of all his Subjects, and that in a more peculiar Manner he is to take care of all thoſe who, by reaſon of their Imbecility and Want * of Underſtanding, are incapable of taking care of themſelves; this, in ſome Books, is called a Prerogative in the Crown, and in others a *Regium Munus*, or Duty which the King owes his Subjects in return to their Subjection and Allegiance to him. Stanf. Prerog. c. 9. f. 33. 2 Inſt. 14. 4 Co. 126. a. Dyer 25. * Page 82

My Lord *Coke* in his 2 *Inſt.* is of Opinion, that by the Common Law the King had no Prerogative in the Cuſtody of an Ideot's Lands, but that the ſame belonged to the Lords of whom the Lands were holden, and that the ſame was given to the King by ſome Act of Parliament after the making of *Magna Charta*, and before the Statute *de Prærogativa Regis*, 17 *E.* 2. *cap.* 9. but in 4 *Co. Beverlye's* Caſe he ſays, that this Prerogative was by the Common Law, and that the Statute *de Prærogativa Regis* is only declarative thereof. 2 Inſt. 14. 4 Co. 126.

But however that may be, now, by the Statute *de Prærogativa Regis*, or 17 *E.* 2. *cap.* 9. it is enacted, "That the King ſhall have the Cuſtody of "the (*a*) Lands of natural Fools, taking the Profits of them, without "Waſte or Deſtruction, and ſhall find them their Neceſſaries of whoſe "Fee ſoever the Lands be holden; and after the Death of ſuch Ideots, "he ſhall render it to the right Heirs, ſo that ſuch Ideots ſhall not alien, "nor their Heirs ſhall be diſinherited."

(*a*) And alſo of their Goods and Chattels. 4 Co. 128.

And *cap.* 10. of the ſaid Statute, "Alſo the King ſhall provide when "any (that before Time hath had his Wit and Memory) happen to fail of "his

" his Wit, and there are many *per Lucida Intervalla*, that their Lands and " Tenements ſhall be ſafely kept without Waſte and Deſtruction, and that " they and their Houſhold ſhall live and be maintained competently with " the Profits of the ſame, and the Reſidue, beſides their Suſtentation, ſhall " be kept to their Uſe, to be delivered unto them when they come to right " Mind; ſo that ſuch Lands and Tenements ſhall in no wiſe be aliened, " and the King ſhall take nothing to his own Uſe; and if the Party die in " ſuch Eſtate, then the Reſidue * ſhall be diſtributed for his Soul, by the " Advice of the Ordinary."

* See *infra* 83.

This Diſtinction, eſtabliſhed by this Statute, between the King's Intereſt in the Lands of an Ideot and Lunatick, is laid down and admitted in all the (*b*) Books which ſpeak of this Matter; and on this Foundation it hath been (*c*) reſolved, that the King may grant the Cuſtody of an (*d*) Ideot and his Lands to a Perſon, his Heirs and Executors, and that he had the ſame Intereſt in ſuch a one as he had in his Ward by the Common Law.

(*b*) Bro. Ideot 4, 5. Dyer 25. Moor 4. pl. 12. And. 23.

4 Co. 127. Co. Lit. 247. (*c*) 3 Mod. 43-4. Skin. 5, 177. pl. 7. 2 Show. 171. pl. 164. Vern. 9. *Prodgers* and Lady *Frazier*. And ſee the Authorities to the third Paragragh of this Title in p. 79.

(*d*) But the King cannot grant the Cuſtody of the Body and Lands of a Lunatick to one, to take the Profits to his own Uſe. Moor 4. pl. 12. adjudged.

4 Co. 127. 2 Chan. Ca. 239.

But though a Lunatick is by Commiſſion to be under the Care of the Publick, and ſuch Committee is to be appointed for him by the Lord Chancellor, whoſe Acts are ſubject to the Controul and Correction of the Court of Chancery; yet ſuch a one, whether ſo appointed, or whether he of his own Head take upon him the Care and Management of the Eſtate of a Lunatick, is but in Nature of a Bailiff or Truſtee for him, and accountable to him, his Executors or Adminiſtrators †.

† The King's Grant of a Lunatick's Eſtate, without Account, is void; but the King, or Lord Chancellor, by Authority of the Sign Manual, may allow ſuch a yearly Maintenance to the Committee, as amounts to the yearly Value of the Lunatick's Eſtate. 3 *P. Will.* 104.

Vern. 262. *Foſter* ver. *Merchant*.

And as the Committees of a Lunatick have no Intereſt, but an Eſtate during Pleaſure, it hath been ruled, that they cannot make Leaſes, nor any ways incumber the Lunatick's Eſtate, without a ſpecial Order from the Court of Chancery, where the Profits are not ſufficient to maintain the Lunatick ‡.

‡ The Committee of a Lunatick cannot make a Leaſe of the Lunatick's Lands at Law. 2 Wilſ. 130

Vern. 262, 3.

Alſo where a Lunatick, before he became ſuch, made a Mortgage of good Part of his Eſtate for 50*l.* and the Committee transferred this Mortgage, and took up 3 or 400*l.* more upon it; and it was held by my Lord Keeper, that the Mortgage ſhould ſtand but a Security for the 50*l.* only.

* Page 83 Vern. 263.

* And as to Improvements and Buildings on the Lunatick's Eſtate, it has been held, that upon his Death the Heir muſt be let into the Eſtate without making any Allowance for ſuch Improvements.

2 Vern. 192. *Awdley* ver. *Awdley*.

The Committees of a Lunatick having inveſted Part of the Lunatick's Perſonal Eſtate in a Purchaſe of Lands, made in the Lunatick's Name to him and his Heirs, the Queſtion was, whether the Committee had not exceeded their Power by changing the Perſonal Eſtate into a real Eſtate, and thereby defeating the next of Kin, in Favour of the Heirs at Law; and after great Debate, and upon reading the Statute made touching the granting the Cuſtody of the Lunatick, whereby it is provided, that the Surplus ſhall be ſafely kept and delivered to him, if he recover; if not, upon his Death to be employed for the Benefit of his Soul, *&c.* the Court decreed an Account of the Perſonal Eſtate, and the Lands purchaſed to be ſold,

and

and the Money to go and be divided, as Perſonal Eſtate, amongſt the next of Kin.

Alſo the Care and Management of all Affairs relating to Ideots and Lunaticks is ſo peculiarly under the Power and Direction of the Court of Chancery, that all Abuſes in relation to them, as taking them out of the Cuſtody of their Committees, Marrying them, &c. are puniſhable as Contempts to that Court. Preced. Chan. 203. Abr. Eq. 278.

But it ſeemeth, that the 17 *E.* 2. *ſtat.* 1. *cap.* 9. (*ante* 82.) which giveth the Wardſhip of Ideots Lands to the King, he finding them convenient Maintenance out of the Profits thereof, extends not to Copyhold Lands, for the Prejudice that would thereby enſue to the Lord; but yet all Alienations made by an Ideot of his Copyhold Lands after Office found, ſhall be avoided by the King. 4 Co. 126. b. Co. *Copyhold.* 152.

And yet it hath been held, that though the King cannot have the Cuſtody of an Ideot or Lunatick Copyholder, by reaſon of the Prejudice that might accrue to the Lord thereby, that yet the Lord of a Manor *de communi jure* hath not the Cuſtody of a Lunatick's Lands, but that there muſt be a Cuſtom to warrant it. Noy 27. Hob. 215. *per Hobart.*

But it hath been reſolved, that the Lord ſhould have the Cuſtody of one that is *Mutus & ſurdus*, without alledging any Cuſtom for it; and the Reaſon given why the Lord ſhould have the Cuſtody is, becauſe otherwiſe he would be prejudiced in his Rents and Services, which Reaſon extends as well where there is no Cuſtom, as where there is; and if the Cuſtody of one that is *Mutus & ſurdus* of common Right belongs to the Lord, by the ſame Reaſon of one that is a Lunatick. Cro. Jac. 105. *Evers* and *Skinner.*

And though the King, as hath been ſaid, has the ſole Direction and Management of Ideots, &c. yet a private Perſon may confine a Friend who is mad, and bind and beat him, &c. in ſuch a Manner as is proper in ſuch Circumſtances. 2 Rol. Abr. 546.

[If the Cuſtody of a Lunatick is granted to Huſband and Wife (ſhe being next of Kin) it determines on her Death. *Ex parte Lyne M.* 9 *Geo.* 2. *Caſ. temp. Ld. Talbot* 143.]

Alſo by the 12 *Ann. cap.* 23. reciting, that whereas there are ſometimes in Pariſhes, Towns, and Places, Perſons of little or no Eſtates, who, by Lunacy or otherwiſe, are furiouſly mad, and dangerous to be permitted to go abroad, and, by the Laws in being, the Juſtices of Peace and Officers have not Authority to reſtrain and confine them, it is enacted, "That it "ſhall and may be lawful for any two or more Juſtices of the Peace where "ſuch Lunatick, or mad Perſon, ſhall be found, by Warrant under their "Hands and Seals, directed to the Conſtables, Churchwardens and Overſeers of the Poor of ſuch Pariſh, Town or Place, or ſome of them, to "cauſe ſuch Perſon to be apprehended and kept ſafely locked up in ſuch "ſecure Place within the County where ſuch Pariſh or Town ſhall lie, as "ſuch Juſtices ſhall, under their Hands and Seals, direct and appoint; and "(if ſuch Juſtices find it neceſſary) to be there chained, if the laſt legal "*(a)* Settlement of ſuch Perſon ſhall be in any Pariſh, Town, or Place "within ſuch County; and if ſuch Settlement ſhall not be there, then ſuch "Perſon ſhall be ſent to the Place of his or her legal Settlement, as* Page 84 "Vagrants by this Act are directed to be ſent, (Whipping excepted) and "ſhall be kept ſafely locked up or chained as aforeſaid; and the Charges "of Keeping and Maintaining ſuch Perſon during ſuch Reſtraint, (which "ſhall be for and during ſuch Time only as ſuch Lunacy or Madneſs ſhall "continue) ſhall be ſatisfied and paid by Order of two or more Juſtices of "the Peace for the County, Town, or Place where ſuch Settlement ſhall "be, out of the Eſtate of ſuch Perſon, if ſuch Perſon hath an Eſtate to pay "and ſatisfy the ſame over and above what ſhall be ſufficient to maintain

(*a*) That an Ideot gains a Settlement like any other poor Child, and that the Father ought to maintain him; but if he cannot, the Pariſh or Place where he is ſettled. 2 Salk. 427. pl. 1.

"his

" his Wife and Children, if he hath any; and if he hath not ſuch an " Eſtate, then the Charges of Keeping and Maintaining ſuch Perſon, dur- " ing ſuch Reſtraint, ſhall be ſatisfied and paid by ſuch Ways and Means " as the Poor of ſuch Pariſh, Town or Place, are by the Laws in Being, to " be provided for."

" Provided that this Act, or any Thing contained therein, ſhall not " extend, or be conſtrued to extend, to reſtrain or abridge the Preroga- " tive of the Queen, or the Power or Authority of the Lord Chancellor, " Lord Keeper, or Commiſſioners of the Great Seal for the Time being " or of the Chancellor, or Vice-Chancellor of the County Palatine of *Lan-* " *caſter* for the Time being, or of the Chamberlain, or Vice-Chamberlain " of the County Palatine of *Cheſter* for the Time being, touching or con- " cerning the Premiſſes †".

† See alſo the ſtat. 17 Geo. 2. c. 5. ſ. 20. Power given to two Juſtices to confine a Lunatick, if his Settlement in the County, otherwiſe to ſend him to his Settlement.

(D) How far their Want of Underſtanding ſhall be ſaid to be prejudicial to them in Civil Reſpects.

Co. Lit. 2, 8. AN Ideot, or Perſon *Non compos*, may inherit, becauſe the Law, in Compaſſion to their natural Infirmities, preſumes them capable of Property.

Co. Lit. 2. 2 Vent. 203. Alſo an Ideot, or Perſon of *Non Sane* Memory, may purchaſe, becauſe it is intended for their Benefit; and if after Recovery of their Memory they agree thereto, they cannot avoid it; but if they die during their Lunacy, their Heirs may avoid it, for they ſhall not be ſubject to the Contracts of Perſons who wanted Capacity to contract; ſo if, after their Memory recovered, the Lunatick, or Perſon *Non compos*, die without Agreement to the Purchaſe, their Heirs may avoid it.

Co. Lit. 31. a. 4 Co. 124, 125. If an Ideot or Lunatick marry, and die, his Wife ſhall be endowed; for this works no Forfeiture at all, and the King has only the Cuſtody of the Inheritance in one Caſe, and a Power of providing for him and his Family in the other; but in both Caſes the Freehold and Inheritance is in the Ideot or Lunatick; and therefore (*a*) if Lands deſcend to an Ideot or Lunatick after Marriage, and the King, on Office found, takes thoſe Lands into his Cuſtody, or grants them over to another, as Committee, in the uſual Manner; yet this ſeems no Reaſon why the Huſband ſhould not be Tenant by the Curteſy, or the Wife endowed, ſince their Title does not begin to any Purpoſe till the Death of the Huſband or Wife, when the King's Title is at an End.

(*a*) Yet *vide* Plow. 263. b. Vern. 10.

Perk. 365. A Lunatick ſhall be Tenant by the Curteſy, and ſhall have Dower; ſo though a Woman, being a Lunatick, kill her Huſband, or any other, yet ſhe ſhall be endowed, becauſe this cannot be Felony in her, who was deprived of her Underſtanding by the Act of God.

* Page 85 Lit. ſ. 405. Co. Lit. 247. * If a Perſon *Non compos* be diſſeiſed, and a Deſcent caſt, this, it is ſaid, takes away his Entry, but not the Entry of his Heir; for regularly, the *Non compos* in this Caſe cannot alledge the Diſability in himſelf, becauſe he cannot be ſuppoſed conſcious of it, nor is he allowed ever, at any Time, to alledge it, for when he is once *Non compos*, there is no certain Time when he can be adjudged to recover that Diſability, unleſs where he

is

is legally committed, and then the Acts during his Lunacy will be ſet aſide and diſcharged, and afterwards the Commiſſion ſuperſeded; for in no other Way can the *Non compos* be legally reſtored to his Right, and to his Capacity of acting.

A Perſon *Non compos*, being Lord of a Copyhold Manor, may make Grants of Copyhold Eſtates, for ſuch Eſtates do not take their Perfection from any Power or Intereſt in the Lord, but from the Cuſtom of the Manor, by which they have been demiſed and demiſable Time out of Mind. 4 Co. 23. b. Co. Copyholder 79, 107.

Ideots and Lunaticks are both by the Civil Law, and likewiſe by the Common Law, incapable of being Executors or Adminiſtrators; for theſe Diſabilities render them not only incapable of executing the Truſt repoſed in them, but alſo by their Inſanity, and Want of Underſtanding, they are incapable of determining whether they will take upon them the Execution of the Truſt, or not. Godolph. Orph. Leg. 86.

Therefore it hath been agreed, that if an Executor become *Non compos*, that the Spiritual Court may, on account of his natural Diſability, commit Adminiſtration to another. Salk. 36. pl. 1.

An Ideot, or Perſon *Non compos*, being robbed, ſhall be (*a*) bound by a Sale of his Goods in a Market-overt. 2 Inſt. 713.

(*a*) Not bound by a Fine and Non-claim, *vide* Tit. *Fines* and *Recoveries*, and 2 Inſt. 516 *.——Cannot bring an Appeal of the Death of his Anceſtor. 2 Hawk. P. C. 162.——* *Vide infra* 86. F. & 87.

(E) How far the Want of Underſtanding will excuſe in Criminal Caſes.

IT is laid down as a general Rule, that Ideots and Lunaticks, being by reaſon of their natural Diſabilities incapable of judging between Good and Evil, are puniſhable by no Criminal Proſecution whatſoever. Hawk. P. C. 2.

And therefore a Perſon, who (*b*) loſes his Memory by Sickneſs, Infirmity, or Accident, and kills himſelf, is not a *Felo de ſe*. 3 Inſt. 54.

(*b*) But if a Lunatick in a lucid Interval kills himſelf, he is a *Felo de ſe*. Hal. Hiſt. P. C. 412.

So if a Man gives himſelf a mortal Stroke while he is *Non compos*, and recovers his Underſtanding, and then dies, he is not *Felo de ſe*; for though the Death compleat the Homicide, the Act muſt be that which makes the Offence. Hal. Hiſt. P. C. 412.

But it is not (*c*) every Melancholy or Hypochondriacal Diſtemper that denominates a Man *Non compos*, for there are few who commit this Offence, but are under ſuch Infirmities; but it muſt be ſuch an Alienation of Mind that renders them to be Madmen, or Frantick, or deſtitute of the Uſe of Reaſon. Hal. Hiſt. P. C. 412.

(*c*) In 3 Mod. 100. it is ſaid to be the prevailing Opinion, that a Perſon who kills himſelf muſt be *Non compos* of Courſe; on this Suppoſition, that it is impoſſible a Man in his Senſes ſhould do a Thing ſo repugnant to Reaſon and Nature.——But in Hawk. P. C. 67. this Notion is explored.—And ſo in Comb. 2, 3.

* And as a Perſon *Non compos* cannot be a *Felo de ſe* by killing himſelf; ſo neither can he be guilty of Homicide in killing another, nor of Petit Treaſon; alſo if one who has committed a Capital Offence become *Non-compos* * Page 86 Hal. Hiſt. P. C. 30. Hawk. P. C. 2 *vide ſupra*,

Letter (B) 80, 81.

compos before Conviction, he ſhall not be arraigned; and if after Conviction, he ſhall not be executed.

(*a*) Fitz. Coron. 351. Regiſt. 309. 4 Co. 124. b. 2 Rol. Rep. 324.

It ſeems to have been (*a*) anciently holden, in reſpect of that high Regard which the Law has for the Safety of the King's Perſon, that a Madman might be puniſhed as a Traitor for killing or offering to kill the King; but this is now (*b*) contradicted by better and later Opinions.

(*b*) 3 Inſt. 46. Co. Lit. 247. H. P. C. 10, 43. Hawk. P. C. 2. and herewith my Lord *Hale* ſeems to agree, Hal. Hiſt. P. C. 36, 37. For he ſays, that the Reaſon is the ſame between Homicide and Treaſon, and that he that cannot act *felonice*, or *Animo felonico*, cannot act *proditorie*.——But as this Exception laid down by my Lord *Coke*, 4 Co. 124. though contradicted by himſelf, 3 Inſt. 46. tends ſo much to the Safety of the King's Perſon, he is not willing to queſtion it.

Hal. Hiſt. P. C. 30.

The great Difficulty, in theſe Caſes, is to determine where a Perſon ſhall be ſaid to be ſo far deprived of his Senſe and Memory, as not to have any of his Actions imputed to him; or where, notwithſtanding ſome Defects of this Kind, he ſtill appears to have ſo much Reaſon and Underſtanding as will make him accountable for his Actions, which my Lord *Hale* diſtinguiſhes between, and calls by the Names of Total and Partial Inſanity; and though it be difficult to define the indiviſible Line that divides perfect and partial Inſanity, yet, ſays he, it muſt reſt upon Circumſtances, duly to be weighed and conſidered both by the Judge and Jury, leſt on the one Side there be a Kind of Inhumanity towards the Defect of Human Nature, or on the other Side too great an Indulgence given to great Crimes; and the beſt Meaſure he can think of is this: Such a Perſon, as labouring under melancholy Diſtempers, hath yet ordinarily as great Underſtandig as ordinarily a Child of fourteen Years hath, is ſuch a Perſon as may be guilty of Treaſon or Felony.

Vide ſupra, Letter (B) 80, 81.

It hath been already obſerved, that he who is guilty of any Crime whatſoever through his voluntary Drunkenneſs, ſhall be puniſhed for it as much as if he had been ſober.

Keil. 53. Dalt. c. 95. Hawk. P. C. 2.

Alſo he who incites a Madman to do a Murder, or other Crime, is a principal Offender, and as much puniſhable as if he had done it himſelf.

2 Rol. Abr. 547. Hob. 134. Co. Lit. 247. Hawk. P. C. 2. Hal. Hiſt. P. C. 15, 16, 38.

And here we muſt obſerve a Difference the Law makes between Civil Suits, that are terminated *in compenſationem damni illati*, and Criminal Suits, or Proſecutions, that are *ad Pœnam & in Vindictam criminis commiſſi*; and therefore it is clearly agreed, that if one who wants Diſcretion commits a Treſpaſs againſt the Perſon or Poſſeſſion of another, he ſhall be compelled in a Civil Action to give Satisfaction for the Damage.

(F) How far their Acts are good, void, or voidable: And of the late Proviſions by Statute-Law.

4 Co. 124. 2 And. 145. Co. Lit. 247. (*c*) A Purchaſe at a great Undervalue by Deed, Fine and Recovery, obtained from a Lunatick, but previous to his being found ſuch, ſaid to be ſet aſide in Chancery. 2 Vern. 678.

HOW we muſt firſt diſtinguiſh between Acts done by Ideots and Lunaticks *in Pais*, and in a Court of Record; that as to thoſe ſolemnly acknowledged in a Court of Record, as (*c*) Fines † and Recoveries, and the Uſes declared on them, they are good, and can neither be avoided by themſelves nor their Repreſentatives; for it is to be preſumed, that had they been under theſe Diſabilities the Judges would not have admitted them to make theſe Acknowledgments.

Therefore

† *Vide ante* 85. 1ſt. n.

* Therefore if a Perſon *Non compos* acknowledges a Fine, it ſhall ſtand againſt him and his Heirs; for though the Judges ought not to admit of a Fine from a Madman under that Diſability, yet when it is once received it ſhall never be reverſed, becauſe, the Record and Judgment of the Court being the higheſt Evidence that can be, the Law preſumes the Conuzor at that Time capable of contracting; and therefore the Credit of it is not to be conteſted, nor the Record avoided by any Averment againſt the Truth of it. * Page 87 4 Co. 124. 2 Inſt. 483. Bro. Tit. *Fines* 75. Co Lit. 247.

So in caſe of a Fine, levied by an Ideot, it ſhall ſtand againſt him and his Heirs; for no Averment of Ideocy can vacate the Fine; nor will an Office, finding him an Ideot *a nativitate*, be ſufficient to reverſe the Fine, for that were to leſſen the Credit of Judgments in Courts of Record, by trying them by other Rules than themſelves. 2 And. 193. 4 Co. 124.

As to Acts done by them *in Pais*, they are diſtinguiſhed into void and voidable, though as to themſelves they are regularly unavoidable, becauſe no Man is allowed to diſable himſelf, for the Inſecurity that may ariſe in Contracts from counterfeit Madneſs and Folly: beſides, if the Excuſe were real, it would be repugnant that the Party ſhould know or remember what he did; but their Heirs and Executors may avoid ſuch Acts *in Pais*, by pleading the Diſability; becauſe if they can prove it, it muſt be preſumed real, ſince no Body can be thought to counterfeit it, when he can expect no Benefit from it himſelf. 4 Co. 124, 5. *Beverley's* Caſe, Bro. Tit. *Fait* 64. F.N.B. 202. Cro. Eliz. 398.

The Feoffment of an Ideot, or *Non compos*, is not void, but voidable; but it cannot be avoided by himſelf by Entry, *&c.* and the Reaſon hereof given in ſome Books is, as before obſerved, becauſe no Man by Law is permitted to diſable himſelf; but the better Reaſon in this Caſe ſeems to be, that anciently thoſe Feoffments were made not only for the Benefit of the Parties, but of the Realm, being annually paid for by the Attendance of the Tenants in Military Service, or in Tillage, and ſo were preſumed to be equally for the Benefit of the Lord and Tenant, and therefore they were not held to be void in themſelves; and though an Infant, at the Age of Diſcretion, defined by the Law, might avoid them, and chooſe which is moſt for his Benefit; yet as to a Perſon of *Non ſane Memory*, there being no Time defined when he recovers his Senſes, he cannot avoid ſuch Acts of his own by any ſubſequent Act of his; but the King, who is the univerſal Curator of all Madmen, may by Writ *de Idiota Inquirendo* avoid ſuch Alienation, on Office found; for the Office, being of equal or greater Solemnity than the Feoffment, gives Notice to all Men in whom the Freehold is veſted; and after ſuch Office, if the Commiſſion of Lunacy be diſcharged, the Lunatick is reſtored to his Lands, becauſe the King is the proper Perſon to judge whether ſuch Alienations are for the Benefit of the Lunatick, or at what Time he is to be looked upon to be reſtored to his Senſes; alſo the Heir may avoid ſuch Alienations by Entry or Writ of *Dum fuit non compos*, for the Reaſons before given; but the Fine or Recovery of a Lunatick cannot be avoided, becauſe they are Acts of Record, and the Judges are ſuppoſed to take care that no ſuch Alienations be allowed, and if they be, there is no Way of rectifying the Error by a Matter of equal Notoriety. 4 Co. 123, *&c.* Show. P. C. 152. Carth. 211, 435. Ld. Raym. 313. 3 Mod. 301. 2 Salk. 427. pl. 2. Show. 296. Comyns 45. pl. 30. Comb. 468. 12 Mod. 174. 3 Salk. 300. pl. 10. 2 Salk. 576. pl. 2. 618.

But though the King, or Heir, may avoid the Feoffment of a *Non compos*, yet if ſuch a one be, by Inquiſition, found an Ideot *a nativitate*, or a Lunatick from ſuch a Time, though the Inquiſition hath Relation to the Nativity, or Time of his becoming a Lunatick, ſo as to avoid meſne Acts, yet it ſhall not have Relation to theſe Times to intitle the King to the meſne Profits, for theſe the Tenant is intitled to in Conſideration of the Services which he is obliged to do to thoſe of whom the Land is holden; *(a)* alſo the King's Title muſt appear by Matter of Record, which cannot be before the Inquiſition found. Ley 25, 26. 8 Co. 170. *Tourſon's* Caſe. *(a) Vid.* Plow. 488 b.

4 Co. 124. Alſo ſuch Heirs and Repreſentatives, as can take Advantage of the voidable Acts of thoſe they repreſent, muſt be Privies in Blood as Heirs Page 88 * are, or by Repreſentation as Executors; but Privies in Eſtate, as thoſe in Remainder or Reverſion, or by Tenure, as the Lord by Eſcheat, cannot take Advantage of the Diſability of him who made the Feoffment.

2 Rol. Abr. 728. 4 Co. 124, 125. But the Releaſe, Surrender, Letter of Attorney to give Livery, Warranty, or any other Deed or Writing obligatory, though they regularly at Law, as hath been ſaid, bind the *Non compos*, are mere Nullities with reſpect to others, and differ from a Feoffment, which is a Matter of greater Solemnity, being antiently tranſacted *Coram paribus curtis*, who ſigned their Atteſtation to the ſame, which, it is preſumed, they would not have done, had the Indiſcretion been apparent.

Carth. 435. 2 Salk. 427. pl. 2. 576 pl. 2. Show. Par. Ca. 152, 3. 3 Mod. 301. Comb. 468. 3 Lev. 284. S.C. *Thompſon* verſus *Leach*, adjudged in *B. R.* and affirmed in the Houſe of Lords. Therefore where a Perſon *Non compos* being Tenant for Life, with Remainder to his firſt and other Sons, Remainder over, did before the Birth of any Son ſurrender to him in Remainder, with an Intent to deſtroy the contingent Remainders, and died, leaving Iſſue a Son; and in this Caſe it was holden, *1ſt*, That the Surrender was void *ab initio*, and not barely voidable; for had it been voidable only, yet if at any Time it had been effectual to merge the Eſtate for Life before the Birth of a Son, it could not have been revived again by any Act *ex poſt facto*. *2dly*, That the Surrender being void *ab initio*, the Son, though he did not claim as Heir, but by way of Remainder, may take advantage of it: And this Reſolution ſeems agreeable to the ſtricteſt Rules of Reaſon and Law; for if the Surrender had been allowed good or voidable only, it would have been prejudicial to all his Sons after born, who were Strangers, and third Perſons, and there could no Uſe be made of the Surrender but to do them Miſchief, which the Acts of a Madman ought not to be allowed to do, when, by a reaſonable Conſtruction, it is in the Power of the Court to help them: And in this Caſe a Difference was taken between a Feoffment and Livery made *propriis manibus* of an Ideot, and the bare Execution of a Deed by ſealing and Delivery thereof, as in Caſes of Surrenders, Grants, Releaſes, *&c.* which have their Strength only by executing them, and in which the Formality of Livery and Seiſin is not ſo much regarded in the Law; and therefore the Feoffment is not merely void, but voidable; but Surrenders, *(a)* Grants, *&c.* by an Ideot are void, *ab initio*.

(a) Therefore if a Man of *non ſane* Memory, being ſeiſed of a Carve of Land, grant a Rent iſſuing out of the ſame Land in Fee, and die, and his Heir enters, and the Grantee diſtrains for the Rent behind, the Heir ſhall have an Action of Treſpaſs; but if the Grantee had diſtrained in the Life of the Grantor for the Rent behind, the Grantor ſhould not have an Action of Treſpaſs; for he cannot avoid his Deed by diſabling himſelf. Perk. ſ. 21.

4 Co. 124. a. 10 Co. 42. b. 2 Inſt. 483. Bro. Fait Inrol. 14. If an Ideot or Lunatick enter into a Recognizance, or acknowledge a Statute, neither they themſelves nor their Heirs nor Executors can avoid them; for theſe are Securities of a higher Nature than Specialties and Obligations, which yet they themſelves cannot avoid, and being Matters of Record, and equivalent to Judgments of the ſuperior Courts, neither they themſelves, their Heirs nor Executors, can avoid them.

Co. Lit. 166. a. If Parceners of *Non ſane Memory* make Partition, unleſs it be equal, it ſhall only bind the Parties themſelves, but not their Iſſue: And the Reaſon it binds the Parties themſelves is the ſame that all other Contracts bind them, *viz.* becauſe no Man is admitted to ſtultify himſelf: And the Reaſon their Iſſue may avoid ſuch Partition is the ſame likewiſe for which they may avoid all other Contracts made by ſuch Anceſtors during their Inſanity, *viz.* becauſe they may be admitted to ſhew the Incapacity of their Anceſtor, and ſo avoid all Acts done by them during that Time. 4 Co. 125.

And

And although, as hath been obſerved, according to the ſtrict Rules of Law no Perſon is allowed to ſtultify himſelf, yet it ſeems that even at Law the Contracts of Ideots and Lunaticks, after Office found, and the Party legally committed, are void, and it muſt be at the Peril of him who deals with ſuch a one; and that if afterwards the Commiſſion of * Lunacy be ſuperſeded or diſcharged, the *Non compos* ſhall be reſtored to his legal Right: But this it ſeems, muſt be at the Suit and Application of his Committee. * Page 89

Alſo there are frequent Inſtances in Equity, where not only Ideots and Lunaticks, who come within the Protection of the Law, but alſo Perſons of weak Underſtandings have been relieved, when they appeared to have been impoſed upon in their Dealings and unreaſonable Purchaſes, and Securities obtained from them ſet aſide in their Favour. But for this *vide* Chan. Ca. 113, 153. Vern. 155. 2 Vern. 189, 414, 678. & *vide* Tit. *Agreements*. Abr. Eq. 279. *Ridler* verſus *Ridler*.

A Bill was brought by a Lunatick and his Committee, to ſet aſide a Settlement which had been obtained from him by the Defendant before the iſſuing out the Commiſſion of Lunacy, but ſubſequent to the Time wherein by the Commiſſion he was found to have been a Lunatick, and the Bill charged ſeveral Acts of Inſanity and Diſtraction previous to the making of the Settlement, and the iſſuing out of the Commiſſion; and charged likewiſe, that the Commiſſion of Lunacy was ſtill in Force: To this Bill the Defendants demurred, for that it was againſt a known Maxim in Law, that any Perſon ſhould be admitted to ſtultify himſelf; becauſe during the Continuance of the Lunacy he cannot be ſuppoſed to know what he did. But my Lord Chancellor over-ruled the Demurrer, and ſaid, that Rule was to be underſtood of Acts done by the Lunatick to the Prejudice of others, that he ſhould not be admitted to excuſe himſelf on Pretence of Lunacy, but not as to Acts done by him to the Prejudice of himſelf; beſides, here, the Committee is likewiſe Plaintiff, and the ſeveral Charges of Lunacy are by him in behalf of the Lunatick; and it has been always held, that the Defendant muſt anſwer in that Caſe; and ſo he was ordered to do here, though the Settlement was not unreaſonable in itſelf, being only to limit the Eſtate in queſtion to the Defendants the Uncles, in caſe of Failure of Iſſue Male of the Lunatick, with Power for the Lunatick to charge the ſame with conſiderable Portions for his three Daughters, with a Power of Revocation.

Idiots and Lunaticks, during their Lunacy, are incapable of making (*a*) any Will or Teſtament; as are alſo Perſons grown childiſh by reaſon of extreme old Age; ſo one actually drunk, if he be ſo drunk as to have loſt the Uſe of his Reaſon: But though a Perſon who wants Underſtanding cannot make a Will, yet the Rule herein is not to be taken from his not being able to meaſure an Ell of Cloth, tell twenty, or the like; but whether he have Senſe enough to diſpoſe of his Eſtate with (*b*) Underſtanding. Swinb. 71. Godolph. Orph. Leg. 25. (*a*) The Statute of 32 H. 8. c. 1. gives a Power to diſpoſe of Lands by Will, excepts Infants, Ideots, Feme Coverts, and Perſons of *non ſane* Memory. (*b*) That it is ſufficient that they be able to anſwer to familiar and uſual Queſtions. Cro. Jac. 497. 6 Co. 23. a.

But every Perſon making a Will is preſumed to be of ſound Underſtanding, until the contrary be proved; ſo that the *Onus probandi* lies on the other Side: If the Teſtator uſed to have Fits and lucid Intervals, and it cannot appear whether the Will be made in the one or the other Time, it ſhall be preſumed to be made in the lucid Intervals, if there be no Argument of Folly in the Will; nay, though the Teſtator had no lucid Intervals, yet if it cannot be proved that he was mad at the Time of making the Will, it ſhall be preſumed there was an Intermiſſion of Madneſs at the Time of making the Will, if the Will be a ſenſible, orderly Will; but the leaſt Word of Folly in ſuch a Will will overthrow it: On the other hand, Swinb. 72. Godolph. 25. Dyer 203. 8 Co. 147.

if one be a very Ideot, and make a good ſenſible Will, yet the Will ſhall not ſtand.

Godolph. 26. 4 Co. 126. (c) Vern. 105.

If a Perſon of ſound Memory makes his Will, and afterwards becomes *Non compos*, this is no Revocation of the Will; yet (c) a Bill will not lie in the Life-time of the *Non compos*, to eſtabliſh the Teſtimony of the Witneſs *in perpetuam rei Memoriam* to ſuch a Will.

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By ſtat. 15. Geo. 2. c. 30. Lunaticks are prohibited from marrying till declared of *ſane* Mind by Lord Chancellor, *&c.* and by 17 Geo. 2. c. 5. ſ. 20. (commonly called the Vagrant Act) dangerous Madmen may be confined by Juſtices of the Peace.

*By the 4 *Geo.* 2. *cap.* 10. it is enacted, "That it ſhall and may be lawful to and for any Perſon or Perſons, being Ideot, Lunatick, or *Non compos mentis*, or for the Committee or Committees of ſuch Perſon or Perſons, in his, her, or their Name or Names, by the Direction of the Lord Chancellor of *Great Britain*, or the Lord Keeper, or Commiſſioners of the Great Seal for the Time being, ſignified by an Order made upon hearing all Parties concerned, on the Petition of the Perſon or Perſons for whom ſuch Perſon or Perſons, being Ideot, Lunatick, or *Non compos mentis*, ſhall be ſeiſed or poſſeſſed in Truſt, or of the Mortgagor or Mortgagors, or of the Perſon or Perſons intitled to the Monies ſecured by or upon any Lands, Tenements or Hereditaments, whereof any ſuch Perſon or Perſons, being Ideot, Lunatick, or *Non compos mentis*, is or are, or ſhall be ſeiſed or poſſeſſed by way of Mortgage, or of the Perſon or Perſons intitled to the Redemption thereof, to convey and aſſure any ſuch Lands, Tenements or Hereditaments, in ſuch Manner as the Lord Chancellor, *&c.* ſhall by ſuch Order ſo to be obtained direct, to any other Perſon or Perſons; and ſuch Conveyance or Aſſurance, ſo to be had and made as aforeſaid, ſhall be as good and effectual in Law, to all Intents and Purpoſes whatſoever, as if the ſaid Perſon or Perſons, being Ideot, Lunatick, or *Non compos mentis*, was or were, at the Time of making ſuch Conveyance or Aſſurance, or *ſane* Mind, Memory and Underſtanding, and not Ideot, Lunatick, or *Non compos mentis*, or had by him, her, or themſelves executed the ſame; any Law, *&c.*

And it is further enacted, "That all and every ſuch Perſon and Perſons being Ideot, *&c.* and only Truſtee or Truſtees, Mortgagee or Mortgagees as aforeſaid, or the Committee or Committees of all and every ſuch Perſon and Perſons being Ideot, Lunatick, or *Non compos mentis*, and only ſuch Truſtee or Mortgagee as aforeſaid, ſhall and may be impowered and compelled, by ſuch Order ſo as aforeſaid to be obtained, to make ſuch Conveyance or Conveyances, Aſſurance or Aſſurances as aforeſaid, in like manner as Truſtees or Mortgagees of *ſane* Memory are compellable to convey, ſurrender or aſſign their Truſt-Eſtates or Mortgages."

[By 14 *Geo.* 3. *cap.* 49. Mad-houſes are regulated. None may keep more than one Lunatick (except committed by the Chancellor,) on pain of 500 *l.* without annual Licence from Commiſſioners, appointed by the College of Phyſicians, for Seven Miles round *London*, and by the Quarter Seſſions elſewhere.——No Perſon to keep two Houſes; Commiſſioners to viſit once a Year, or when required by the Chancellor, or either Chief Juſtice, or when they think fit, and examine Perſons confined, and where, and by whom. The Keeper receiving a Patient without an Order from a Phyſician, Surgeon, or Apothecary, or not ſending Notice to the Secretary of the Commiſſioners, in three Days near *London*, or fourteen Days, elſewhere, forfeits 100 *l.*——This Act does not give any new Juſtification, but all muſt be juſtified at common Law.]

(G) How they are to ſue and defend.

WHEN an Ideot doth ſue or defend he ſhall not appear by Guardian, (a) *prochein Amy* or Attorney, but he muſt be ever in proper Perſon. Co. Lit. 135. b. F. N. B. 27

(a) The Statute Weſt. 2. c. 15. extends not to an Ideot. 2 Inſt. 390.

But otherwiſe of him who becomes *Non compos mentis*; for he ſhall appear by Guardian if within Age, or by Attorney if of full Age. 4 Co. 124. b. Palm. 520. & v. 2 Sand. 235.

If a Treſpaſs be committed in the Lands of a Lunatick who is legally committed, (b) the Committee cannot bring an Action of Treſpaſs; but this muſt be brought in the Name of the Lunatick. 2 Sid. 125.

(b) Where the Committee of a Lunatick brought a Bill to be relieved againſt a Debt aſſigned by the Lunatick without Conſideration, and it was held not neceſſary that the Lunatick ſhould be made a Party. 1 Chan. Ca. 113.—But that it is otherwiſe of an Ideot. 1 Chan. Ca. 153.

If a Lunatick be ſued, he muſt have a Committee aſſigned to him to defend the Suit. Vern. 106.

INDICTMENTS.

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AN Indictment is defined an Accuſation at the Suit of the King, by the Oaths of twelve Men, of the ſame County wherein the Offence was committed, returned to inquire of all Offences in general in the County, determinable by the Court in which they are returned, and finding a Bill brought before them to be true: But when ſuch Accuſation is found by a Grand Jury, without any Bill brought before them, and afterwards reduced to a formed Indictment, it is called (a) a Preſentment: And when it is found by Jurors returned to inquire of that particular Offence only which is indicted, it is properly called an Inquiſition. 2 H. P. C. 209.

(a) A Preſentment is a more comprehenſive Term than Indictment; for regularly an Indictment is an Accuſation given in againſt a Perſon by the Grand Inqueſt for ſome Miſdemeanor, whereunto he is put to anſwer; but Preſentments not only include ſuch Indictments, but alſo ſome other Informations, whereunto the Party is not put to anſwer; as Preſentments of *Felo de ſe*, of *Fugam fecit*, of *Deodands*, of Deaths *per Infortunium*, &c. 2 Hal. Hiſt. P. C. 152-3.——That regularly all Preſentments and Indictments are traverſable, and conclude not the Party, or thoſe claiming under him. 2 Hal. Hiſt. P. C. 153-4.

For the better underſtanding the Law herein, the ſame hath been reduced to the following Heads.

(A) Of the Nature of an Indictment, and how far it is conſidered as a Proſecution at the Suit of the King. 92.

(B) Where

(B) Where it is neceſſary, or the Party may be tried for a Capital Offence without it. 93.
(C) By whom it is to be found; and therein who may and ought to be Indictors. 95.
(D) Whether the Indictors or Grand Jury may find Part of a Bill brought before them true, and Part falſe. 95.
(E) What Matters are indictable. 96.
(F) Within what Place the Offence inquired of muſt ariſe. 97.
(G) What ought to be the Form of the Body of an Indictment at Common Law. 100.

And herein,

1. How the Body of an Indictment at Common Law ought to ſet forth the Subſtance and Manner of the Fact. 100.
2. How, the Perſons mentioned or referred to in it. 103.
3. How, the Thing wherein the Offence was committed. 105.
4. How, the Circumſtances of Time and Place. 106.
5. Where the Offence indictable may be laid jointly, and where ſeverally, and where both jointly and ſeverally, and where the Offences of ſeveral Perſons may be laid in one Indictment. 108.
6. Whether the Words *Vi & Armis* be in any Caſe neceſſary. 108.
7. Whether it be neceſſary to lay the Words *contra Pacem.* 109.
8. Whether it be neceſſary to lay it *contra Coronam & Dignitatem Regis.* 110.
9. Whether it be neceſſary to lay it *in Contemptum Regis.* 110.
10. Whether neceſſary to lay it *illicite.* 110.
11. Whether a Defect in any of theſe Particulars be amendable. 110.
12. Additional Obſervations, as to Pleading, Arraignment, Trial, and Judgment, *&c.* from modern Caſes. 111.

(H) What ought to be the Form of an Indictment upon a Statute. 111.

And herein,

1. Whether it be neceſſary that ſuch Indictment recite the Statute whereon it is grounded. 111.

2. What

2. What Misrecitals of such Statutes are fatal. 111.
3. How far it is necessary to bring the Offence indicted within the very Words of the Statute. 113.
4. Whether an Indictment grounded on a Statute that will not maintain it, may be good as an Indictment at Common Law. 114.
5. How far it is necessary to conclude *Contra Formam Statuti*. 114.

(I) What ought to be the Form of a Caption of an Indictment. 115.
(K) Where an Indictment may be quashed. 116.

(A) Of the Nature of an Indictment, and how far it is considered as a Prosecution at the Suit of the King.

AN Indictment is a brief Narrative of an Offence committed by any Person, which the Public Good requires should be punished; and therefore it is said to be a Prosecution at the Suit of the King merely. 2 Hal. Hist. P. C. 169. 2 Hawk. P. C. 210.

Hence also, from its being the King's Suit, it is every Day admitted that the Party, who prosecutes it, is a good Witness to prove it. 2 Hawk. P. C. 210.

And from its being the King's Suit it is agreed, that no Damages can be given the Party grieved upon an Indictment, or any other criminal Prosecution; notwithstanding the King, by his Commission erecting a new Court, expresly direct that the Party shall recover his Damages by such a Prosecution. Rol. Abr. 220. 2 Rol. Abr. 83. Cro. Car. 531, 558. 2 Hawk. P. C. 210.

Also where by Statute Damages are given to the Party grieved by the Offence intended to be redressed, it seems that they cannot be recovered on an Indictment grounded on such Statute, unless such Method of recovering them be expresly given by the Statute; but that they ought to be sued for in an Action on the Statute, in the Name of the Party grieved. Jones 380. Cro. Car. 448. Rol. Abr. 220. 2 Hawk. P. C. 210.

But if the Statute prohibit any Act to be done, and by a Substantive Clause gives a Recovery by Action of Debt, Bill, Plaint or Information, but mentions not Indictment, the Party may be indicted upon the prohibitory Clause, and thereupon fined, but not to recover the Penalty, as upon the Statute of 3 *Jac. cap.* 5. prohibiting Recusants to baptize their Children by a Popish Priest; but then it seems the Fine ought not to exceed the Penalty. 2 Hal. Hist. P. C. 171. & *vide* Cro. Jac. 643-4.

* But if the Act be not prohibitory, but only that if any Person shall do such a Thing he shall forfeit 5 *l.* to be recovered by Action of Debt, Bill, Plaint or Information, he cannot be indicted for it; but the Proceeding must be by Action, Bill, Plaint or Information. *Page 93. 2 Hal. Hist. P. C. 171.

And although Damages cannot be recovered on an Indictment, yet the Court of King's Bench, having the King's Privy Seal for that Purpose, may give to the Prosecutor the third Part of the Fine assessed on a criminal Prosecution for any Offence whatsoever. Keb. 487. 2 Hawk. P. C. 210.

2 Hawk. P. C. 210. Alſo it is every Day's Practice of that Court to induce Defendants to make Satisfaction to Proſecutors for the Coſts of the Proſecution, and alſo for the Damages ſuſtained by the Injury, whereof the Defendants are convicted, by intimating an Inclination on that Account to mitigate the Fine due to the King.

[If a Man is indicted for Inſulting a Juſtice of Peace in the Execution of his Office, the Defendant's Recognizance ſhall not be diſcharged, though the Juſtice dies, but he muſt plead. 1 *Wilſ.* 222.]

(B) Where it is neceſſary, or the Party may be tried for a capital Offence without it.

2 Hal. Hiſt. P. C. c. 20. IN all criminal Cauſes the moſt regular and ſafe Way, and moſt conſonant to the Common Law, and the Statutes of *Magna Charta*, *cap.* 29. 5 *E.* 3. *cap.* 9. 25 *E.* 3. *cap.* 4. 28 *E.* 3 *cap.* 3. and 42 *E.* 3. *cap.* 3. is by Preſentment or Indictment of twelve ſworn Men; yet at Common Law there were ſeveral Means of putting the Party to anſwer for a criminal Offence without any Indictment, ſome whereof are ſtill in Force, and others either grown obſolete, or wholly taken away by Statute.

2 Hawk. P. C. 211. 1. If a Thief or Robber had, on freſh Purſuit, been taken within the Manor, and the Goods found upon him brought into the Court with him, he might have been tried immediately, without any Indictment: And this is ſaid to have been the proper Method of proceeding in ſuch Manors which had the Franchiſe of Infangthefe, but is (*a*) obſolete at this Day.

(*a*) This Proceeding upon the *Mainœuvre* is wholly taken away by the Statutes 25 E. 3. c. 4. 28 E. 3. c. 3. 42 E. 3. c. 3. 2 Hal. Hiſt. c. 20.

2 Hal. Hiſt. P. C. c. 20. 2. Another Kind of proceeding in Caſes capital without Indictment is, where an Appeal is brought at the Suit of the Party, and the Plaintiff is (*b*) nonſuit upon that Appeal, yet the Offender ſhall be arraigned at the King's Suit upon ſuch Appeal; and ſo it is in caſe the Appellant die or releaſe; and in ſuch Caſe, although the Party be indicted as well as appealed yet, upon the Nonſuit of the Plaintiff, the Proceeding for the King ſhall not be upon the Indictment, but upon the Appeal.

(*b*) That ſuch Nonſuit, &c. muſt be after the Appellant has declared, and that ſuch Appeal muſt have been well commenced: But for this *vide* 2 Hawk. P. C. 212, 213.

2 Hal. Hiſt. P. C. c. 20. But for the Learning hereof, *vide* 2 Hawk P. C. 204. 2 Hal. Hiſt. P. C. 225, &c. 3. If a Perſon indicted of Treaſon or Felony confeſſes the Fact, and accuſes others of being guilty of the ſame Offence with him, by which he becomes and is admitted an Approver, the Parties accuſed may, on his Appeal, be tried without other Indictment or Preſentment.

2 Hal. Hiſt. P. C. c. 20. 4. There were before the Statute of 1 *H.* 4. *cap.* 14. Appeals by particular Perſons, eſpecially of Treaſon, in Parliament, which are ſaid to have been very frequent in antient Times, and eſpecially in the Reign of *Rich.* 2. but are now wholly taken away by the ſaid Statute; and therefore (*c*) where in the Reign of *Char.* 2. the Earl of *Briſtol* preferred Articles of High *Treaſon, and other Miſdemeanors, againſt the Earl of *Clarendon*, it was re-

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(*c*) State Tri. vol. 2. p. 550. —And *note*, That though in all capital Offences a Peer is to be tried by his Peers, yet it muſt regularly be upon an Indictment found againſt him by a Grand Jury of Commoners. 2 Hawk. P. C. 424.

ſolved

ſolved by all the Judges, that ſuch Articles were within the ſaid Statute 1 *H.* 4.

But Impeachments by the Houſe of Commons of High Treaſon, or other Miſdemeanors, in the Lords Houſe, have been frequently in Practice, notwithſtanding the Statute of 1 *H.* 4. and are neither within the Words nor Intent of that Statute; for it is a Preſentment by the moſt ſolemn Grand Inqueſt of the whole Kingdom. 2 Hal. Hiſt. P. C. c. 20.

5. If in a Civil Action in the King's Bench *de Muliere abducta cum bonis viri*, upon Not guilty pleaded, the Defendant be convicted and found Guilty of having carried away the Woman and Goods with Force and feloniouſly, he may be put to anſwer the Felony without farther Accuſation; for ſuch a Charge, by the Oaths of twelve Men on their Inquiry into the Merits of a Cauſe, in a Court which has Juriſdiction over the Crime, is equivalent to an Indictment; and the King being always, in Judgment of Law, preſent in Court, may take advantage of any Matter therein properly diſcloſed for his Benefit. 2 Hawk. P. C. 211. and ſeveral Authorities there cited. 2 Hal. Hiſt. c. 20.

So if upon a Special Verdict, in a common Action of Treſpaſs brought in the King's Bench, it be found that the Defendant took them feloniouſly, this may ſerve for an Indictment. 2 Hawk. P. C. 211. 2 Hal. Hiſt. c. 20.

So if in an Action of Slander, for calling a Man Thief, the Defendant juſtifies that he ſtole Goods, and Iſſue thereupon taken, and it be found for the Defendant; if this be in the King's Bench, and for Felony in the ſame County where the Court ſits, or if it be before Juſtices of Aſſiſe, who have alſo a Commiſſion of Goal-Delivery, he ſhall be forthwith arraigned upon this Verdict as on an Indictment; and the Reaſon is, becauſe here is a Verdict of twelve Men in theſe Caſes, and ſo the Verdict, though in a Civil Action, ſerves the King's Suit as an Indictment, and is not contrary to the Acts of 25 *E.* 3. *cap.* 4. 28 *E.* 3. *cap.* 3. and 42 *E.* 3. *cap* 3. which enact, that no Man ſhall be put to anſwer, *&c.* but by Indictment or Preſentment. 2 Hal. Hiſt. P. C. c. 20.

But ſuch a Finding, in a Court which hath not Criminal Juriſdiction, is of no Force. 2 Hawk. P. C. 211.

Neither ſhall a Jury's finding *A.* guilty on the Trial of an Indictment againſt *B.* amount to an Indictment againſt *B.* becauſe the finding of one Man guilty on the Trial of another is extrajudicial, except only in the Caſe of a Coroner's Inqueſt of Death, taken on View; for the finding a Stranger guilty, upon the Acquittal of a Defendant, on the Trial of ſuch an Inqueſt, is not wholly extrajudicial, becauſe the Jury acquitting the Man on ſuch an Inqueſt, muſt inquire what other Perſon did the Fact. 2 Hawk. P. C. 212.

Alſo if on a Declaration in the King's Bench againſt *A.* for having been guilty of a Miſdemeanor *ſimul cum B.* the Jury find *B.* guilty; it is ſaid, that ſuch a Finding is equivalent to an Indictment, becauſe it is not wholly extrajudicial. 2 Hawk. P. C. 212.

6. If the Sheriff return a Reſcue of a Priſoner taken for Felony, or Breach of Priſon by one arreſted for Felony, this is not ſufficient to arraign the Party, nor doth it (*a*) countervail an Indictment, for it is not by the Oath of twelve Men. 2 Hal. Hiſt. P. C. c. 20. 2 Hawk. P. C. 214.

(*a*) But an Abuſe offered to the Proceſs of a Court, is ſuch a Contempt as is puniſhable by Impriſonment; for though by the Statute of *Magna Charta*, *&c.* no Man is to be impriſoned *ſine Judicio Parium*, *vel per legem terræ*; yet it is one Part of the Law of the Land to commit for Contempts, not taken away by any Statute; *vide* Tit. *Attachments*.

And although Informations are practiſed oftentimes in the Crown-Office in Caſes Criminal, and by many Penal Statutes, the Proſecution upon them is by the Acts themſelves limited to be by Bill, Plaint, Information or Indictment, yet the Method of Proſecution of Capital Offences is ſtill to be by Indictment, except in the Caſes above-mentioned. 2 Hal. Hiſt. P. C. c. 20. *vide* 5 Mod. 459, *&c.*

Page 95 (C) By whom it is to be found; and herein who may and ought to be Indictors.

EVERY Indictment is to be found by *(a)* twelve lawful Liege Freemen of the *(b)* County wherein the Crime was committed, returned by the proper Officer, without the Nomination of any other Perſon.

But for this *vide* Head of *Juries.*

(a) That if it appears by the Caption of the Indictment, or otherwiſe, that it was found by leſs than twelve Men, the Proceedings upon it will be erroneous. 2 Hawk. P. C. 215.——But if there be thirteen, or more, of the Grand Jury, and twelve agree, it is ſufficient, though the reſt diſſent. 2 Hal. Hiſt. P. C. 161.

(b) For they are ſworn *ad Inquirendum pro Corpore Comitatus*, and cannot regularly inquire of a Fact done out of that County for which they are ſworn, unleſs ſpecially enabled by Act of Parliament. 2 Hal. Hiſt. P. C. 163.

They muſt be *Probi & Legales Homines*; therefore it is a good Exception to one returned on a Grand Jury, that he is an Alien or Villain, attainted in a Conſpiracy, or *decies tantum*, or of Perjury, or *(c)* Outlawed, or Attaint of Felony or *Præmunire.*

2 Hal. Hiſt. P. C. 155.

(c) Though it be in a Perſonal Action. 2 Hal. Hiſt. P. C.—But this is left a *Quære* in 2 Hawk. P. C. 216.

(D) Whether the Indictors, or Grand Jury, may find Part of a Bill brought before them true, and Part falſe.

IT ſeems to be generally agreed, that a Grand Jury muſt find either *Billa vera*, or *Ignoramus* for the Whole; and that if they take upon them to find it ſpecially or conditionally, or to be true for Part only, and not for the Reſt, the Whole is void, and the Party cannot be tried upon it, but ought to be indicted a-new.

2 Rol. Rep. 52. 3 Bulſ. 206. Rol. Rep. 407. 2 Hawk. P. C. 210.

Hence it hath been held, that if a Grand Jury indorſe a Bill of Murder *Billa vera ſe defendendo*, or *Billa vera* for Manſlaughter, and not for Murder, the Whole is void; and the Reaſon hereof given is, that the Grand Jury are not to diſtinguiſh betwixt Murder and Manſlaughter, for it is only the Circumſtance of Malice that makes the Difference, and that may be implied by the Law without any Fact at all, and ſo it lies not in the Judgment of a Jury, but of the Judge; alſo the Intention of their finding Indictments is, that there may be no malicious Proſecution; and therefore if the Matter of the Indictment be not framed of Malice, but is *Veriſimilis*, though it be not *vera*, yet it anſwers their Oaths to preſent it.

3 Bulſ. 206. 2 Rol. Rep. 52. Sid. 23. 2 Keb. 180. Keil. 50.

Vide 2 Hal. Hiſt. 161. & *vide* Tit. *Juries.*

But it ſeems to be now agreed, that the Grand Jury may, without ſubjecting themſelves to any Puniſhment, find Part of a Bill true, and Part falſe, and that againſt the Direction of the Court.

2 Hal. Hiſt. 162.

And it is ſaid by *Hale*, that if a Bill of Indictment be for Murder, and the Grand Jury return it *Billa vera quoad* Manſlaughter, and *Ignoramus quoad* Murder, the uſual Courſe is, in the Preſence of the Grand Jury, to ſtrike out *Malitioſe*, and *ex Malitia ſua præcogitata*, and *Murdravit*, and leave in ſo much as makes the Bill to be but bare Manſlaughter.

2 Hal. Hiſt. 162.

But yet the ſafeſt Way is to deliver them a new Bill for Manſlaughter, and they to indorſe it generally *Billa vera*, for the Words of the Indorſement make not the Indictment, but only evidence the Aſſent or Diſſent of the Grand Inqueſt; it is the Bill itſelf is the Indictment, when affirmed.

But

* But notwithſtanding this Diſcretionary Power in the Grand Jury, yet, by the ſame Author, if *A.* be killed by *B.* ſo that it doth *conſtare de Perſona occiſi & occidentis*, and a Bill of Murder be preſented to them, regularly, they ought to find the Bill for Murder, and not for Manſlaughter, or *ſe defendendo*; becauſe otherwiſe Offences may be ſmothered without due Trial, and when the Party comes upon his Trial, the whole Fact will be examined before the Court and the Petty Jury; and in many Caſes it is a great Diſadvantage to the Party accuſed; for if a Man kill *B.* in his own Defence, or *per Infortunium*, or poſſibly in executing the Proceſs of Law, upon an Aſſault made upon him, or in his own Defence upon the Highway, or in Defence of his Houſe againſt thoſe who come to rob him, (in which three laſt Caſes it is neither Felony nor Forfeiture, but upon Not guilty pleaded, he ought to be acquitted;) yet if the Grand Inqueſt find *Ignoramus* upon the Bill, or find the ſpecial Matter, whereby the Priſoner is diſmiſſed and diſcharged, he may nevertheleſs be indicted for Murder ſeven Years after. * Page 96 2 Hal. Hiſt. 158.

If the Grand Jury indorſe an Indictment on the Statute of News *Billa vera*, but whether *Iſta verba prolata fuerunt malicioſe, ſeditioſe, vel contra, Ignoramus*; or if they indorſe an Indictment of forcible Entry and forcible Detainer, *Billa vera* as to the forcible Entry, and *Ignoramus* as to the forcible Detainer; or if they indorſe, that if the Freehold were in *J. S.* or the Poſſeſſion were in *J. S.* then they find *Billa vera*, the Whole is void. Yelv. 99. 2 Hawk. P. C. 210.

(E) What Matters are indictable.

NOT only Capital Offences, ſuch as Treaſons and Felonies, are indictable, but likewiſe all other Crimes being of a public Nature, and *Mala in ſe*, though of an inferior Kind: as Miſpriſions, and all other Contempts, all Diſturbances of the Peace, all Oppreſſions and all other (*a*) Miſdemeanors whatſoever of a public evil Example againſt the Common Law, may be indicted. 2 Hawk. P. C. 210. Placing a Perſon in the Footway of a public Street

in *London*, to deliver out printed Bills, not indictable. Bur. Rep. 516. (*a*) Where one was indicted for hiring a Man to kill the Maſter of the Rolls, and for wearing a Sword with an Intent to kill the Maſter of the Rolls, *&c.* or to that Effect; and it was moved in Arreſt, that an Attempt only, is not puniſhable in our Law, *& non efficit Conatus niſi ſequatur effectus*; but the Court held clearly, that though in Caſes of Felony the Law be not as it was heretofore, when *Voluntas reputabatur pro facto*, yet, as to Matters of Miſdemeanors, Attempts and Conſpiracies are puniſhable. Sid. 230. Lev. 146. Keb. 809. *Bacon*'s Caſe, and *vide infra*.

But no Injuries of (*b*) a private Nature, unleſs they ſome way concern the King, can be puniſhed by way of Indictment at Common Law. 27 Aſſ. pl. 20. Bro. Indictment 16.

Carth. 277. Preſentment 26. (*b*) 2 Bur. Rep. 1127, 1128. And therefore where one was indicted for theſe Words, *viz.* The Juſtices of Peace have no Power to ſet up a Watch-houſe where the old one ſtood; and the Indictment was quaſhed, becauſe the Words are not indictable, for it is a Queſtion touching a Right. Trin. 27 Car. 2. Captain *Cane*'s Caſe.

Alſo generally where a Statute either prohibits a Matter of public Grievance, or commands a Matter of public Convenience, as the Repairing the common Streets of a Town, *&c.* every ſuch Diſobedience of ſuch Statute is indictable; but if the Party hath once been fined in an Action on the Statute, ſuch Fine is, it ſeems, a good Bar to the Indictment, becauſe by the Fine the End of the Statute is ſatisfied. 2 Inſt. 55, 163. Cro Jac. 577. Mod. 34. Sid. 209. S. P. *The King* v *Jones. Mich.* 14 Geo. 2.

10 Co. 75. 2 Cro. 577. Ld. Raym. 347, 711. 2 Ld. Raym. 991. 10 Mod. 336. 12 Mod. 30, 104, 117, 223, 446, 502, 634. Fitzgib. 47, 65. 2 Stra. 828. Barnard. K. B. 108. 2 Seſſ. Ca. 19.

Alſo

* Page 97 * Alſo if a Statute extend only to (*a*) private Perſons, or if it extend to all Perſons in general, but chiefly concern Diſputes of a private Nature, (*b*) as thoſe relating to Diſtreſſes made by Lords on their Tenants, it is ſaid, that Offences againſt ſuch Statute will hardly bear an Indictment.

(*a*) Sid. 209.
(*b*) Mod. 71, 288.
Lev. 299.
Raym. 205. Vent 104. 2 Inſt. 121, 232. 2 Hawk. P. C. 211. 2 Keb. 687, 697.

Alſo where a Statute makes a new Offence, which was no way prohibited by the Common Law, and appoints a particular Proceeding againſt the Offender, as by Commitment, or Action of Debt, or Information, &c. without mentioning an Indictment, it ſeems to be ſettled at this Day, that it will not maintain an Indictment, becauſe the mentioning the other Methods of proceeding only, ſeems impliedly to exclude that of Indictment.

Show. 398.
3 Keb. 34, 273.
Cro. Jac. 643, 644.
3 Mod. 79.
Palm. 388.
Sid. 434.
6 Mod. 86. 2 Rol. Rep. 247, 398. 2 Hawk. P. C. 211. Ld. Raym. 682, 991. 10 Mod. 337. 12 Mod. 104, 446, 502, 634. Fitzgib. 47, 65. Stra. 62. 2 Stra. 828, 1256. Barnard. K. B. 108. 2 Seſſ. Caſ. 19. 4 Mod. 144. Carth. 263. Bur. Rep. 545. 2 Bur. Rep. 803.

Yet it hath been adjudged, that if ſuch a Statute give a Recovery by Action of Debt, Bill, Plaint or Information, or otherwiſe, it authorizes a Proceeding by way of Indictment.

Trin. 3 Geo. 1. *Rex* ver. *Dixon*.
2 Hawk. P. C. 211.

Alſo where a Statute adds a new Penalty to an Offence prohibited alſo by the Common Law, it is in the Election of the Proſecutor to proceed either at Common Law, or on the Statute; and if he conclude his Indictment *cont. formam Statuti*, and cannot make it good as an Indictment on the Statute, yet if the Indictment be good as an Indictment at Common Law, it ſhall ſtand as ſuch, and the Words *contra formam Statuti* ſhall be rejected.

2 Hawk. P. C. 211. but for this *vide infra*, 113, 114.

The true Diſtinction for granting or refuſing an Indictment is this; In all ſuch Impoſitions or Deceits, where common Prudence is ſufficient to guard a Perſon from ſuffering, the Offence is not indictable, but the injured Party is left to his civil Remedy; but where ſuch Methods are taken to cheat and deceive, as a Perſon cannot by ordinary Care or Prudence be guarded againſt, there it is an Offence indictable, as falſe Weights and Meaſures, or falſe Tokens.

2 Bur. Rep. 1129, 1130.

[An Indictment for Extortion, may be at the Seſſions, *Stra.* 73. A Perſon may be indicted, for an Attempt to pick a Pocket, or commit Sodomy. *Stra.* 193. For ſaying of a Juſtice of the Peace, in the Execution of his Office, *You* are a Rogue and a Liar. *Stra.* 420. For making great Noiſes in the Night, with a Speaking Trumpet. *Stra.* 704. For refuſing to execute the Office of Conſtable. *Stra.* 920. For having Coining Tools. *Stra.* 1074. & *Stat.* 8 & 9 *W.* 3. *cap.* 26. & *vide Caſ. temp. Hardw* 371. For not taking upon him the Office of Overſeer, when appointed. *Stra* 1146. For a Smell, tho' not unwholeſome, if it renders the Enjoyment of Life and Property uncomfortable. 1 *Burr.* 333. For not obeying an Order of Quarter Seſſions to pay two Shillings *per* Week for Maintenance of a Grand child. 2 *Burr.* 799. Where the Offence intended to be guarded againſt by a Statute was puniſhable before, there the particular Remedy given by Statute is *cumulative*, and does not take away the former; where the Statute enacts, that what was not puniſhable before, ſhall now be puniſhable in ſuch a particular Manner, there that Method muſt be purſued, and not by Indictment, 2 *Burr.* 799. But where the ſummary Remedy can be purſued, it is unreaſonable, oppreſſive, and wrong, to take the Remedy by Indictment. *Ibid.* An Indictment lies againſt an Overſeer of the Poor, for refuſing to receive a Pauper removed

removed by Order of two Juſtices, under 13 & 14 *Car.* 2 *cap.* 12. *Ibid.* Indictment lies againſt a Pariſhioner, for not doing his Highway Labour. 2 *Burr.* 832. It lies againſt a Conſtable, for diſcharging a Perſon brought to the Watch-houſe, by a Watch-man in the Night. 2 *Burr.* 864. By 30 *Geo.* 2. *cap.* 24. Any Perſon convicted of obtaining Money, by falſe Pretences, or ſending a Letter threatening to accuſe of a Crime puniſhable with infamous Puniſhment, with a View to obtain Money, may be fined, impriſoned, pilloried, whipt, or tranſported. An Indictment does not lie for caſual Damage in doing a lawful Act. *Stra.* 190. Nor for a Deceipt of a private Nature, as for not delivering a Quantity of Beer agreed and paid for. 1 *Wilſ.* 301. Nor for ſelling *ſhort* Meaſure, tho' it lies for ſelling by *falſe Meaſure*. 3 *Burr.* 1697. Nor for a Treſpaſs of a private Nature, tho' laid *vi et armis*, as for entering a Yard, a Field, *&c.* if no Riot, or unlawful Aſſembly. 3 *Burr.* 1698, 1706, 7, 1731. See farther 6 *Com. Dig.* 354.]

(F) Within what Place the Offence inquired of muſt ariſe.

THE Grand Jury are ſworn *ad Inquirendum pro Corpore comitatus*, and therefore by the Common Law cannot regularly indict or preſent any Offence which does not ariſe within the County or Precinct for which they are returned. 2 Hal. Hiſt. P. C. 163. 2 Hawk. P. C. 220.

And therefore it is a good Exception to an Indictment, that it doth not appear that the Offence aroſe within ſuch County or Precinct. 2 Hawk. P. C. 220. and ſeveral Authorities there cited.

Alſo it hath been holden, that the finding of a Collateral Matter expreſsly alledged in the Indictment, in a different County or Precinct, is void. Hawk. P. C. 220.

Alſo it hath been generally holden, that the Want of an expreſs Allegation of the Precinct where the Offence happened, is not ſupplied by putting it in the Margent of the Indictment, unleſs it go farther, as by adding *in Comitatu prædicto*, *&c.* which ſeems to be ſufficient, where in the Body of the Indictment no other County is named before. 2 Hawk. P. C. 220.

Alſo if a Fact be alledged in *B. juxta D. in comitatu E.* it is ſaid, that hereby it ſufficiently appears that *B.* is in the County of *E*. Cro. Jac. 41. *Baud*'s Caſe.

So if an Arreſt be alledged in the County of *A.* and one be indicted for reſcuing the Party arreſted, without ſaying in what County, it ſhall be intended to have been in the County of *A.* where the Arreſt was. 2 Hawk. P. C. 220.

It ſeems alſo, that by the Common Law, if a Fact done in one County prove a Nuiſance to another, it may be indicted in either. 2 Hawk. P. C. 221.

* So if *A.* by reaſon of Tenure of Lands in the County of *B.* be bound to repair a Bridge in the County of *C.* if the Bridge be in Decay, he may be indicted in the County of *C.* that he is bound *ratione tenuræ* of Lands in the County of *B* to repair the Bridge. * Page 98 2 Hal. Hiſt. P. C. 164.

Alſo by the Common Law, if one guilty of a (*a*) *Larceny* in one County carry the Goods ſtolen into another, he may be indicted in either. 2 Hawk. P. C. 221.

(*a*) But if *A.* rob *B.* in the County of *C.* and carry the Goods into the County of *D.* *A.* cannot be indicted of *Robbery* in the County of *D.* becauſe the *Robbery* was in another County; but he may be indicted of *Larceny*, or *Theft*, in the County of *D.* becauſe it is Theft wherever he carries the Goods; the like Law in an Appeal. 7 C. 2. a. 2 Hal. Hiſt. P. C. 163.

If

2 Hawk. P. C. 221. (*b*) Hawk. P. 111.—But for this *vid.* Sid. 171. Kel. 79.

If a Man marry two Wives, the firſt in a foreign Country, and the ſecond in *England*, he may be indicted and tried for it in *England* upon the Statute of 1 *Jac.* 1. *cap.* 11. which makes it Felony, becauſe the ſecond Marriage alone was Criminal, and the firſt had nothing unlawful in it, and was merely of a tranſitory Nature; and by (*b*) *Hawkins*, if the ſecond Marriage had been in a foreign Country the Party might have been indicted here within the Purview of the ſaid Statute 1 *Jac.* 1.

2 Hawk. P. C. 221.

Alſo if a Woman be taken by Force in one County, and carried into another, and there married, the Offence may be indicted, *&c.* in the ſecond County on the Statute of 3 *H.* 7. *cap.* 2. becauſe the Continuance of the Force amounts to a forcible Taking.

2 Hawk. P. C. 220.

But if an Offence in ſtealing a Record, *&c.* contrary to 8 *H.* 6. *cap.* 12. be committed, partly in one County, and partly in another, ſo as not to amount to a compleat Offence within the Statute in either, it is ſaid, that the Party cannot be indicted for a Felony in either, but only for a Miſpriſion.

2 Hawk. P. C. 220.

But notwithſtanding the above Inſtances, it ſeems agreed as a general Rule, that, let the Nature of the Offence indicted be what it will, if it appear, upon Not guilty, to have been committed in a different County from that in which the Indictment was found, the Party ſhall be acquitted.

2 Hawk. P. C. 220, 1.

And therefore at the Common Law, if a Man had died in one County of a Stroke he received in another, it was holden that the Homicide was indictable in neither, becauſe the Offence was not compleat in either; but to remedy this Inconvenience, it is enacted by 2 *&* 3 *E.* 6. *cap.* 24. "That "where any one ſhall be felonioufly ſtricken or poiſoned in one County, "and die thereof in another, an Indictment thereof found by the Jurors "of the County where the Death ſhall happen, whether before the Co- "roner, on View of the Body, or whether before Juſtices of the Peace, "or other Juſtices, *&c.* ſhall be as (*c*) effectual, as if the Stroke, *&c.* had "been in the County where the Party ſhall die, or where the Indictment "ſhall be ſo found."

(*c*) The Offender muſt be tried where the Death happened; but an Appeal may be brought in either County. 7 Co. 2. *Bulwer's* Caſe. 2 Hal. Hiſt. P. C. 163.

2 Hal. Hiſt. P. C. 163.

So if *A.* had committed a Felony in the County of *D.* and *B.* had been Acceſſory before or after in the County of *C. B.* could not have been indicted as Acceſſory in either County at Common Law; but by the above Statute he is indictable, and ſhall be tried in the County where he ſo became Acceſſory.

2 Hal. Hiſt. P. C. 163. 2 Hawk. P. C. 222, 3.

It appears to have been a great Doubt at Common Law, how Treaſon done out of the Realm was triable; ſome holding, that it was only triable by Appeal before the Conſtable and Marſhal; others that it was indictable in any County where the King pleaſed; and ſome that it was indictable where the Offender had Lands: But for a plain Remedy, Order and Declaration of this Matter, it is enacted by 35 *H.* 8 *cap.* 2. "That "all Offences then or after made or declared to be Treaſons, Miſpriſions "of Treaſon, or Concealments of Treaſons, done out of this Realm of
* Page 99 * "*England*, ſhall be inquired of, heard and determined, by the King's "Bench, by lawful Men of the Shire where the ſame Bench ſhall ſit; "or elſe before ſuch Commiſſioners, and in ſuch Shire of the Realm, as "ſhall be aſſigned by the King's Commiſſion, and by lawful Men of the "ſame Shire, in like manner to all Intents and Purpoſes, as if ſuch Trea- "ſons, *&c.* had been done within the ſame Shire, where they ſhall be ſo "inquired of, *&c.*"

In

In the Conſtruction hereof it hath been reſolved,

1. That if after an Indictment has been taken in purſuance to this Statute, the Court, or Commiſſioners appointed by the King, remove into a different County, the Trial ſhall be by Jurors returned from the firſt County, (*a*) being moſt agreeable to the general Courſe of the Common Law, which requires that Indictments ſhall be tried by Jurors of the ſame County in which they were found. 2 Hawk. P. C. 223. (*a*) 3 Inſt. 34. H. P. C. 204. Stanf. P. C. 90. Dyer 286.

2. That the Commiſſioners and County for the Trial are well aſſigned by the King's Writing his Name to the Commiſſion, or by his Signing the Warrant for it. 3 Inſt. 11. 2 Hawk. P. C. 223.

3. That an Offence in *Ireland*, that is Treaſon here as well as there, is triable here by Virtue of this Statute, unleſs it were committed by a Peer of *Ireland*; in which Caſe it is not triable here, becauſe the Party would loſe the Benefit of a Trial by his Peers. 2 Hawk. P. C. 223.

That this Statute is not repealed by 1 & 2. *Ph. & M. cap.* 10. *ſect.* 7. which enacts, That all Trials for Treaſon ſhall be according to the Common Law. 2 Hawk. P. C. 205. 2 *Hale* Hiſt. P. C. 164.

By the 28 *H.* 8. *cap.* 15. it is enacted, "That Treaſons, Felonies and "Robberies, &c. upon the Sea, &c. ſhall be inquired, &c. in ſuch Places "in the Realm as ſhall be limited by the King's Commiſſion, in like "manner as if ſuch Offences had been committed on the Land." But for this *vide* Tit. *Piracy*, & 11 & 12 *W.* 3. c. 7. ſ. 1.

which enacts, that all Piracies and Felonies upon the Sea, &c. may be tried *in any Place at Sea*, or upon the Land in his Majeſty's Plantations. [And ſect. 14. of the ſame Statute enacts, That the Commiſſioners, &c. ſhall have Power to try Pirates in all the Colonies, &c. in *America*, and to grant Warrants, in order to their being apprehended and tried there, or ſent into *England* for Trial.]

"By the 27 *H.* 8. *cap.* 6. for the Puniſhment and ſpeedy Trial, as well "of the Counterfeiters of any Coin current within this Realm, as of all "Felonies and Acceſſories of the ſame, and other Offences felonioufly "done within any (*b*) Lordſhip Marchers of *Wales*, the Juſtices of Gaol-"Delivery and of the Peace in the Shire or Shires of *England*, where "the King's Writ runneth, next adjoining to the Lordſhip Marchers, or "other Place in *Wales*, where ſuch Counterfeiting, &c. ſhall be committed, "ſhall have Power, at their Seſſions and Goal-Delivery, to inquire by "Verdict of twelve Men of the ſame Shire, &c. in *England*, there to cauſe "all ſuch Counterfeiters, &c. to be indicted, &c. in like manner as "if the ſame Petit Treaſons, &c. had been done within any of the ſaid "Shires within the ſaid Realm; alſo ſuch Juſtices ſhall try all foreign "Pleas pleaded by ſuch Offenders; neither ſhall an Acquittal, &c. or Fine "making in the Lordſhips Marchers, be (*c*) a Bar for a Perſon indicted "in the ſaid Shire within two Years after the Felony."

(*b*) This Statute extends as well to the old *Welſh* Counties, as to the Lordſhip Marchers. Paſch. 12 Geo. 1. *Athoro*'s Caſe. Stra. 553. 8 Mod. 135.

(*c*) But an Acquittal at the Grand Seſſions is a good Bar of an Indictment for the ſame Crime in *England*. 2 Hawk. P. C. 221.

By the 27 *Eliz. cap.* 2. Treaſons by Prieſts or Jeſuits coming into *England*, and Felony for receiving them, are inquirable and determinable where the Offender is apprehended. 2 *Hale* Hiſt. P. C. 164.

Page 100 (G) **What ought to be the Form of the Body of an Indictment at Common Law:** And herein,

1. How the Body of an Indictment at Common Law ought to ſet forth the Subſtance and Manner of the Fact.

2 Hal. Hiſt. 169. (a) To that Degree as to become the Diſeaſe and Reproach of the Law. 2 Hal. Hiſt. P. C. 193.——That before the 4 Geo. 2. c. 26. and 6 Geo. 2. c. 14.—all Parts of it ought to be in *Latin*, and how far it was vitious for falſe or improper *Latin*, *vide* 2 Hawk. P. C. 238, 9.

AN Indictment, as defined by my Lord *Hale*, is nothing elſe but a plain brief and certain Narrative of an Offence committed by any Perſon, and of thoſe neceſſary Circumſtances that concur to aſcertain the Fact, and its Nature, in which, in favour of Life, great (a) Strictneſſes have at all Times been required.

Cro. Eliz. 147, 201. 2 Hawk. P. C. 225.

And therefore it is laid down as a good general Rule, that in Indictments, as well as in Appeals, the ſpecial Manner of the whole Fact ought to be ſet forth with ſuch Certainty, that it may judicially appear to the Court that the Indictors have not gone upon inſufficient Premiſſes.

2 Hawk. P. C. 224. and ſeveral Authorities there cited. 2 Hal. Hiſt. P. C. 183, 184. accord. (b) And therefore an Indictment againſt *A. quod felonice abduxit unum equum*, without ſaying *cepit & abduxit*, is not good, for he might have the Horſe by Bailment, and then it is no Felony. 2 Hal. Hiſt. P. C. 184. (c) For if *A.* is indicted, that *furatus eſt unum equum*, it is but a Treſpaſs, for want of the Word *felonice*. 2 Hal. Hiſt. P. C. 184. (d) In Petit Treaſon it muſt be laid *felonice & proditorie*; for though he be acquitted of the Petit Treaſon, he may be convict of the Manſlaughter or Murder. 2 Hal. Hiſt. P. C. 184.

Hence it hath been held, that no Periphraſis, or Circumlocution whatſoever, will ſupply thoſe Words of Art which the Law hath appropriated for the Deſcription of the Offence; as *Murdravit* in an Indictment of Murder, (b) *Cepit* in an Indictment of Larceny, *Mayhemavit* in an Indictment of *Mayhem*, (c) *Felonice* in an Indictment of any Felony whatſoever, *Burglariter*, or *Burgulariter*, or elſe *Burgalariter*, in an Indictment of Burglary, (d) *Proditorie* in any Indictment of Treaſon, *contra Ligeantiæ ſuæ debitum* in an Indictment of Treaſon againſt the King's Perſon.

2 Hawk. P. C. 224. (e) But an Indictment of Rape, *quod felonice & carnaliter cognovit*, without the Word *rapuit*, is not good, though it conclude *contra formam Statuti*. 2 Hal. Hiſt. P. C. 184.

But in an Indictment, or Appeal of Rape, the ſame is ſufficiently ſet forth by the Words *felonice rapuit*, without adding (e) *carnaliter cognovit*, or ſetting forth the ſpecial Manner of the Terror or Violence, and then concluding that the Defendant *ſic felonice rapuit*.

2 Hawk. P. C. 225.

And from this Certainty required in Indictments, it hath been holden, that an Indictment for a felonious Breach of Priſon, without ſhewing the Cauſe of the Impriſonment, is not good.

Allen 78. Mod. 24. 5 Mod. 96, 129.

So of an Indictment for refuſing to ſerve the Office of Conſtable, being *Legitimo modo electus*, without ſhewing the Manner of the Election.

Cro. Eliz. 483. pl. 12.

So it hath been adjudged, that an Indictment of Burglary is inſufficient, without ſhewing that it was *Noctanter*.

2 Rol. Rep. 345. Palm. 368, 374.

Alſo it is agreed, that an Indictment, charging a Man with a Nuſance, in reſpect of a Fact which is lawful in itſelf, as the Erecting of an Inn, &c. and only becomes unlawful for particular Circumſtances, is inſufficient, unleſs it ſet forth ſome Circumſtances that make it unlawful.

So

* So it hath been adjudged, that an Indictment for traiterously coining *Alkemii* like to the King's Money, without shewing what Money, *viz.* whether Gold, Silver or Copper, is insufficient; for the latter of these, the Offence could not amount to Treason. * Page 101 2 Hawk. P. C. 225.

So an Indictment of Perjury not shewing in what Manner, and in what Court the false Oath was taken, is insufficient; because, for aught appears, it might have been extrajudicial. Cro. Eliz. 137.

But an Indictment of Extortion, charging *J. S.* with the taking of 50*s.* as a Bailiff of an Hundred *colore Officii*, without shewing for what he took it, is good, at least after Verdict; for perhaps he might claim it generally, as being due to him as Bailiff, in which Case the taking could not be otherwise expressed. Sid. 91. 2 Hawk. P. C. 225.

An Indictment charging a Man disjunctively is void; as *murdravit, vel murdrari causavit*, or that A. *verberavit* B. *vel verberari causavit*, or that A. *fabricavit talem chartam, vel fabricari causavit*, &c. for here are distinct Offences, and it appears not of which of them the Party is accused. 5 Mod. 137, 138. Salk. 371. pl. 8. 2 Hawk. P. C. 225.

Also an Indictment accusing a Man in general Terms, without ascertaining the particular Fact laid to his Charge, is insufficient; for no one can know what Defence to make to a Charge which is uncertain; nor can he plead it in Bar or Abatement of a subsequent Prosecution; neither can it appear that the Facts given in Evidence against a Defendant on such a general Accusation are the same of which the Indictors have accused him; nor can it judicially appear to the Court what Punishment is proper for an Offence so loosely expressed. Lev. 203. Keb. 278. Show. 389. 2 Hawk. P. C. 226. 4 Mod. 100. 3 Salk. 198. pl. 1. Comb. 193. Carth 226. Holt 363. pl. 3.

As where the Indictment charges the Party with having spoken divers false and scandalous Words against *J. S.* being Mayor of *A.* &c or with being a common Defamer, Vexer, and Oppressor, &c. or with being a common Disturber of the Peace, and having stirred up divers Quarrels among his Neighbours; or with being a Person of evil Behaviour, a common Deceiver, a common Publisher of the King's Secrets, &c. or with being a common Forestaller, a common Thief, a common Champertor, &c. 2 Hawk. P. C. 226. and several Authorities there cited.

But Barretry being an Offence of a complicated Nature, consisting in the Repetition of frequent Acts, all of which it would be too prolix to enumerate, Experience has settled it to be sufficient to charge a Man in general as a common Barretor. 2 Hawk. P. C. 226. *vide* Tit. *Barretry.*

And for the same Reason an Indictment against a common Scold is sufficient, without shewing any Particulars. 2 Hawk. P. C. 227.

Neither is it necessary for an Indictment of either of these two last mentioned Offences to conclude *in Nocumentum omnium Ligeorum*, &c. for it appears from the Nature of the Thing, that it could not but be so. 2 Hawk. P. C. 227. Salk. 371 pl. 6. Cro. Jac. 20. 4 Co. 42.

An Indictment must lay the Charge against the Defendant positively, and not by way of Recital, as with a *Quod cum*, &c. and it must expressly alledge every Thing material in the Description of the Substance, Nature and Manner of the Crime; for no Intendment shall be admitted to supply a Defect of this Kind. 5 Co 150. 2 Hawk. P. C. 227.

Therefore if an Indictment of Murder want the Words *ex Malitia præcogitata*, it is no Answer that it has the Words *felonice murdravit*, which imply as much. Dyer 99. pl. 63. 2 Hawk. P. C. 227.

So if any Indictment of Death want an express Allegation that the Party received the Hurt laid as the Cause of his Death, and also that he died thereof, no Implication will help it. 2 Hawk. P. C. 227. 2 Hawk. P. C. 227.

Also if an Indictment for feloniously breaking of a Prison, and commanding *J. S.* there imprisoned, &c. to escape, do not expressly alledge that *J. S.* did escape, it is no Answer that it is fully implied in calling the Offence a felonious Breaking. Keilw. 87. 2 Hawk. P. C. 227.

4 Co. 41. 2 Hawk. P. C. 227. *Page 102

Yet ſtrained and over-nice Exceptions of this Kind are not to be regarded; as that an Indictment of Death, laying the Aſſault to have been * with Malice prepenſe, doth not expreſly repeat it in the Clauſe immediately following, and joined with a Copulative ſhewing the giving of the Wound at the ſame Time and Place.

Cro Jac. 473. 2 Hawk. P. C. 227.

Or that an Indictment ſetting forth that *J. S.* was lawfully arreſted by Virtue of a Plaint before ſuch a Sheriff, *&c.* doth not expreſly ſhew that there was a good Warrant.

9 Co. 67. 5 Co. 150. 2 Hawk. P. C. 227.

Or that an Indictment ſetting forth an Arreſt in ſuch a Pariſh and Ward in *London*, by Virtue of a Warrant, to arreſt the Party within the Liberties of *London*, doth not expreſly lay ſuch Pariſh and Ward within the Liberties of *London*.

Cro Jac. 610. 2 Mod. 128. 2 Rol. Rep. 226. Moor 606. 2 Lev. 229. Raym. 378. Keb. 852.

Or that an Indictment finding that *J. S. exiſtens* of ſuch a Trade, *&c.* as will bring him within the Law whereon the Indictment is founded, committed ſuch a Fact, does not expreſly alledge that he was of ſuch a Trade, *&c.* at the Time of the Fact; for it fully appears from the natural Conſtruction of the Participle *exiſtens* going before the Verb, to which it is the Nominative Caſe.

Cro Jac. 610. 2 Rol. Rep. 226. 2 Lev. 229. 2 Mod. 129. 2 Hawk. P. C. 228. Ld. Raym. 610.

Yet it is a good Exception to an Indictment of forcible Entry finding that *A.* diſſeiſed *B.* of ſuch Land *exiſtens liberum Tenementum* of *B.* that it is not expreſſed at what Time it was his Freehold; for it ſtands indifferent, according to the common Rules of Conſtruction, whether it was his Freehold at the Time of the Diſſeiſin, or at the Time of finding the Indictment, the Word *exiſtens* being applied only to the Thing which was the Subject of the Action, and not being the Nominative Caſe of the Verb, as in the former Caſe.

2 Hawk. P. C. 228-9. and ſeveral Authorities there cited.

If one material Part of an Indictment be repugnant to another, or if the Fact as laid be impoſſible or abſurd, the Indictment is void; as where one is indicted for having forged a Writing, in which *A.* was bound to *B.* which is impoſſible if the Writing were forged; or for having diſſeiſed *J. S.* of Land; wherein it appears, by the Indictment itſelf, that he had no Freehold, or for having entered peaceably on *J. S.* and then and there forcibly diſſeiſed him; or for having diſſeiſed him of Land then being, and for ever ſince continuing to be, his Freehold; or for having murdered *J. S.* at *B.* where by the Indictment it appears that *J. S.* was only wounded at *B.* and died at *C.* or for ſelling Iron with falſe Weights and Meaſures, which is not only abſurd, as ſuppoſing that Iron could be ſold by Meaſure, but inconſiſtent, in ſuppoſing that it was ſo ſold, and yet at the ſame Time ſold by Weight; or for being abſent from Church ſix Months, between ſuch and ſuch a Time, which appears to have contained only the Space of eleven Days; or for feloniouſly cutting down Trees, *&c.* Yet where the Senſe is clear, a ſmall Impropriety may be diſpenſed with; as where one is indicted for having mowed *unam acram Fœni*, which is ſaid to be ſufficient, and yet that which was mowed could not, at the Time of the mowing, in Strictneſs be called Hay, but Graſs only

2 Hawk. P. C. 229.

Alſo a Repugnancy in an Indictment in ſetting forth the Offence of the Acceſſory, is as fatal as it is in ſetting forth that of the Principal; as where an Indictment of Death having laid the Stroke on one Day, and the Death at another, charges the Acceſſory with having abetted the Principal at the Time of the Felony only.

9 Co. 67. Plow. 97.

But where ſeveral are preſent and abet a Fact, and one only actually does it, an Indictment may, in the ſame Manner as an Appeal, lay it as done by the one, and abetted by the reſt.

2 Hawk. P. C. 229.

But if it barely charge a Man with having been preſent, it is void, becauſe a Man may be innocently preſent.

2 Hawk. P. C. 229.

An Indictment of *J. S.* as Acceſſory to four by theſe Words, *Sciens ipſos quatuor feloniam prædict' feciſſe apud* B. *felonice receptavit*, without adding

ing

ing *eos* is naught; for it appears not clearly how many of them he is charged to have received.

* Also an Indictment of a Constable for having voluntarily and feloniously suffered a Person arrested by him on Suspicion of Felony to escape, without shewing what the Felony was, and that it was actually committed, is said to be void for the Uncertainty: But an Indictment for knowingly suffering Persons convicted of Felony to escape, is said to be good, without finding expresly what the Felony was, or that it was committed, if the Record of Conviction be set forth with convenient Certainty; for that shews what the Felony was, and that it was committed. *Page 103 2 Hawk. P. C. 229, 230.

It is holden by some, that an Indictment finding that *J. S. scienter receptavit J. D.* being a Felon, is not good, without expresly finding that he knew him to be a Felon; but by others, such Indictment is good, because the plain Construction of the Word *scienter* carries it through the whole Sentence †. 2 Hawk. P. C. 230. and the Authorities there cited.

† *Sciens* that, &c. a sufficient Averment. Stra. 904.—Indictment must be in the Present Tense, *do*, and not *did*, present. Andr. 162. In an Indictment of a Scold, it must be laid *ad communem nocumentum*. Stra. 1246.

2. How the Indictment must set forth the Persons mentioned or referred to in it.

The Name and Addition of the Party indicted ought regularly to be inserted, and inserted truly, in every Indictment; but if the Party be indicted by a wrong Christian Name, Surname or Addition, and he plead to that Indictment Not guilty, or answer to that Indictment upon his Arraignment by that Name, he shall not be received after to plead a Misnomer or Falsity of his Addition; for he is concluded and estopped by his Plea by that Name, and of that Estoppel the Gaoler and Sheriff that doth Execution shall have Advantage. 2 Hal. Hist. P. C. 175.

But it is said, that an Indictment that the King's Highway in such a Place is in Decay, through the Default of the Inhabitants of such a Town, is good without naming any Person in certain. 2 Rol. Abr. 79. 2 Hawk. P. C. 230.

Also it is said, that no Indictee can take any Advantage of a mistaken (*a*) Surname in the Indictment, either by Plea in Abatement, or otherwise, notwithstanding such Surname have no manner of Affinity with his true one, and he was never known by it. 2 Hawk. P. C. 230.

(*a*) But *per Hale*, it is the safest Way to allow his Plea of Misnomer, both as to his Surname and as to his Christian Name; for he that pleads Misnomer of either, must in the same Plea set forth what his true Name is, and then he concludes himself; and if the Grand Jury be not discharged, the Indictment may be presently amended by the Grand Jury, and returned according to the Name he gives himself. 2 Hal. Hist. P. C. 176.

And in this Respect an Indictment (*b*) differs from an Appeal, whereof it is certain that a Misnomer of a Surname may be pleaded in an Abatement as well as any other Misnomer whatsoever. 2 Hal. Hist. P. C. 176. 2 Hawk. P. C. 230.

(*b*) But that every other Misnomer of the Defendant, as also every defective Addition, are as fatal in an Indictment as an Appeal; for which *vide* 2 Hawk. P. C. 187, &c.

Not only the Misnomer of the Name of Baptism will abate an Indictment, but also the Naming the Defendant Knight, &c. who is a Baronet, and no Knight, &c. or the Omission of a Name of Dignity; as where Garter King at Arms is not named Garter in the Indictment; and so of any other Name of Dignity, (*c*) if Process of Outlawry lie upon it. 2 Hawk. P. C. 230. and several Authorities there cited.

(*c*) But an Indictment against a Peer of the Realm is good without an Addition, because no Process of Outlawry lies against him. Cro. Eliz. 148. Lord *Dacre*'s Case. 2 Hal. Hist. P. C. 177.

2 Hal. Hiſt. P. C. 176. By the Common Law the Party indicted could not take Advantage of a Miſnomer or the Want of Addition, becauſe the Fact being ſworn againſt the Party preſent, and appearing to their View, there could be no Injury by the Miſnomer; alſo as Felons generally go by no certain Name, and have
*Page 104 * no fixed Habitation, it was thought hard to find out their real Names or Profeſſions; but this was altered by the Statute 1 *H.* 5. *cap.* 5. which requires that in all Indictments, *&c.* the Party indicted ought to have the Addition of his Myſtery, Degree, Place and County.

2 Hal. Hiſt. 176. But for this *vide* 2 Hawk. P. C. 187, 8. The Additions required by the Statute are, that of his Degree, as *Yeoman*, *Gentleman*, *Eſquire*; of his Myſtery, as *Huſbandman*, *Sailor*, *Spinſter*, *&c.* therefore if the Addition be only general, as Servant, Farmer, Citizen, *&c.* or of Crimes and Miſdemeanors only, as Extortioner, Vagabond, Heretick, *&c.* theſe are no good Additions.

2 Hal. Hiſt. P. C. 177. 2 Hawk. P. C. 231. The Addition ought to be to the Subſtantive Name, and not to that which comes after the *Alias dictus*, becauſe regularly the Addition refers to the laſt Antecedent.

2 Hal. Hiſt. P. C. 177. But in 2 Hawk. P. C. 231. it is ſaid that where ſeveral are indicted, and there is an Omiſſion of an Addition as to one, it makes the Indictment vicious as to all; for which is cited. Bulſ. 183. If ſeveral Perſons be indicted for one Offence, Miſnomer, or Want of Addition of one, quaſheth the Indictment only againſt him, and the Reſt ſhall be put to anſwer; for they are in Law as ſeveral Indictments; and ſo in Treſpaſs.

2 Hawk. P. C. 231. Not only the Defendant, but regularly all other Perſons alſo mentioned in an Indictment, muſt be deſcribed with convenient Certainty; and therefore it ſeems to be generally agreed at this Day, that an Indictment for ſuffering divers Bakers to bake, *&c.* againſt the Aſſiſe, or for diſtraining divers Perſons without Cauſe, or for taking divers Sums of Money of divers Perſons for ſuch a Toll, *&c.* without naming any Bakers, *&c.* in particular, is inſufficient.

Plow. 85. b. Dyer 285. a. 2 Hal. Hiſt. 181. 2 Hawk. P. C. 232. But an Indictment of Murder *cujuſdam ignoti* is good; and ſo for ſtealing the Goods *cujuſdam ignoti*; ſo of an Aſſault *in quendam ignotum*; and if he be acquitted or convicted, and be afterwards indicted for an Aſſault or Murder of ſuch a Man by Name, he may plead the former Conviction or Acquittal, and aver it to be the ſame Perſon.

Hal. Hiſt. 181. But an Indictment *quod invenit quendam hominem mortuum, ac felonice furatus eſt duas Tunicas*, without ſaying *de Bonis & Catallis cujuſdam ignoti*, is not good.

2 Hal. Hiſt. P. C. 181. If the Goods of a Chapel be ſtolen, the Indictment ſhall ſay *Bona & Catalla Capellæ in cuſtodia Præpoſitorum*; if it be done in Time of Vacation, *Bona & Cattalla Capellæ tempore Vacationis*; but if the Goods of a Pariſh Church be ſtolen, as the Bell, the Books, *&c.* it ſhall run *Bona Parochianorum de* S. *in cuſtodia Guardianorum Eccleſiæ*, and ſhall not ſuppoſe them *Bona Eccleſiæ*.

2 Hal. Hiſt. P. C. 181. If the Goods which *A.* hath as Executor of *B.* be ſtolen, the Offender may be indicted *quod Bona Teſtatoris in cuſtodia* A. *Executoris ejuſdem* B. or it may be general *Bona ipſus* A.

2 Hal. Hiſt. P. C. 181. If *A.* dying be buried, and *B.* opens the Grave in the Night-time and ſteals the Winding-ſheet, the Indictment cannot ſuppoſe them the Goods of the dead Man, but of the Executors, Adminiſtrators or Ordinary, as the Caſe falls out,

Cro. Eliz. 490. 2 Hal. Hiſt. P. C. 182. An Indictment *quod felonice, &c. cepit quandam peciam Panni cujuſdam* J. S. without ſaying *de Bonis & Catallis cujuſdam* J. S. was therefore quaſhed.

2 Hal. Hiſt. P. C. 182. There is no Need of an Addition of the Perſon robbed or murdered, *&c.* unleſs there be a Plurality of Perſons of the ſame Name; neither then is it eſſential to the Indictment, though ſometimes it may be convenient, for

Diſtinction

Diſtinction ſake, to add it; for it is ſufficient if the Indictment be true, *viz.* that *J. S.* was killed or robbed, though there are many of the ſame Name.

And it hath been adjudged, that an Indictment of an Aſſault on *John*, Pariſh Prieſt of *D.* in the County of *C.* is good without mentioning his Surname; for the Certainty of the Perſon ſufficiently appears. Keilw. 25. Dyer 285. pl. 38. 2 Hawk. P. C. 232.

* But it ſeems that if ſuch Indictment had only deſcribed him by his Name of Baptiſm without any farther Addition, it had been too uncertain; yet the contrary ſeems to be held in (*a*) *Moor:* However it ſeems agreed that a Repugnancy or Abſurdity in the Deſcription of the Perſon injured will vitiate an Indictment: as where one is indicted for ſtealing *Bona præ-dict'* J. S. where no *J. S.* was mentioned before. * Page 105 2 Hawk P. C. 232, 3. (*a*) Moor 466. pl. 662.

It is not neceſſary to alledge in an Indictment of Death, that the Party killed was in the Peace of God. 2 Hawk. P. C. 233.

3. How the Indictment ought to ſet forth the Thing wherein the Offence was committed.

An Indictment, which doth not with ſufficient Certainty ſet forth the Thing wherein the Offence was committed, is inſufficient; as where one is indicted for having forged a Leaſe of certain Lands, without naming ſome one certain Parcel; or for having ſtolen *Bona & Catalla* J. S. without ſhewing any in particular; or for having treſpaſſed on two Cloſes of Meadow or Paſture, or for having diverted *quandam partem Aquæ* running from ſuch a Place to ſuch a Place, without any farther Deſcription; or for having ingroſſed *magnam quantitatem Straminis & Fœni*, or *diverſos cumulos Tritici*, without ſhewing how much of each; or for having carried away *duas centenas Caſei*, without adding *Libras* or *Uncias*, &c. or for having erected ſeveral Cottages *contra Formam Statuti*, without ſhewing how many. 2 Hawk. P. C. 233, 4. 2 Hal. Hiſt. P. C. 182. accord.

It is ſaid to be moſt proper in Indictments of Larceny and Treſpaſs on a living Thing to ſhew to whom the Property of it belonged, by calling it the Ox or Horſe, &c. of *J. S.* without uſing the Words *Bona & Catalla:* Yet there are many Precedents in Books of good Authority, wherein this Nicety is not obſerved. 2 Hawk. P. C. 234.

If Theft be alledged in any Thing, the Indictment muſt ſet down the Value, that it may appear whether it be Grand or Petit Larceny. 2 Hal. Hiſt. P. C. 183.

If the Thing be moveable, as a Horſe, Cow, &c. it is ſaid to be moſt proper to ſhew its Worth by the Word *Pretium*; but if the Thing be immoveable, and conſiſts of divers dead Things, it ought to be *ad Valentiam*; (*b*) yet this Nicety ſeems not neceſſary; neither is it clear that the Worth of the Thing ſtolen is required to be ſet forth in an Indictment of Larceny, for any other Purpoſe, than to ſhew that the Crime amounts to Grand Larceny, and the better to aſcertain the Crime, in order for a Reſtitution; or in an Indictment of Treſpaſs, for any other Purpoſe, than to aggravate the Crime. 2 Hawk. P. C. 234. (*b*) And *per Hale* this is but Clerkſhip, and not ſubſtantial; for if *Pretii* be ſet inſtead of *ad Valentiam*, or *e Converſo*, it doth not vitiate the Indictment; and ſo it is if one *Pretii* or *ad Valentiam* be added to ſeveral Things, where in true Clerkſhip it ſhould be applied ſeverally, it is good if the Party be convict of all; but poſſibly, if the Party be convict but of Part, it is not good, becauſe it will be uncertain whether Grand or Petit Larceny. 2 Hal. Hiſt. P. C. 183.

An Indictment *quod felonice cepit* 20 *Oves*, *Matrices & Agnos*, or *Matrices & Verveces*, is not good, becauſe it doth not appear how many of one Sort; and how many of another; but 20 *Oves* generally might have been 2 Hal. Hiſt. P. C. 183.

been good without diſtinguiſhing *Matrices & Verveces*, as in caſe of Replevin or Treſpaſs.

2 Hal. Hiſt. P. C. 183. But an Indictment *de quatuor Riſcis & Ciſtis, Anglice* Cheſts and Coffers, is good, becauſe ſynonymous.

where it is ſaid, that regularly the ſame or more Certainty is required in an Indictment of Goods, than in Treſpaſs for Goods.—And *note*, That it is agreed as a general Rule, that if an Indictment be uncertain as to ſome Particulars only, and certain as to the Reſt, it is void only as to thoſe which are uncertainly expreſſed, and good for the Reſidue. 2 Hawk. P. C. 234.——[*Quia male et negligenter ſe geſſit in Executione* of the Office of Conſtable, quaſhed for being too general. Stra. 2.——*De ſcriptis bonis & catallis, de D. decipiebant et defraudabant*, quaſhed for being too general. Stra. 8.——*Diverſas quantitates cervifiæ*, too general. Stra. 497.——On an Indictment upon 5 Eliz. c. 4. if it is averred, a Trade uſed in *Great Britain*, inſtead of *England*, it is bad. Stra. 552, 788.——*Quod cum* there was ſuch an Order, *&c.* is too uncertain. 2 Ld. Raym. 1363.——An Indictment muſt ſet out the Words ſpoken of a Juſtice of Peace in the Execution of his Office.——If for obſtructing him, it muſt ſhew by what Act. Stra. 699.——None but a Barretor and Common Scold, are indictable by general Words. Stra. 1246, which *vide & Id.* 849.——An Indictment for a Nuiſance, that the Defendant *ſepem levavit vel levari cauſavit*, adjudged ill for Uncertainty. Stra. 900.——An Indictment for procuring by falſe Tokens muſt ſpecify them. Stra. 1127.——Indictment for conveying, or cauſing to be conveyed, a Pauper; is too uncertain; or if it does not ſay that he was unable to maintain himſelf, *Caſ. temp. Hardw.* 370.——In an Indictment for carrying a Perſon with the Small-pox, from one Pariſh to another; it muſt ſet forth that Defendant knew the Perſon had the Small-pox, and that it was with an ill Intent. Andr. 162. See farther 6 Com. Dig. 355, *&c.*]

4. How the Indictment muſt ſet forth the Circumſtances of Time and Place.

2 Hawk. P. C. 235. and ſeveral Authorities there cited. It is laid down as an undoubted Principle in all the Books that treat of this Matter, that no Indictment whatſoever can be good without preciſely ſhewing a certain Year and (*a*) Day of the material Facts alledged in it.

—And this the Law requires, not only becauſe the Party may be the better prepared to make his Defence, but alſo becauſe that in Indictments, on which, upon a Conviction, there incurs a Forfeiture of Lands, it may appear to what Day the Forfeiture is to have Relation; as alſo that if it be an Indictment of Murder or Manſlaughter, it may appear that the Death was within the Year and Day after the Stroke. 2 Hal. Hiſt. P. C. 179.—But it is not neceſſary upon the Evidence to prove the Crime to have been committed on the very Day laid in the Indictment; but if it be proved to have been at any Time before or after, the Party is to be convicted. 2 Hal. Hiſt P. C. 179. (*a*) But it is not neceſſary to mention the Hour in an Indictment. 2 Hawk. P. C. 235.—Unleſs the Time of the Day is material to aſcertain the Nature of the Offence, and then it muſt be expreſſed; as in an Indictment of Burglary it ought to ſay, *tali Die circa Horam decimam in Nocte ejuſdem Diei, felonice & burglariter fregit*; yet it is ſaid that by ſome Opinions *burglariter* carries a ſufficient Expreſſion that it was done in the Night. 2 Hal. Hiſt. P. C. 179.—So upon breaking a Houſe in the Day-time, to ouſt the Offender of his Clergy upon the Statute of 39 Eliz. c. 15. it is uſual to add *tempore Diurno*; for the Statute expreſſeth it ſo; otherwiſe, though the Indictment be good, yet he ſhall not be ouſted of his Clergy. 2 Hal. Hiſt. P. C. 179.

2 Hawk. P. C. 235. 2 Hal. Hiſt. P. C. 178. As if an Indictment of Death laying the Aſſault at a certain Time, *&c.* do not repeat it in the Clauſe of the Stroke, or if it do not ſet forth the Time of the Death, as well as of the Stroke.

2 Hawk. P. C. 235. So if any Indictment lay the Offence on an impoſſible Day, or on a Day that makes the Indictment repugnant to itſelf, or if it lay one and the ſame Offence at different Days, it is inſufficient.

2 Hal. Hiſt. P. C. 178. As if *A.* be indicted *quod primo die* Maii *& ſecundo die* Maii *apud* D. he made an Aſſault upon *B. & quandam togam ipſius* B. *adtunc & ibidem invent' felonice cepit, &c.* This Indictment is not good, becauſe there are ſeveral Days mentioned before, and it is uncertain to which the felonious Taking ſhall relate.

2 Hal. Hiſt. P. C. 178. So if *A.* be indicted that he *Feſto Sancti* Petri *anno* 20 *Car.* killed *J. S.* this is not good, becauſe there are two Feaſts of St. *Peter*, and neither

neither without Addition, *viz.* St. *Peter ad Vincula*, and St. *Peter in Cathedra*.

The Words *adtunc & ibidem* in the ſubſequent Part of an Indictment are as effectual, as if the Year and Day mentioned in the former Part had been expreſsly repeated. 2 Hawk. P. C. 235-6.

Alſo if it lay the Fact on the *Thurſday* after the Feaſt of *Pentecoſt* in ſuch a Year, or on the *Utas* of *Eaſter*, *&c.* (which ſhall be taken for the very eighth after the Feaſt) or on the 10th of *March* laſt, (being aſcertained by the Stile of the Seſſions, *&c.*) it is as good as if it had expreſly named the Day of the Month, *&c.* 2 Hawk. P. C. 236.

Alſo if an Indictment charge a Man with an Omiſſion, *&c.* as not ſcowring ſuch a Ditch, it needs not ſhew any Time. 2 Hawk. P. C. 236.

So if an Indictment charge a Man with having done ſuch a Nuſance ſuch a Day and Year, and on divers other Days, it is void only as to the Facts alledged on the Days uncertainly ſet forth; but if it charge a Man generally with ſeveral Offences at ſeveral Times between ſuch a Day and ſuch a Day, without laying any one at a certain Day, it hath been adjudged to be wholly void. 2 Hawk. P. C. 236.

Yet it hath been ſolemnly adjudged, that a Conviction of Deer-ſtealing, ſetting forth the Offence between the 8th and 12th of *July*, *&c.* is ſufficient. 2 Hawk. P. C. 236.

* And in theſe Caſes it is ſaid to be moſt regular to ſet forth the Year, by ſhewing the Year of the King; yet this may be diſpenſed with for ſpecial Reaſons, if the very Year be otherwiſe ſufficiently expreſſed, for that only is material. 2 Hawk. P. C. 236. *Page 107

Every Indictment at common Law muſt expreſly ſhew ſome (*a*) Place wherein the Offence was committed, which muſt appear to have been within the Juriſdiction of the Court in which the Indictment was taken, and muſt be alledged without any Repugnancy; for if one and the ſame Offence be alledged at two different Places, or at *B.* aforeſaid, where *B.* was not before mentioned, or if the Stroke be alledged at *A.* and the Death at *B.* and the Indictment conclude that the Defendant *ſic felonice murderavit* the Deceaſed at *A.* the Indictment is void. 2 Hawk. P. C. 236.

(*a*) That regularly the Vill or Hamlet and County muſt be expreſſed in the Indictment, and where the Time muſt be repeated again upon ſeveral Acts done, regularly the Place alſo muſt be repeated, *viz. tunc & ibidem.* 2 Hal. Hiſt. P. C. 180.

So it is alſo if it lay not both a Place of the Stroke and Death, or if any Place ſo alledged be not ſuch from whence a Viſne may come; as to which it hath been adjudged, that if a Fact be alledged in a Pariſh in *London* with ſome other Addition which ſufficiently aſcertains it, or in the Pariſh of St. *Lawrence Jewry*, it needs not ſhew the Ward. 2 Hawk. P. C. 236. 9 Co. 66.

Alſo in ſome Crimes no Vill need be named; as upon an Indictment of Barretry, becauſe he is a Barretor every where, and it ſhall be tried *de Corpore Comitatus*. 2 Hal. Hiſt. P. C. 180.

Suff. in the Margin, the Indictment ſuppoſing a Fact done *apud* S. *in Com' prædict'* is good; for it refers to the County in the Margin. 2 Hal. Hiſt. P. C. 180.

But if there be two Counties named, one in the Margin, another in the Addition of any Party, or in the Recital of an Act of Parliament recited in the Premiſſes of the Indictment, the Fact laid *apud* S. *in Com' prædict'* vitiates the Indictment; becauſe two Counties are named before, and it is uncertain to which it refers. Cro. Eliz. 739. 2 Hal. Hiſt. P. C. 180.

Indictment againſt *A. B.* that he *apud* N. *in Com' prædict'* made an Aſſault upon *C. D.* of *F. in Com' prædict' & ipſum adtunc & ibidem cum quodam gladio, &c. percuſſit, &c.* this Indictment is not good, becauſe two Places named before; and if it refers to both, it is impoſſible; and if only to one, it muſt refer to the laſt, and then it is inſenſible. 2 Hal. Hiſt. P. C. 180.

It

2 Hawk. P. C. 237. It hath been holden, that an Indictment on a Statute, prohibiting ſuch and ſuch Perſons to do ſuch a Thing, needs not ſhew where the Facts happened which bring the Defendant within the Prohibition; as where it is enacted, that it ſhall be Treaſon for a Perſon born within the Realm and in Popiſh Orders to remain here, *&c.* in which Caſe it is ſaid, that the Indictment needs not ſhew a Viſne for the (*b*) Birth or Ordination.

(*b*) But if a Man be indicted for that *Ratione Tenuræ* of certain Lands he is bound to repair a Bridge, and that it is in Decay, it muſt be alledged where thoſe Lands lie. 2 Hal. Hiſt. P. C. 181.

2 Hawk. P. C. 237. Alſo a Miſtake in Evidence of the Place laid is in no Caſe material, on Not guilty pleaded, if the Fact be proved in any other Place in the County; but if there be no ſuch Place in a County, as that wherein an Offence is laid in an Appeal or Indictment, all Proceſs thereon is void by the Statutes of 9 *H.* 5. *cap.* 1. and 18 *H.* 6. *cap.* 12.

[*Communis ſtrata, ſive alta regia via*, denote the ſame Place, and are not uncertain. *Stra.* 44.—The *terminus a quo* and *ad quem* a Road leads is not neceſſary. *Ibid.*——In criminal Caſes though the County be laid in the Margin, yet the Place where the Fact is ſuppoſed to be done, muſt be laid in the Body of the Indictment to be *in com. prædict.* 3 *P. Will.* 439. and Care ſhould be taken, if any other County hath before been mentioned, as in Defendant's Addition, *&c.* to name the County where the Venue is laid.——If the Fact is laid to be done in a City, a County in itſelf, but which are not co-extenſive, it muſt ſay within the City and County of *E. &c. Andr.* 162. *Sed qu.* if the Fact is within the City, if laying it in the *City*, is not ſufficient?——Indictments for Treaſon, by levying War, do generally charge the overt Acts, but on one Day only. *Foſt.* 7.——*At* the Pariſh of *A. near* the Highway, and Dwelling-Houſes, is ſufficient for a Nuiſance, without ſaying in the Town or Village. 1 *Burr.* 333.]

*Page 108 * 5. Where the Offence indictable may be laid jointly, and where ſeverally, and where both jointly and ſeverally, and where the Offences of ſeveral Perſons may be laid in one Indictment.

2 Hawk. P. C. 240. Although the Offence of ſeveral Perſons cannot but be ſeveral, becauſe one Man's Offence cannot be another's, but every Man muſt anſwer for himſelf; yet if it wholly ariſe from (*c*) a joint Act, which is in itſelf criminal, as where ſeveral join in keeping a Gaming-Houſe, or in Deer-ſtealing, or Maintenance, *&c.* the Defendants may be indicted jointly and ſeverally; as thus, *quod cuſtodiverunt & uterque eorum cuſtodivit*, or jointly only; for it ſufficiently appears, that if all are joined in ſuch Act, each muſt be guilty; and therefore ſome of them may be convicted, and ſome acquitted.

(*c*) So if ſeveral commit a Robbery, Burglary, Murder, *&c.* 2 Hal. Hiſt. P. C. 173.

—And as ſeveral Perſons may be joined in the ſame Indictment, ſo ſeveral Offences committed by the ſame Party may be joined in one Indictment; as Burglary and Larceny; Larcenies committed of ſeveral Things, though at ſeveral Times, and from ſeveral Perſons, may be joined in one Indictment. 2 Hal. Hiſt. P. C. 173.

2 Hawk. P. C. 240, 1. 2 Hal. Hiſt. P. C. 174. accord. But where the Offence ariſes from a joint Act which in itſelf is not criminal, but may be ſo by reaſon of ſome perſonal Defect peculiar to each Defendant, as where divers follow a joint Trade, for which the Law requires a ſeven Years Apprenticeſhip, in which Caſe each Trader's particular Defect, and not the joint Act, makes him guilty, it ſeems moſt proper to indict them ſeverally, and not jointly, becauſe each Man's Offence is grounded on a Defect peculiar to himſelf.

And

And for this Reaſon Indictments have been quaſhed for jointly charging ſeveral Defendants (*b*) for not repairing the Streets before their Houſes, or for taking Inmates, or for neglecting a Day of Faſting appointed by Proclamation; and this is agreeable to the Rule of Law as to bringing Actions on penal Statutes, wherein ſeveral Defendants ſhall not be joined, except it be in reſpect of ſome one Thing in which all are jointly concerned; as where ſeveral join in a Suit in the Admiralty on a Contract on Land, or in procuring or giving an untrue Verdict, *&c.*

2 Hawk. P. C. 241, and ſeveral Authorities there cited.

(*b*) So an Indictment againſt ſeveral Officers, *quod celare ſeparalium Officiorum ſuorum ſeparaliter exterſive ceperunt*, was quaſhed. 2 Hal. Hiſt. P. C. 174.

But yet where *A. B. C.* and *D.* were indicted for erecting four ſeveral Inns *ad commune Nocumentum*, it was ruled, that for ſeveral Offences of the ſame Nature ſeveral Perſons may be indicted in the ſame Indictment; but then it muſt be laid *ſeparaliter erexerunt*, and for Want of that Word (*ſeparaliter*) the Indictment was quaſhed.

2 Hal. Hiſt. P. C. 174.

Alſo it is ſaid in *Hale* to be common Experience, that twenty Perſons may be indicted for keeping Diſorderly Houſes or Baudy Houſes, and they are daily convicted upon ſuch Indictments; for the Word *ſeparaliter* makes them ſeveral Indictments.

2 Hal. Hiſt. P. C. 174. and in *Hawkins*, that in ſome Books we find joint Indictments againſt ſeveral Perſons for ſeveral Offences; as Recuſancy, following a Trade without ſerving an Apprenticeſhip, mentioned without any Exception on this Account; therefore this Matter doth not ſeem to be fully ſettled. 2 Hawk. P. C. 241.——[Several Perſons cannot be joined in one Indictment for Perjury. Stra. 921.—A Wife or Servant, joining with a Stranger in the ſame Murder, may be charged in one Indictment, and concluding *felonice proditorie et ex malitia precogitata*, *&c.* is good for both, *reddendo ſingula ſingulis.* Foſt. 329]

6. Whether the Words *Vi & Armis* be in any Caſe neceſſary.

At Common Law the Words *Vi & Armis* were neceſſary in Indictments for Offences which amount to an actual Diſturbance of the Peace, as Reſcouſes and Aſſaults, *&c.* but it ſeems that they were never neceſ- * ſary where it would be abſurd to uſe them; as in Indictments for Conſpiracies, Slanders, (*c*) Cheats, Eſcapes, and ſuch like, or for Nuiſances in the Defendant's own Ground, *&c.*

Cro Jac. 473. 2 Lev. 221. Skin 426. 2 Hawk. P. C. 241.

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(*c*) As an Indictment for cheating another *per quendam Luſum, Angl' vocat.* Trick at Cards; it was held, that it need not be laid *Vi et Armis*, becauſe cheating is clandeſtine. Keb. 652.

But however material theſe Words might have been by the Common Law, yet now it is enacted by 37 *H.* 8. *cap* 8. "That the Words *Vi & Armis*, *viz.* "*cum baculis, cultellis, arcubus & ſaggittis*, ſhall not of Neceſſity be put in "any Indictment or Inquiſition, nor ſhall the Parties indicted have any Ad- "vantage by Writ of Error, or Plea, or otherwiſe, to avoid any ſuch In- "dictment or Inquiſition, for the Want of theſe or the like Words; but "the ſaid Indictments, *&c.* lacking the ſaid Words, or any of them, ſhall "be adjudged as effectual to all Intents, Conſtructions and Purpoſes, as the "ſame Indictments, *&c.* having the ſame Words in them."

Yet ſince this Statute, Exceptions to Indictments of Treſpaſs, and ſuch like, for want of the Words *Vi & Armis*, where they have not been implied by other Words, as *Reſcuſſit manu forti*, *&c.* have ſometimes prevailed; and the Neceſſity of them is (*d*) ſaid to be owing to this, that without them there can be no *Capiatur* entred, nor Fine to the King.

2 Hawk. P. C. 242.

(*d*) 2 Lev. 221.

Yet, ſays *Hawkins*, they have been often over-ruled, and it is not eaſy to ſhew how they ever could prevail, ſince the ſaid Statute, conſiſtently with the manifeſt Purport of it; however, it is certainly ſafe and adviſeable to

2 Hawk. P. C. 242. and herewith 2 Hal. Hiſt.

P. C. 187. seems to agree. to make uſe of them where they are proper and pertinent, if it be to no other Purpoſe than to aggravate the Offence.

[The Words *Vi et Armis* not neceſſary in an Indictment for a *Riot*. Stra. 834.]

7. Whether it be neceſſary to lay the Words *contra Pacem*.

2 Hawk. P. C. 242. (*c*) That every Indictment ought regularly to In as much as all Offences, which are puniſhable by a public Proſecution, tend to the Diſturbance of the quiet and peaceable Government of the King over his People, it ſeems a good (*c*) general Rule, that all Indictments and Criminal Informations ought to conclude *contra Pacem* of the King, or Kings, in whoſe Reign, or Reigns, the Offence was committed.

conclude *contra Pacem Domini Regis*. 2 Hal. Hiſt. P. C. 188.——And though it conclude *contra Pacem*, yet if it be without *Domini Regis*, it is inſufficient. 2 Hal. Hiſt. P. C. 188.—That though the Offence be for uſing a Trade, not having ſerved an Apprenticeſhip, yet it ought to conclude *contra Pacem*; for every Offence againſt a Statute is *contra Pacem*, and ought to be ſo laid, 2 Hal. Hiſt. P. C. 188. Yet, *per Hawkins*, there are ſome Precedents without this Concluſion, but not warranted by any Reſolution. 2 Hawk. P. C. 242, 243.—Except only where the Indictment is for a baſe Non-feaſance, as the not performing the Order of Juſtices of Peace; which hath been reſolved to be good, without this Concluſion, in Vent. 108, 111.

2 Hal. Hiſt. P. C. 188, 189. Therefore if *A.* be indicted for an Offence ſuppoſed to be committed in the Time of a former King, and concludes *contra Pacem Domini Regis nunc*, it is inſufficient; for it muſt be ſuppoſed to be done *contra Pacem* of that King in whoſe Time it was committed.

2 Hal. Hiſt. P. C. 189. If an Offence be ſuppoſed to be begun in the Time of one King, and continued in the Time of his Succeſſor, (as a Nuſance) it muſt conclude *contra Pacem* of both Kings, or elſe it is inſufficient.

Yelv. 66. Sir *John Winter's* Caſe. 2 Hawk. P. C. 243. As if one be indicted for having erected a Wear in the Reign of Queen *Elizabeth*, and continuing it in the Reign of King *James*, and the Indictment conclude, that ſo it was erected and continued *contra Pacem Regis*, *&c.* without adding *contra Pacem nuper Reginæ*, it is inſufficient, becauſe the Commencement of the Wrong, which is as much indicted as the Continuance, was in the Reign of the Queen; but it is ſaid, that if the Erection had been laid only by way of Inducement, and the Jet of the

Page 110 Indictment had only been the Continuance of it, ſuch Concluſion, *contra Pacem* of the King only, might be good.

Cro. Jac. 377. 2 Hal. Hiſt. P. C. 189. Q. If an Offence be alledged in the Time of Queen *Elizabeth*, and the Indictment taken in the Time of King *James*, and concludes *contra Pacem nuper Reginæ & Domini Regis nunc*, it ſeems good; and *Domini Regis nunc*, but Surpluſage, as well as in a Court in Treſpaſs †.

† If the Crime is charged to have been committed in the Time of the *late* King, and the Indictment concludes againſt the Peace of the *preſent* King, it is fatal; the Judgment muſt be reverſed. *Rex* verſus *Lookup*. 3 Bur. 1901.

2 Hawk. P. C. 243. It ſeems clear, that neither Informations *qui tam*, nor Informations for an Intruſion, or other Wrong of a Civil Nature, done to the King's Lands, Goods or Revenues, need this Concluſion.

8. Whether it be neceſſary to lay it *contra Coronam & Dignitatem Regis*.

2 Hawk. P. C. 243. and *per Hal.*, an In- It is ſaid in *Hawkins* that the Words *contra Coronam & Dignitatem Regis*, are uſed in all the Precedents in *Coke's Entries*, which lay the Offence *contra Pacem*,

Pacem, yet that they are omitted in *Raſtal's Precedents*; and it hath been (*a*) reſolved, that an Indictment for a Riot is good without them, nor can he find the contrary to have been adjudged any where.

Indictments need not conclude *& contra Coronam & Dignitatem ejus*, though it be uſual in many Indictments. 2 Hal. Hiſt. P. C. 188. (*a*) 2 Rol. Abr. 82.

9. Whether it be neceſſary to lay it *in Contemptum Regis*.

The Words *in Contemptum Regis*, are ſometimes uſed in Indictments of ſuperior Courts, and in Informations of Intruſion, and in Actions upon Statutes, and ſometimes omitted; but there is no Authority relating hereto, except in the Year Book of 4 *H.* 6. *pl.* 7. wherein it ſeems to be admitted, that it is neceſſary in an Action on a Statute. 2 Hawk. P. C. 243.

10. Whether it be neceſſary to lay it *illicite*.

The Word *illicite* has been adjudged not to be neceſſary in an Indictment for a Riot, becauſe the Fact indicted appears to be unlawful; and the ſame may be ſaid to all other Indictments at Common Law; but if a Statute in deſcribing a Thing prohibited uſes the Word *illicite*, an Indictment thereon is not good without it. 2 Hawk. P. C. 244.

11. Whether a Defect in any of theſe Particulars be amendable.

It is clearly agreeed, that none of the Statutes of Amendment extend to Criminal Proſecutions, and therefore no Indictment can be amended in any Caſe wherein an Amendment is not allowable by the Common Law. 2 Hawk. P. C. 244. & *vide* Tit. *Amendment & Jeofail*, Letter (C).

But it is ſaid, that the Body of an Indictment from *London* may be amended, becauſe by the City Charters the Tenor of the Record only ſhall be removed from thence. 2 Hawk. P. C. 244.

Alſo a Coroner may, by Rule, amend his Inqueſt by the Notes, in Matter of Form, before it is filed; and the Caption of an Indictment may, on Motion, be amended by the Clerk of the Aſſiſes, or of the Peace, ſo as to make it agree with the original Record, at any Time during the Term in which it came in, but not in a ſubſequent Term, 2 Hawk. P. C. 244.

* But it is ſaid, that the Caption of an Inquiſition ſhall never be amended after it is filed; for being Part of, and drawn at the ſame Time with the Inquiſition, greater Exactneſs is required in it than in the Caption of an Indictment, which is left, as of courſe, to be drawn up as Occaſion ſhall require. *Page 111 2 Hawk. P. C. 144.

Alſo it ſeems to be ſettled, that a Diſcontinuance in a Criminal Proſecution is not amendable, without Conſent; but it ſeems, that a mere Miſpriſion in the Joining of an Iſſue, as where the Word *Similiter &c.* is omitted, is amendable at any Time; alſo the Direction of a *Venire vicecomitibus* of *B.* which is returned by *J. S. vicecomiti*, may be amended on the Oath of *J. S.* that there is but one Sheriff of *B.* which is himſelf; alſo it is common Practice to amend Criminal Informations, and the Pleadings thereon, while all is in Paper. 2 Hawk. P. C. 244.

And anciently, where an Indictment appeared to be inſufficient, the Practice was, not to put the Defendant to anſwer it; but if it were found in the County in which the Court ſat, to award Proceſs againſt the Grand Jury, to come into Court, and amend it; and it is the common Practice at this 2 Hawk. P. C. 245.

this Day, while the Grand Jury, which found a Bill, is before the Court, to amend it, by their Conſent, in Matter of Form, as the Name or Addition of the Party.

[12. Additional Obſervations, as to Pleading, Arraignment, Trial, and Judgment, *&c.* from modern Caſes.

On an Indictment for a *Mayhem*, laid *felonice*, the Defendant need not be brought to the Bar to plead, but his Plea may be delivered in the Office *Stra.* 1100———*Autrefoits acquit*, or *attaint*, on an Indictment for *Murder*, is a good Bar to an Indictment for Petit-Treaſon for the ſame Fact; *et vice verſa*. *Foſter* 329.—If Defendant pleads a dilatory Plea (as *Miſnomer* of the Place where he reſides,) he muſt annex an Affidavit of the Truth of it, or the Court will ſet aſide the Plea. 3 *Burr.* 1617.

In an Indictment where the Puniſhment may be infamous, the King may not withdraw a Juror *Stra.* 984.———If a Man is indicted for Petit-Treaſon, he may be found guilty of Murder. *Foſter* 104.——If *A.* be indicted for Petit-Treaſon and *B.* for Murder, and they do not challenge, they may be tried together; if they inſiſt on their Challenges, they muſt be tried ſeparately, for the Number of peremptory Challenges are different. *Ibid.*——Whether a Man indicted for Murder, when it ought to have been for Petit-Treaſon, can be found guilty. 2 *Foſter* 327.———In Caſes of *Infancy*, and *Inſanity*, and in all Caſes of juſtifiable Homicide, the Jury, *under the Direction of the Court*, may find a general Verdict of Acquittal. *Foſter* 279.——So in Homicide by Miſadventure. *Id.* 280.

It is not neceſſary that on an Indictment for a Nuiſance, there be always *Judgment* that it be abated, if it be a tranſitory Nuſance, as dreſſing Skins. *Stra.* 686.——The Defendant need not be in Court, on arguing a Special Verdict, as he muſt on a Motion in Arreſt of Judgment. *Stra.* 843.——Or, as he muſt, on moving for a new Trial. *Stra.* 968.——Or, upon an Argument on an Indictment removed by *Certiorari*, where Defendant is found guilty of a Conſpiracy, but it is alſo found that the other Conſpirator is dead. *Stra.* 1227.

If the Words *ad tunc et ibidem* are left out, as to Swearing of the Jury, Judgment ſhall be arreſted. *Stra.* 901.

A Man indicted for a Robbery from the Perſon, cannot on that Indictment be found guilty of Larceny. *Caſ. temp. Hardw.* 113. *Stra.* 1015.—If Huſband and Wife are convicted of keeping a diſorderly Houſe, there may be Judgment againſt the Wife, tho' the Huſband is abſent. *Caſ. temp. Hardw.* 278.—The uſual Judgment is Pillory; but the Court is not tied down to any particular Puniſhment for a Miſdemeanor. *Ibid.*

In all Caſes, where the Indictment does not well charge a Felony, nor the Special Verdict *certainly* find any, on the Facts therein ſtated, or where the Priſoner demurs, which is allowed, or where, on a general Verdict of guilty, Judgment is arreſted for Defects in the Indictment, Judgment of Acquittal muſt be given; and this will be no Bar to another Indictment, conſtituting another Offence. 3 *P. Will.* 439.

Judgment regularly obtained in a Criminal Cauſe is never ſet aſide. 1 *Wilſ.* 163.—*Sed qu* if the Court will not ſometimes, in caſe of a Verdict againſt Defendant in a Criminal Caſe, grant a new Trial?

If Judgment againſt Defendant, found guilty of inſulting a Juſtice of Peace, in the Execution of his Office, is Impriſonment for a Month, to aſk Pardon of the Juſtice at his Houſe, and to advertize it in a Newſpaper; only the Impriſonment is legal, the reſt void; and when the Impriſonment is executed, Defendant ſhall be diſcharged on *Habeas Corpus*. 1 *Wilſ.* 332.

Motion

Motion in Arreſt of Judgment (on the Crown-ſide) may be made at any Time before Sentence pronounced; for the Judgment ſigned in the Office is only interlocutory, and the Award *quod capiatur*, only to bring Defendant in to receive the final Judgment. 2 *Burr.* 799.

On Motion in Arreſt of Judgment, after Conviction for a Conſpiracy to charge one with a Capital Felony, Defendant muſt be perſonally preſent in Court. 2 *Burr.* 930.

Judgment on an Indictment for a Conſpiracy to indict a Man for a Capital Offence ſhall not be arreſted, becauſe it does not ſay "*falſely*," or becauſe it does not ſpecify at firſt, of what Capital Offence they conſpired to indict him; eſpecially if it afterwards ſets forth the Indictment, and it is found, that they did according to the Conſpiracy *falſely* indict. Nor (*ſemb. ſed Q.*) even if it was a bare unexecuted Conſpiracy. 2 *Burr.* 993.

No Regard ſhould be had to a Repreſentation by Jurymen after their Departure from the Bar, contrary to what they have found on Oath. 3 *Burr.* 1696.

After Sentence for Perjury, the Court will not let in a Motion in Arreſt of Judgment, for a Miſtake in the Indictment. *Rex* v. *Lookup*, 3 *Burr.* 1901.——Tho' in Caſe, there was Error for which the Judgment was afterwards reverſed, on a Writ of Error.

Affidavits of the Conſequences of a Riot, (even tho' relating to a third Perſon, may be read for Aggravation of a Fine, where they are the immediate Conſequences, and cannot ſubſiſt as a diſtinct Crime by itſelf; not where they can, as the Defendant might be again indicted for that. *Stra.* 139.]

(H) What ought to be the Form of an Indictment upon a Statute: And herein,

1. Whether it be neceſſary that ſuch Indictment recite the Statute whereon it is grounded.

IT ſeems to be agreed, that there is no Neceſſity for any Indictment or Information on a (*a*) Public Statute, to recite ſuch Statute, whether the Offence be *Malum prohibitum*, or *Malum in ſe*, or whether it be prohibited by more than one Statute, or by one only; for the Judges muſt, *ex Officio*, take Notice of all Public Statutes; or if there be any more than one, by which an Indictment may be maintained, they will go upon that which is moſt for the King's Advantage.

(*a*) 2 Hawk. P. C. 245. and ſeveral Authorities there cited. 2 Hal. Hiſt. P. C. 172. S. P. accord.

And that all Penal Statutes that induce a Forfeiture to the King, or make a Felony or Treaſon, are general Statutes, becauſe it concerns the King.

2. What Miſrecitals of ſuch Statutes are fatal.

Although it be not neceſſary to recite a public Statute; yet if a Proſecutor take upon himſelf to recite a Statute; and materially vary from it, Plowd. 79, and 83, 84. Cro. Eliz. 236, 245. Palm. 565. 4 Co. 48. 2 Hawk. P. C. 246.

(b) But if it conclude generally *contra formam Statuti in hujuſmodi caſu edit' & provis'*, it is good; for the Court takes Notice of the true Statute, and will reject the Miſrecital as Surpluſage. 2 Hal. Hiſt. P. C. 172, 173. Keb. 662. S. P.

and conclude *contra formam Statuti* (b) *prædicti*, he vitiates the Indictment; becauſe it judicially appears that there is no ſuch Foundation as that whereon it is expreſly grounded.

2 Hawk. P. C. 246. As where in an Indictment, with ſuch Concluſion on the Statutes which prohibit Entries with ſtrong Hand, the Word *Vi* is put for *Manu*; or where *Nuncia* is put for *Mendacia* in an Indictment on the Statute of *Scandalum Magnatum*, or where the Verb put to expreſs the principal Act, wherein the Offence conſiſts, is neither Claſſical nor Legal *Latin*, *&c.*

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2 Hawk. P. C. 246. Yet the Omiſſion of a ſynonimous Word, having no farther Meaning than thoſe which are expreſly recited, or the joining of Words much of the ſame Senſe, as *Malitioſe & Contemptuoſi* with a Copulative, where the Statute uſes a Disjunctive; or the uſing the Singular Number for the Plural or the Plural for the Singular, where the Senſe is the ſame, vitiates not an Indictment; as where in reciting a Statute, ſpeaking of any Suits in any Courts, or of Diſturbers of Perſons in open Preaching, the Words *in aliqua curia* or *in apertis Prædicationibus*, are uſed.

2 Hawk. P. C. 246. Alſo no Advantage can be taken of a Variance from any Part of a private Statute, without ſhewing it to the Court in (c) a proper Manner; becauſe otherwiſe ſuch Statute ſhall be taken to be as it is recited.

(c) If a Statute be particular, it muſt be recited in the Indictment, and proved by an examined Copy upon the Trial. 2 Hal. Hiſt. P. C. 172.

2 Hawk. P. C. 246, 247. A Miſrecital of the Place or Day on which the Parliament was holden, by which a Public Statute was made, on which the Indictment is grounded, vitiates the Indictment; for the Court takes judicial Notice of all ſuch Statutes, and will not make good a Proceeding, which, of the Part's own ſhewing, appears to be commenced on a ſuppoſed Statute of this Kind, where there is no ſuch Statute; as if a Parliament be ſummoned to meet on the twenty-third Day of *January*, and before the Meeting, be prorogued to the twenty-fifth, *&c.* and a Statute made by it be recited as made in a Parliament holden on the twenty-third, *&c.* or if a Parliament firſt holden in one Year be prorogued to another, and a Statute made the ſecond Year be recited, as having been made at a Parliament holden or begun in ſuch ſecond Year, which is all one, inſtead of ſaying, that it was made at a Seſſions of Parliament then holden, and the Indictment conclude *contra formam Statuti prædict. &c.* yet Faults of this Nature may be helped by the conſtant Courſe of Precedents on a Statute, or by concluding *contra formam Statuti*, without adding *prædicti*; or, as ſome ſay, by the Defendant's Admittance that there is ſuch a Statute as is ſuppoſed.

2 Hawk. P. C. 247. Alſo a Repugnancy in ſetting forth the Time when a Parliament was holden is fatal; as if a Statute be recited to have been made in the firſt and ſecond Years of ſuch a King; alſo it hath been holden neceſſary to ſhew in what County the Parliament was holden, but that the Omiſſion of the Day is no Fault.

2 Hawk. P. C. 247. It ſeems not to be clearly ſettled, whether the Miſrecital of the Title of an Act be material; but it ſeems more clear, that a Variance in reciting it, as commencing after the Making, where it is to commence after the End of the Seſſions, is fatal.

2 Hawk. P. C. 247. A Variance no way altering the Senſe does no Hurt; as where in reciting an Oath preſcribed by Statute, the Words *Sea of Rome*, are put for *See of Rome*, and *I do declare in Conſcience*, inſtead of *I do declare in my Conſcience*; neither is it a Material Variance to omit or miſrecite a Branch of a Statute no way relating to the preſent Purpoſe, but put only by way of Flouriſh and *ex abundanti*.

Neither

Neither is the Miſrecital of the Preamble of a Statute material, where the Subſtance of the Purview is well recited; as where, in an Action on the Statute of Hue and Cry the Declaration recites the Preamble, as ſpeaking of burning of Houſes, where the Statute ſpeaks of Arſons generally, without mentioning Houſes; or where in an Action of *Scandalum Magnatum*, the Declaration, reciting the Preamble of the Statute, mentions only what relates to Earls, *&c.* but if an Indictment on 8 *H.* 6. *cap.* 9. *ſect.* 6. in reciting the Clauſe, which ſhews in what Actions the Party ſhall recover, after mentioning Recoveries by Verdict, omit the Words, *or in other manner*, or recite the Statute as giving the Fine on a Recovery by Action *dicto Domino Regi*; where there is nothing to make good the Word *dicto*; or recite the Clauſe concerning the bringing an Action, as ſaying, *if the Party after ſuch Entry make a Feoffment, &c.* where the Words are, *if after ſuch Entry any Feoffment be made*; or recite it thus, *if any Perſon be put out and diſſeiſed*, where the Words are *if any Perſon be put out or diſſeiſed*, the Variances have been adjudged fatal; yet the laſt has been holden to be immaterial, becauſe though the Words abovementioned are in the Disjunctive, they have been always expounded in the Copulative; and it ſeems queſtionable how far the other Variances will be holden fatal at this Day; Niceties of this Kind not having been of late ſo much regarded as formerly. 2 Hawk. P. C. 247, 248. *Page 113

The total Omiſſion of the Clauſe, which gives the Forfeiture, does not hurt; and it may be probably argued, that a Miſrecital of ſuch Clauſe, in putting the Words *admitteret & forisfaceret*, for *amitteret & forisfaceret*, is immaterial; for the Variance is in a Word wholly nugatory, and the Senſe is compleat without it; but if the Variance carries with it a material Repugnancy, as where the Words *whoever ſhall do the ſame ſhall incur the Pain*, &c. are thus recited, *whoever ſhall do the contrary ſhall incur the Pain*, &c. it will be difficult to make it good. 2 Hawk. P. C. 248-9.

3. How far it is neceſſary to bring the Offence indictable within the very Words of the Statute.

It is a general Rule, that unleſs the Statute be recited, neither the Words *contra formam Statuti*, nor any Periphraſis, Intendment or Concluſion, will make good an Indictment which does not bring the Offence within all the material Words of the Statute; as if an Indictment of Rape omit the Word *rapuit*; or an Indictment of Perjury on 5 *Eliz. cap.* 9. omit the Words *voluntarie & corrupte*; or an Indictment for Striking in a Church on 5 & 6 *E.* 4. *cap.* 4. omit the Words *to the Intent to ſtrike*; or an Indictment for Foreſtalling on 5 & 6 *E.* 6. *cap.* 14. do not expreſly alledge that the *Goods were then coming to the Market to be ſold*; or an Indictment on the ſame Statute for Ingroſſing, do not alledge that the Defendant *ingroſſed*, &c. *by buying*, &c. or an Indictment of Treaſon in compaſſing the King's Death, on 25 *E.* 3. *ſtat.* 5. *cap.* 2. have neither the Words *compaſs* nor *imagine*, &c. 2 Hawk. P. C. 249.

Neither is it always ſufficient to purſue the Words of the Statute, unleſs in ſo doing you fully, directly and expreſly alledge the Matter wherein the Offence conſiſts, without the leaſt Uncertainty or Ambiguity; and therefore if an Indictment of Perjury on 5 *Eliz. cap.* 9. ſetting forth that the Party, *tacto per ſe Sacro Evangelio falſo depoſuit*, do not directly ſhew that he was ſworn; or if an Information on 18 *H.* 6. *cap.* 17. for not abating ſo much of the Price of Wine ſold as the Veſſels wanted of the Statute-Meaſure, do not expreſly ſhew how much they wanted; or if an Indictment on the Statute of Uſury, ſetting forth that the Defendant took more than Five in the Hundred, do not ſhew how much, it is inſufficient. 2 Hawk. P. C. 249.

If

2 Hawk. P. C. 250. If the Statute relate only to ſuch and ſuch Perſons particularly deſcribed by it, the Indictment muſt bring the Defendant within all ſuch Deſcriptions, unleſs they carry with them the bare Denial of a Matter, the Affirmation whereof will be a proper natural Plea for the Defendant; as where it is enacted, that all Perſons, having no reaſonable Excuſe, ſhall go to their Pariſh Church, *&c.* in which Caſe there is no need to alledge in the Indictment, that the Defendant had no reaſonable Excuſe; for this will more properly come into Queſtion from the Plea; neither is there any Need, in order to bring a Defendant within the Deſcription of a Statute, to ſhew where the Thing happened which brought him within it; neither is it neceſſary, where you alledge, that the Defendant *exiſtens* ſo and ſo, as the
*Page 114 * Statute mentions, did the Fact, to ſhew any farther, that he was ſo at the Time of the Fact.

2 Hawk. P. C. 250. There is no need to alledge in an *Indictment* on a Statute, that the Defendant is not within any of its Proviſoes, notwithſtanding the Purview expreſly takes notice of them, as by ſaying, that none ſhall do the Thing prohibited otherwiſe than in ſuch Special Caſes, *&c.* as are expreſſed in the
† *i. e.* before Juſtices of Peace. Act; but it is ſaid, that a Conviction † on a Penal Statute ought expreſly to ſhew that the Defendant is not within any of its Proviſoes; for ſince the Defendant has no Remedy againſt ſuch a Conviction, but from a Defect appearing on the Face of it, it ought to have the higheſt Certainty, and to ſatisfy the Court that the Defendant had no ſuch Matter in his Favour, as the Statute itſelf allows him to plead.

2 Hawk. P. C. 250. If the Statute whereon an Indictmeat is founded, be particularly recited, and the Subſtance of the Fact, and the Time and Place, and Things and Perſons concerned, be alledged with ſufficient Certainty, and a Circumſtance only omitted, the general Concluſion, *contra formam Statuti*, ſeems to help ſuch Omiſſion.

4. Whether an Indictment grounded on a Statute that will not maintain it, may be good as an Indictment at Common Law.

2 Hawk. P. C. 251. It was formerly holden, that no Indictment grounded on a Statute, and concluding *contra formam Statuti*, could be maintained as an Indictment at Common Law, if it were not maintainable as an Indictment on ſome Statute, becauſe it appears that the Proſecution is grounded on a Foundation which will not ſupport it; but the Law is now taken to be otherwiſe; and accordingly it hath been adjudged, that on a ſpecial Indictment on the Statute of Stabbing, the Defendant may be found Guilty of general Manſlaughter at Common Law, and the Words *contra formam Statuti* rejected as ſenſeleſs.

5. How far it is neceſſary to conclude *Contra Formam Statuti.*

2 Hawk. P. C. 251. It ſeems to be agreed, that a Judgment on a Statute ſhall never be given on an Indictment which doth not conclude *contra formam Statuti*; and therefore if the Fact indicted be an Offence prohibited only by Statute, and the Indictment conclude not *contra formam Statuti*, no Judgment can be given upon it; for though an Indictment, which is redundant, may be helped by rejecting what is ſenſeleſs, an Indictment that is defective in a material Part can be no way ſupplied; but it ſeems, that a Judgment on 8 *H.* 6. *cap.* 9. may be given on a Writ of Aſſiſe of *Novel Diſſeiſin*, brought in the Common Law Form; but this depends upon a reaſonable Conſtruc-

tion

tion of the Statute, which being expreſs that the Party may recover by ſuch Writ, but giving no new one, may be well intended to give the Party a Remedy by a Writ brought in the old Form.

If there be more than one Statute concerning the ſame Offence, the latter of which only continues the former, without making any Addition to it, or only qualifies the Method of Proceeding upon it, without altering the Subſtance of its Purview, it is ſafe to conclude an Indictment on it *contra formam Statuti*; but where the ſame Offence is prohibited by ſeveral independent Statutes, or a new Penalty is added by a ſubſequent Statute to an Offence prohibited by a former, it is ſaid to be ſafer to conclude *contra formam Statutorum*, than *contra formam Statuti*. 2 Hawk. P. C. 252.

[Facts done by virtue of an Act containing a former one, expired, may be laid to be done by virtue of the original Act. *Stra.* 1066.—Tho' the Indictment be *contra formam. Stat.* it is not neceſſary that the *Certiorari*, *Venire* and *Diſtringas*, expreſs it. *Stra.* 843. 2 *L. Raym.* 1518.]

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* (I) What ought to be the Form of a Caption of an Indictment. *Page 115

THE Caption of the Indictment is no Part of the Indictment itſelf, but it is the Style of the Preamble, or Return, that is made from an Inferior Court to a Superior, from whence a *Certiorari* iſſues to remove it, or when the whole Record is made up in Form; for whereas the Record of the Indictment, as it ſtands upon the File in the Court wherein it is taken, is only thus: *Juratores pro Domino Rege ſuper Sacramentum ſuum præſentant*; when this comes to be returned upon a *Certiorari*, it is more (*a*) full and explicite. 2 Hal. Hiſt. P. C. 165.

(*a*) And in this Form,

Norff. *Ad generalem Seſſionem Pacis tent. apud S. in Com. prædict. 5 die Octobris Anno Regni, &c. coram A. B. C. D. & Sociis ſuis Juſticiariis Domini Regis ad Pacem dicti Domini Regis in Com. prædict. conſervand. nec non ad diverſas felonias, tranſgreſs. & alia malefacta in eodem comitat. audiend. & terminand. aſſignatis, per Sacrament. E. F. G. H. &c. proborum & legalium hominum comit. prædict. jurat. & onerat. ad inquirend. pro dicto Domino Rege & pro corpore Comit. prædict. exiſtit præſentatum.* 2 Hal. Hiſt. P. C. 165.

Every Caption of an Indictment muſt ſhew that it was taken before a Court which has a proper Juriſdiction; and therefore if it ſhew only that it was taken before *J. S.* Steward, without ſhewing to whom, or in what Court; or if the Caption of an Inquiſition *ſuper viſum Corporis*, ſhew only that it was taken before *J. S.* Mayor of *London*, without adding that he was Coroner; or if it barely call him Coroner, without ſhewing that he was ſuch for the Diſtrict in which the Inquiſition was taken, it is inſufficient; but if it ſhew that he was a Coroner in the County, it ſufficiently ſhews that he was a Coroner for the County; and if the Caption of an Indictment ſhew that it was taken at the Seſſions of the Peace of ſuch a County, it ſufficiently ſhews that ſuch Seſſions was holden for the County; but if it only ſhew that it was holden in the County, it is ſaid to be inſufficient; ſo it is alſo if it omit the Clauſe *nec non ad diverſas felonias, &c.* or if it barely ſhew that the Indictment was taken at a Seſſions of the Peace, without ſhewing before whom, or without naming of the Juſtices, or ſhewing for what Place they were Juſtices; or if in deſcribing them as Juſtices *ad Pacem, &c. conſervand.* it omit the Word *aſſignat.* but if it ſufficiently ſhews that ſome of them were of the *Quorum*, by ſhewing that the Indictment was taken at a General Seſſions, and if it call them Juſtices of Peace, it needs not any farther to ſhew that they were Juſtices of the King's Peace. 2 Hawk. P. C. 253.

2 Hawk. P. C. 254. The Caption of an Indictment *ad magnam curiam cum leta tent.* is insufficient; but if it be *ad magnam curiam & ad letam*, or *ad vis. franci pleg. cum cur. baron. tent.* perhaps it is sufficient; for since the Court Baron has no Jurisdiction over Criminal Matters, and the Caption in these last Cases is not express that the Indictment was taken at it, as it is in the first Case, the Court will intend that it was taken at the Leet, which alone had Power to take it.

2 Hawk. P. C. 254. The not shewing in the Caption of an Indictment at a Leet, whether the Court were holden by Charter or Prescription, is helped by the Multitude of Precedents.

2 Hawk. P. C. 254. Every Caption of an Indictment ought to shew that the Indictors were of the Precinct for which the Court was holden, and that they were twelve in Number, and that they found the Indictment on their Oaths; also Indictments have been quashed for an Omission of the Names of the Jurors; and others, for want of the Words *proborum & legalium hominum*; and others, for want of the Words *adtunc & ibidem* before *jurat' & onerat'*; and others, for want of the Words *ad inquirend. pro Domino Rege & pro Corpore Comitatus*; yet of late Years Exceptions of this Kind have not been much favoured, especially if the Indictment were in a superior Court, and that *Page 116* which is omitted be, in common Understanding, implied in what is expressed.

Every Caption must shew a certain Day and Year when the Indictment was found, and must record it in the present Tense; but if it describe the Court as holden *die Martis & die Mercurii*, or on such a Day in such a Year of the King, without shewing what King; or if it shew the Day and Year in Figures, which are not *Roman* †, it is insufficient; yet it needs not add the Year of the Lord; and the Multitude of Precedents have made good the Use of *Extitit Præsentat'* instead of *exiſtit*, &c.

† *Sed qu.*

2 Hawk. P. C. 255. Every such Caption must also shew where the Indictment was found, that it may appear to have been at a Place within the Jurisdiction of the Court; and therefore if it set forth, that the Indictment was taken at a Sessions of the Peace, holden for such a County at *B.* without shewing in what County *B.* lies, otherwise than by putting the County in the Margent, it is insufficient; but if an Inquest of Death be set forth as taken at *B.* before the Coroner of the Liberty of *B.* it needs not express that *B.* is within the Liberty of *B.* for it cannot but be intended.

(K) Where an Indictment may be quashed.

2 Hawk. P. C. 258. BY the Common Law, the Judges may, in Discretion, quash any Indictment for any such Insufficiency in the Body or Caption of it, as will make a Judgment given on it against the Defendant erroneous; but they are in no Case bound so to do *ex debito justitiæ* but may oblige the Defendant to plead or demur; and this they generally do where the Offence is of an enormous or public Nature, or where the Indictment has been removed by *Certiorari*, and a Recognizance for procuring the Trial of it has been forfeited.

[Indictment against Six jointly and severally, for exercising a Trade, may be quashed. *Stra.* 623.——The Court will not quash an Indictment, because not laid *contra formam stat.* but leave Defendant to demur. *Stra.* 602.—The Court cannot strike Counts out of an Indictment, for it is the Finding of the Grand Jury. *Stra.* 1026. *Hardw.* 203.—*B. R.* will quash

quaſh an Indictment at Quarter Seſſions for Perjury at Common Law, for Want of Juriſdiction. *Stra.* 1088.—*B. R.* will not quaſh an Indictment for a Nuiſance, but put Defendant to demur. *Andr.* 220.—Indictment for Words ſpoken to a Juſtice, but not laid to be ſpoken to him in the Execution of his Office, quaſhed. *Andr.* 226.—Indictment for maintaining a Cottage, without laying four Acres of Ground thereto, if it ſays, *was preſented*, without adding *on the Oaths of Twelve*, &c. and if it only ſays, Defendant maintained it *for Habitation*, without ſaying *it was inhabited*, ſhall be quaſhed. *Andr.* 230.—The Court will not quaſh an Indictment for not attending a Mayor to execute his Warrant, but Defendant may demur to it. *Stra.* 1211.—The Court will not quaſh an Indictment againſt Overſeers for not paying Money over to their Succeſſors; for quaſhing is not *ex debito juſtitiæ*, and this is a growing Evil. *Stra.* 1268.—The Court will quaſh an Indictment for not receiving an Apprentice, if it does not appear by the Circumſtances averred, that it was a Binding within the *ſtat.* 43 *Eliz. cap.* 2. and *Qu.* Whether an Indictment lies? *Stra.* 1268.—The Court will not, on Motion, quaſh an Indictment againſt ſeveral for breaking and entering a Mine, and carrying away Lead; eſpecially if it is at the Time that the Judges are trying others in the ſame County for a like Offence. 1 *Wilſ.* 325.——Indictment lies not for ſetting a Perſon on the Footway to deliver printed Bills of Defendant's Occupation, whereby the Way was obſtructed; and Indictment ſhall be quaſhed. 1 *Burr.* 516.——Nor againſt a Spiritual Perſon, for occupying Lands contrary to 21 *H.* 8. *cap.* 13. the Proceeding muſt be by Action or Information, and it muſt be in one of the King's Courts, not at Seſſions. 1 *Burr.* 543.—A Motion may be made the laſt Day of Term, to quaſh an Indictment, but not to quaſh an Order. 1 *Burr.* 651.——Motion for the Proſecutor to quaſh his own Indictment is not of courſe, eſpecially if the Defendant has been put to Expence. 3 *Burr.* 1468.——If after Indictment removed by *Certiorari* it is at Iſſue, and Jury appointed, Proſecutor countermands Notice of Trial, and Defendant chuſes to bring it on by Proviſoe, and it ſtands for Trial, and Proſecutor in the Interim gets a new Indictment found, and then moves to quaſh the firſt, alledging it to be defective, which was cured by the new, on which it's intended to proceed; the Court may (by Conſent) order the firſt to be quaſhed, and the ſecond to be put in it's Place, and to ſtand in the ſame Condition. *Id.*—The Court refuſed to quaſh an Indictment, for ſelling Flour by falſe Weights, tho' it appeared on the Face of it that the *Flour-Scale* was the lighter, which muſt tend to the Prejudice of the Seller, and tho' it did not ſay *where* the Selling was. 3 *Burr.* 1841.]

By the 7 *W. & M. cap.* 3. "No Indictment for High Treaſon or Miſ-
" priſion thereof, (except Indictments for counterfeiting the King's Coin,
" Seal, Sign or Signet,) nor any Proceſs, or Return thereupon, ſhall be
" quaſhed for Miſreciting, Miſpelling, falſe or improper *Latin*, unleſs Ex-
" ception concerning the ſame be taken and made in the reſpective Court
" where the Trial ſhall be, by the Priſoner, or his Counſel aſſigned, (*a*)
" before any Evidence given in open Court on ſuch Indictment; nor
" ſhall any ſuch Miſreciting, Miſpelling, falſe or improper *Latin*, after
" Conviction on ſuch Indictment, be any Cauſe to ſtay or arreſt Judgment;
" but nevertheleſs any Judgment on ſuch Indictment ſhall be liable to be
" reverſed on a Writ of Error, as formerly."

(*a*) In the Conſtruction hereof it hath been ſettled, that no ſuch Exception can be taken after Plea pleaded. 2 Hawk. P. C. 259.

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* Infancy and Age.

(A) Who are Infants; and herein of the ſeveral Ages and Periods between which the Law diſtinguiſhes as to ſeveral Purpoſes. 118.
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(C) How far the Law regards and takes notice of Infants in Ventre ſa Mere. 123.
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(F) Of what Things capable, being for his own Advantage. 126.
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(H) Where puniſhable for Crimes and Injuries committed by him. 130.
(I) Of the Acts of Infants, as they are good, void, or voidable. 132.

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(K) Of

(K) Of the Privilege of Infants in Suits and Actions by and againſt them. 146.

And herein,

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*(L) Of the Privilege of Infancy as to the Parol's demurring. 152. *Page 118

And herein,

1. In what Actions the Parol ſhall demur. 152.
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3. Upon what Plea pleaded the Parol ſhall demur. 158.
4. For the Nonage of what Perſon the Parol ſhall demur. 158.
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8. In what Caſes if the Parol demur againſt one it ſhall againſt another. 162.
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10. Of the Prayer of Age and Counterplea. 163.

(A) Who are Infants; and herein of the ſeveral Ages and Periods between which the Law diſtinguiſhes as to ſeveral Purpoſes.

FROM the Obſervations made on the daily Actions of Infants, as to their arriving to Diſcretion, the Laws and Cuſtoms of (*a*) every Country have fixed upon particular Periods on which they are preſumed capable of acting with Reaſon and Diſcretion. Hence in our Law the (*b*) full Age of Man or Woman is (*c*) Twenty-one Years.

(*a*) For tho' the Civil Law obtains much, being a wiſe and well calculated Law, yet it is not of any Force here, or in any other Countries, farther than by Cuſtom or Acts of Parliament it has been admitted. Hal. Hiſt. P. C. 16. (*b*) It's the full Age of Male or Female, according to common Speech. Lit. ſ. 104, 259. (*c*) At which Age he is capable of contracting, and may alien his Lands, Goods and Chattels; and this Period we have fixed upon from the Feudal Law, for by that Law the Tenant at this Age was preſumed capable to attend his Lord in the Wars, and therefore at this Age was out of Ward of Guardian in Chivalry. Co. Lit. 78. b —But according to the Civil Law, the compleat full Age, as to Matters of Contract, is twenty-five Years. Dig. lib. 4. tit. 4. Hal. Hiſt. P. C. 17.

Therefore

Therefore if one under the Age of (*d*) Twenty-one Years makes his (*e*) Will, and thereby deviſes his Lands, and after attains the Age of Twenty-one Years, and dies, without making any new Publication thereof, this Deviſe is void.

Dyer 143. Raym. 84. Sid. 162.

(*d*) If a Child be born the 16th Day of *February*, this Child will be of full Age any Part of the 15th Day of *February* Twenty-one Years after, for the Law makes no Fractions of a Day, and upon the laſt Inſtant of that Day he would have compleated Twenty-one Years. Keb. 589. Sid. 162. Raym. 84. S. C. *Herbert* and *Tarbel.* 2 Mod. 281. S. P. *arguendo.* Salk. 44. S. P. ſaid by *Holt*, to have been adjudged. Ld. Raym. 281, 480. (*e*) So if an Infant make a Deed, and deliver it within Age, and afterwards, upon his coming of full Age, deliver it again, yet the Deed is void; for the Deed muſt take effect from the firſt Delivery, or not at all. 3 Co. 35. b.

Vaugh. 178. But though a Perſon under the Age of Twenty-one cannot diſpoſe of his Lands, yet it is ſaid, that one under that Age may, purſuant to the Statute of 12 *Car.* 2. *cap.* 24. diſpoſe of the Cuſtody of his Infant Child, and that ſuch Diſpoſition draws after it the Land, &c. as incident to the Cuſtody.

*Page 119 * Alſo, it ſeems, it was agreed, that an Infant Male at fourteen, and Female at twelve, may diſpoſe of their perſonal Eſtate at thoſe Ages: For herein the Common Law has appointed no Time, being a Matter cognizable in the Spiritual Court, which herein proceeds according to the Civil Law, by which Law Infants at thoſe Ages are preſumed to have ſufficient Diſcretion to make ſuch Diſpoſition; and therefore their Teſtaments in theſe Caſes are not to be ſet aſide, or controuled in Chancery or the Temporal Courts.

2 Mod. 315. 2 Jones 210. Comb. 50. Vern. 255. 2 Vern. 469. Preced. Chan. 316. ——In the *Office of Execut.* 305.

it is ſaid that the Common Law has not preciſely determined at what Age a Perſon may make a Diſpoſition of his perſonal Eſtate; but that it is generally allowed it may be made at the Age of eighteen.——And my Lord *Coke* mentions ſeventeen or eighteen; at which Years, he ſays, an Infant may make his Teſtament, and conſtitute his Executors for his Goods and Chattels. Co. Lit. 89. b.

Co. Lit. 33, 78, 79. 2 Inſt. 434. 3 Inſt. 88, 89. 6 Co. 22. 7 Co. 43. Rol. Abr. 340, 341.

The Age of Conſent to a Marriage in an Infant Male is (*f*) fourteen, and in a Female twelve; (*g*) but they may marry before, and if they agree thereto when they attain theſe Ages, the Marriage is good; but they cannot (*b*) diſagree before then; and if one of them be above the Age of Conſent, and the other under ſuch Age, the Party ſo above the Age may as well diſagree as the other; for both muſt be bound, or neither.

(*f*) That herein our Law and the Civil agree, for that before theſe Ages they are ſaid to be *impuberes.* Hal. Hiſt. P. C. 17.—And though by our Law they may agree before, yet if the Wife hath a Child, begotten after Marriage, ſolemnized *infra annos nubiles*, and for that Cauſe afterwards divorced, it is a Baſtard. 7 Co. 42. &c. *Keen*'s Caſe. *Godolph. Repert. Canon.* 484. (*g*) And they are Baron and Feme *de facto*; ſo that the Baron before he attains the Age of fourteen, or the Wife twelve, may have Treſpaſs *de Muliere abductâ cum bonis Viri.* Rol. Abr. 340. Moor 741. 2 And. 208. 6 Co. 22. (*b*) If they diſagree by Parol, and afterwards agree and live together as Man and Wife, the Diſagreement is not binding, but that they may well live together without any new Marriage. Rol. Abr. 341. *Lee* and *Aſhton.*—But if the Diſagreement had been before the Ordinary, they could never agree again to make it a good Marriage. Rol. Abr. 341. *per Warberton.*—If a Man within the Age of fourteen takes a Wife of full Age, and after brings a Writ *de Muliere abductâ cum bonis Viri*, and after comes to the Age of fourteen, if he after makes any Continuation of the Action, this ſhall be an Agreement to the Marriage, ſo that it cannot after be defeated. Rol. Abr. 341.

Co. Lit. 79. But though the Party above Age may as well diſagree as the other, yet it is ſaid that the Party cannot do it before the other arrives at the proper Age: * Alſo it is ſaid to have been (*i*) adjudged, that if a Man marries a Woman that is within the Age of twelve Years, and after the Woman at eleven Years of Age diſagrees to the Marriage, and after the Huſband takes another Wife, and hath Iſſue by her, that this a Baſtard; for the firſt Marriage continues, notwithſtanding the Diſagreement of the Woman; for ſhe cannot diſagree within the Age of twelve Years, and ſo her Diſagreement is void ‡.

* See *infra* the Caſe of Lord *Decius.* (*i*) Roll. Abr. 341.

‡ See the next Caſe.

If

If a Man marries a Woman that is within the Age of twelve Years, and after the Feme Covert within the Age of Conſent diſagrees to the Marriage, and after the Age of twelve Years marries another, now the firſt Marriage is abſolutely diſſolved, ſo that he may take another Wife; for though the Diſagreement within the Age of Conſent was not † ſufficient, yet her taking another Huſband after the Age of Conſent affirms the Diſagreement, and ſo the Marriage avoided *ab initio*.

Rol. Abr. 341. *Babington* and *Warner*, adjudged in *B. R.* upon a Writ of Error out of the *C. B.* and the ſecond Huſband at all Times after the Age of Conſent. But *note*; It does not appear by the Book whether the ſecond Marriage was at or before the Age of Conſent. N. Dyer 13. a. Margin, S. C. cited.——

firſt Judgment affirmed. Moor 575. S. C. adjudged, becauſe ſhe cohabited with her

† See *infra*, the Caſe of Lord *Decius*.

But for the better Explication hereof it may not be improper to inſert a Caſe determined before the Delegates, which was thus:

Mrs. *K. Fitzgerrard* was married to my Lord *Decius*, ſhe being of the Age of twelve Years and a Half, and he of the Age of eight; afterwards, ſhe being thirteen Years old diſagreed from this Marriage, and married Mr. *Villers*; and upon Suit in the Spiritual Court the ſecond Marriage was affirmed: The Lord *Decius* appealed to the Delegates; and it was argued by Civilians and Common Lawyers before the Biſhops of *London* and *Rocheſter*. *North* C. J. *Littleton* Baron, *Jones* and *Atkins* Juſtices, * and ſeveral Doctors of the Civil Law: The Civilians ſaid, That Minors could not contract Matrimony, but only *Sponſalia de futuro*, and therefore though they bind themſelves *per verba de preſenti tempore*, yet the Law, by reaſon of the Incapacity of the Parties, would make ſuch a Conſtruction that it ſhall only be a Contract *de futuro*. In this Caſe indeed one of the Parties is of Age of Conſent, but that makes no Diverſity; for a Contract of Matrimony is *utrinque obligatorius*, and reciprocal in its Nature. On the other Side it was ſaid, that ſuch a Contract as this betwixt Perſons of unequal Ages might as well eludicate as other Contracts, which are alſo *utrinque obligatorii*; they ſaid, that a Contract of Marriage carries a Relation in itſelf, and is reciprocal, but that in ſome Caſes this may fail, by reaſon of an Accident or Circumſtance in the Perſons, notwithſtanding which the Nature of the Thing will remain to be *ultro citroque* obligatory, as we ſee in other Contracts; but Arguments from the Definition of Civil Affairs are not cogent; for no Law can be framed to meet with all Emergencies and Circumſtances but ought to be differently applied according as the particular Circumſtances require. The Law does not make Contracts *per verba de præſenti tempore* to be Contracts *de futuro*, but in Caſes of Minors, and they cannot ſhew any Texts that Contracts *per verba de præſenti* by *Majors* ſhall be by Conſtruction made Contracts *de futuro*. The Laws of God and Nature require Performance of Promiſes and Agreements; and the Woman, in the preſent Caſe, cannot diſſent *before the Huſband come to the Age of Conſent*, becauſe till then he cannot diſſent no more than he can aſſent. Serjeant *Maynard*. In our Law, Marriage betwixt Minors has the Effect of a Marriage till it be annulled: If the Woman be nine Years old ſhe ſhall be endowed, be the Huſband of what Age ſoever, and Dower can never be, but where there was a precedent Marriage, *poſito effectu ponitur cauſa*; ſuch a Wife ſhall have an Appeal of the Death of her Huſband, and the Huſband in ſuch a Caſe ſhall have a Writ *de Uxore abducta cum bonis Viri*. If Tenant by Knight's Service die, his Heir within Age of Conſent, and married, the Lord cannot tender him to Marriage, a Diſagreement, he within Age. *Lee* and *Aſhton*, 5 *Jac.* 1. where two within Age had contracted Matrimony, and the Parent of one was bound to give ſo much at their Age of Conſent, if they would agree to this Marriage: An Action was brought for this Money, and it was found that within Age they diſagreed, but at their full Age agreed; and Judgment was for the Plaintiff, becauſe

21 June 29 Car. 2. before the Delegates at *Serjeants-Inn*, *Fleet-Street*.

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becauſe the Diſagreement was not material. 1 *Inſt.* 79. *Baniſters* verſus *Offley*. Our Law calls it *Matrimonium*, although the Term of *Sponſalia* is not unknown to us; we find it in *Glanvil*, *Lib.* 6. and *Littleton* calls it an Affiance; to ſhew what Regard our Law has to ſuch a Marriage, he cited 1 *Inſt.* 33. 1 *Roll. Abr.* 340. *Dyer* 369. To prove that before Age of Conſent no Agreement or Diſagreement can be, *Moor* 575. 1 *Roll. Abr.* 341. 1 *Inſt.* 79. and the Pleadings in 7 *Co. Kenn*'s Caſe, and 6 *Co. Ambroſia George*'s Caſe. *Thurſby. cont.* Our Law gives ſuch Credit to this inchoate Marriage, that, if the Parties die before it be avoided, the Law will not ſay that it was null and void; and upon this Ground are the Caſes of Dower and Appeal which have been cited. The Caſe in *Dyer* 369. is for the Decree; for there, by the Opinion of many Doctors, *quamvis alia ſunt Sponſalia de futuro, tamen in cauſa Dotis extenduntur ad verum Matrimonium ratione Privilegii*; he cited 7 *H.* 6. 11. 6 *Co.* 22. and the Sentence given in the Spiritual Court was affirmed.

Co. Lit. 78. b. Hob. 225. And as the Age of fourteen is the Age of Conſent to a Marriage in an Infant Male; ſo by Law hath he ſeveral other Ages aſſigned him to ſeveral Purpoſes, *viz.* at the Age of twelve to take the Oath of Allegiance in the Tourn or Leet, at fourteen to be out of Ward of Guardian in Soccage, to chuſe a Guardian; and this alſo is accounted his Age of Diſcretion; fifteen to have had *Aid pur fair Fitz Chevalier*.

*Page 121 Lit. ſ. 103. Co. Lit. 75. 2 Inſt. 135. * The Authority of a Guardian in Chivalry did not determine till the Heir, if a Male, came to the Age of twenty-one Years; becauſe it was preſumed that till that Age he was not capable of doing Knight Service, and attending the Lord in his Wars. The Guardianſhip of an Heir Female determined at (*a*) fourteen at Common Law, but by *Weſtminſter* the 1ſt, the Lord had the Wardſhip till ſhe attained the Age of ſixteen, to tender her convenable Marriage; but the Authority of a Guardian in (*b*) Soccage, as hath been ſaid, ceaſes at the Age of fourteen, at which Age the Infant may call his Guardian to an Account, and may (*c*) chuſe a new Guardian.

(*a*) Before which Time, if the Guardian diſparaged her in Marriage, an Action lay againſt him by the Statute of *Merton*, c. 6. Lit. ſ. 108. Co. Lit. 80. (*b*) But the Guardianſhip of the Father, which is a Guardianſhip by Nature, continues till the Son and Heir Apparent attain to the Age of twenty-one Years; but that is with reſpect to the Cuſtody of the Body only. Carth. 386. *per Holt*, C. J. (*c*) In the Spiritual Court, if the Infant be above the Age of ſeven, he chuſes his own Curator or Tutor; but if under that Age, they chuſe one for him.

Co. Lit 65. b. 2 Inſt. 11. One within the Age of twenty-one Years may do Homage, but cannot do Fealty; becauſe in doing of Fealty he ought to be ſworn, which an Infant (*d*) cannot be.

(*d*) But an Infant at the Age of fourteen may be ſworn as a Witneſs, at which Age he is preſumed to have ſufficient Diſcretion. 2 Hal. Hiſt. P. C. 278. *Vide* Tit. *Evidence*, Letter (A).

1 Co. 29. b. Off. Ex. 307. Hal. Hiſt. P. C. 17. An Infant at the Age of ſeventeen may be a Procurator or (*e*) Executor; and in this both the Civil and Common Law agree.

(*e*) And if one under the Age of ſeventeen be made Executor, and Adminiſtration *durante minore ætate* is granted to another, ſuch Adminiſtration ceaſes when the Infant arrives to the Age of ſeventeen. Hob. 250. Yelv. 128. 5 Co. 29. Godolph. 102.——But if Adminiſtration be granted to one during the Minority of a Perſon who is intitled to it as next of Kin to the Inteſtate, ſuch Adminiſtration does not determine till the Infant's Age of twenty-one; becauſe before that Age he cannot give Bond to the Ordinary to adminiſter faithfully. Carth. 446, 447. Ld. Raym. 338. 5 Mod. 395. Comb. 475. Salk. 39. pl. 7. 12 Mod. 194, 501. Comyns 112—159. pl. 107.

Comp. Incumb. 142, 214. Gibſ. Cod. 168. 3 Mod. 67. Infancy is a good Cauſe of Refuſal of a Clerk; alſo by the Statutes 13 *Eliz. cap.* 12 and 13 & 14 *Car.* 2. none is to be admitted a Deacon unleſs he be twenty-three Years at leaſt, nor a Prieſt unleſs he be twenty-four.

By

By the Cuſtom of *Gavelkind*, an Infant at the Age of fifteen is reckoned at full Age to ſell his Lands; and this ſeems to have been taken from the Civil Law, which reckons fourteen the *Ætas Pubertatis*; for they reckoned that though the Infant had ended his Years of Guardianſhip at fourteen, yet he might not have completed his Account with his Guardian till the Age of fifteen, and that was eſteemed to be the Age when he was completely out of Guardianſhip; and therefore at this Age he was allowed to ſell the Lands deſcended to him: But in this the Cuſtoms of *England* differed from the Civil Law; for the Civil Law does not allow of his Diſpoſitions till the Age of twenty-five; and therefore this muſt have been allowed by the old *Saxon* Law, becauſe they thought that a great deal of Time was loſt, if the Infant could only uſe his own, without being able to diſpoſe of it in a Way of Traffick, or in Marriage, till twenty-five; and therefore they allowed the Infant to ſell, but under great Limitations and Reſtrictions, that he might not be defrauded; and by this Means they thought there was ſufficient Proviſion made for the Neceſſity of Commerce, which in the ſmall divided Shares was abſolutely neceſſary. Lamb. 624, 625. & *vide* Tit. *Gavelkind*.

Alſo by Cuſtom, in ſome Places, an Infant ſeiſed of Lands in Socage may at the Age of fifteen Years make a Leaſe for Years, which ſhall bind him after he comes of Age; for the Cuſtom makes fifteen his full Age to that Purpoſe. Co.Lit.45.b.

Alſo by the Cuſtom of *London*, an Infant unmarried, and above the Age of fourteen, though under twenty-one, may bind himſelf Apprentice * to (*a*) a Freeman of *London* by Indenture, with proper Covenants; which Covenants, by the Cuſtom of *London*, ſhall be as (*b*) binding as if he were of full Age. *Page 122 Moor 134. 2 Bulſt. 192. 2 Rol. Rep. 305. Palm. 361. Mod. 271. 2 Danv. Abr. 421. pl. 7. 460. pl. 12. 2 Vern. 492. 2 Will. Rep. 228. pl. 78. 9 Mod. 191.

(*a*) But this Cuſtom does not extend to one bound Apprentice to a Waterman under twenty-one; for the Company of Watermen are but a voluntary Society, and being free of that does not make one free of the City of *London*. 6 Mod. 69. 12 Mod. 415. (*b*) And for Breach an Action may be brought in any other Court, as well as in the Courts in the City. Moor 136.

As to Capital Offences, in which the Law is the ſame with regard to the Male and Female Sex, the Age of fourteen is the common Standard, at which both Males and Females are, by (*c*) our Law, obnoxious to Capital Puniſhments; for this being the *Ætas Pubertatis*, or Age of Diſcretion, the Law preſumes them at thoſe Years to be *Doli Capaces*, and capable of diſcerning between Good and Evil; and therefore ſubjects them to Capital Puniſhments as much as if they were of full Age. F.N.B. 202. Co.Lit. 247. b. Dalt. ap. 95, and 104. Hal. Hiſt. P. C. 25. Hawk. P.C. 2. Forſt. Cr. Law. 70.

(*c*) But the Civil Law, as to Capital Puniſhments, diſtinguiſhed the Ages in to four Ranks: 1. *Ætas Pubertatis plena*, which is eighteen Years. 2. *Ætas Pubertatis* or *Pubertas* generally, which is fourteen Years, at which Time they were likewiſe preſumed to be *Doli Capaces*. 3. *Ætas Pubertati proxima*; but in this the *Roman* Lawyers were divided, ſome aſſigning it to ten Years and an Half, others to eleven, before which the Party was not preſumed to be *Dilo Capax*. 4. *Infantia*, which laſts till ſeven Years, within which Age there can be no Guilt of a Capital Offence. Hal. Hiſt. P.C. 17, 18, 19.

But though the Age of fourteen be the *Ætas Pubertatis*, before which our Law does not preſume the Party to be *Doli Capax*, and therefore that a Party indicted for a Capital Offence committed before theſe Years, is to be found Not guilty; yet hath this general Rule the following Temperaments: Hal. Hiſt. P. C. 26.

1. That if the Party be above twelve, though under fourteen, and appears to be *Doli Capax*, and could diſcern between Good and Evil at the Time of the Offence committed, he may be convicted and undergo Judgment and Execution of Death, though he hath not attained the Age of fourteen: but herein, according to the Nature of the Offence and Circumſtances Hal. Hiſt. P. C. 26.

of

of the Caſe, the Judge may or may not in Diſcretion reprieve him before or after Judgment in order to the obtaining the King's Pardon *.

*In the Caſe of *William York*, a Boy of ten Years of Age, convicted before Lord Chief Juſtice *Willes* at *Bury* Summer Aſſizes, 1748, for the Murder of a Girl of about five Years of Age, and on whom Sentence of Death was paſſed, it appeared by the Boy's own Confeſſion, That he had accuſed her of a Thing of which ſhe was innocent, and for the ſuppoſed Commiſſion of which, he had murdered her, and buried her in a Dungheap, placing the Dung and Straw that was bloody under the Body, and covering it up with what was clean; and having ſo done, he got Water and waſhed himſelf as clean as he could.—— The Chief Juſtice, out of Regard to the tender Years of the Priſoner, reſpited Execution, till he ſhould have an Opportunity of taking the Opinion of the reſt of the Judges, whether it was proper to execute him or not, upon the ſpecial Circumſtances of the Caſe; which he reported to the Judges at *Serjeants-Inn*, in *Michaelmas* Term following, to this Effect, That, ſuppoſing the Boy to have been guilty of the Fact, there were ſo many Circumſtances ſtated in the Report, which were undoubtedly Tokens of what my Lord Chief Juſtice *Hale* calls a *miſchievous Diſcretion*, that he was certainly a proper Object for capital Puniſhment, and ought to ſuffer.——The Judge reprieved the Priſoner ſeveral Times, in hopes that ſomething would have come out to ſhew, that he was deſired to do the Act by Perſons of Maturity; but nothing of that Kind falling out, he left him to abide the Sentence of the Law: But he afterwards received his Majeſty's Pardon, on Condition of entering into the Sea Service.—*Vide* the Caſe in *Foſter*'s Crown Law, fo. 70. &c.

2. If an Infant be above ſeven, and under twelve Years, and commit a Capital Offence, *prima facie* he is to be judged Not guilty, and to be found ſo; becauſe he is ſuppoſed not of Diſcretion to judge between Good and Evil: But yet if it appear, by ſtrong and pregnant Evidence and Circumſtances, that he had Diſcretion to judge between Good and Evil, Judgment of Death may be given againſt him; for *Malitia ſupplet Ætatem*; but herein the Circumſtances muſt be inquired of by the Jury, and the Infant is not to be convict upon his Confeſſion: Alſo herein, my Lord *Hale* ſays, that it is Prudence after Conviction to reſpite Judgment, or at leaſt Execution; but he ſays, that if he be convicted, the Judge cannot diſcharge him, but only reprieve him from Judgment, and leave him in Cuſtody till the King's Pleaſure be known.

Hal. Hiſt. P.C. 27.

Hal. Hiſt. P.C. 27, 28. Plow. 19. a.

3. If an Infant within Age be *infra Ætatem Infantiæ*, *viz.* ſeven Years old, he cannot be guilty of Felony, whatever Circumſtances proving Diſcretion may appear; for *ex Præſumptione Juris* he cannot have Diſcretion, and no Averment ſhall be received againſt that Preſumption.

Page 123 (B) To whom the Privilege of Infancy extends, or who are to be conſidered as Minors.

Co. Lit. 43. Dyer 209. b.

THE Privilege of Infancy does not extend to the King; for the Political Rules of Government have thought it neceſſary, that he who is to govern and manage the whole Kingdom, ſhould never be conſidered as a Minor, incapable of governing himſelf and his own Affairs.

Plow. 213. a. 5 Co. 27. 7 Co. 12.

Therefore if the King within Age make any Leaſe or Grant, he is bound preſently, and cannot avoid them, either during his Minority, or when he comes of full Age.

Co. Lit. 43. Rol. Abr. 728.

So if the King conſent to an Act of Parliament during his Minority, yet he cannot after avoid this Act; becauſe the King, as King, cannot be a Minor; for as a King he is a Body Politick.

CroCar. 557. 5 Co. 27.

Alſo the Acts of a Mayor and Commonalty ſhall not be avoided, by reaſon of the Nonage of the Mayor.

4 Co. 119. Comp. Incumb. 22.

Although a Duke, Earl, or the like, be but a Minor, or not above ten Years of Age, in the Cuſtody and in the Family of another Nobleman, who may

may and doth retain Chaplains, yet he may qualify Chaplains to be dispensed withal to hold two Benefices with Cure, in like sort as if he was of full Age.

An Infant in Gavelkind shall have his Age, and all other Privileges of the Infant at Common Law; because though he hath the Privilege of Alienation at fifteen, yet that doth not take from him any Privilege he had before at Common Law. Rol. Abr. 144.

A Bastard being impleaded shall have his Age; for the dilatory Plea must be determined before the Pleas in chief can come on; so that the Plea of Infancy will stay the Suit, before it can be inquired whether he is or is not a Bastard. Co. Lit. 244. b.

(C) How far the Law regards and takes notice of Infants in Ventre sa Mere.

A Child in *Ventre sa Mere* may be appointed Executor, or may take a Legacy; also if there are two or more at a Birth, they shall be joint Executors or joint Legatees of the Thing bequeathed; for the (*a*) Civil Law, for the Benefit of the Infant, reputes a Child in his Mother's Womb in the same Condition as if it were born. Godolph. Orph. Leg. 102.

(*a*) And by our Law a Child in *Ventre sa Mere* may be vouched; is capable of taking; the Mother may detain Charters on Behalf of such Child; a Bill may be brought on Behalf of such Child; and a Court of Equity will grant an Injunction in his Favour to stay Waste. 2 Vern. 710, 711.

If there be a *Bastard eigne* and *Mulier puisne*, and the Bastard enters, and dies seized, his Issue shall inherit the Lands, and exclude the *Mulier* for ever; but in this Case, if the Bastard had died leaving Issue in *Ventre sa Mere*, and the *Mulier* had entered, and then a Son is born, yet cannot he enter upon the *Mulier*: And herein our Law differs from the Civil Law; for our Law requires an immediate Descent, which cannot be before the Person is in *Esse*; also by our Law the Freehold cannot be in Abeyance. Co. Lit. 244.

* It appears to have been a Matter of much Controversy, whether a Devise of Lands to an Infant in *Ventre sa Mere* be good, because not in Being to take at the Time of the Death of the Devisor; and since, as some say, by the Devise the Person is to take immediately after the Death of the Devisor, the Freehold cannot be put in Abeyance by the Act of the Parties; but others hold, that such Devise is good, though the Infant be not in *Esse* at the Death of the Devisor, and that the Freehold shall not be in Abeyance, but shall descend to the Heir at Law in the mean Time. *Page 124 11 H. 6. 13. Bro. Devise 32. Moor 177, 637. 2 Bulst. 273. Cro. Eliz. 423. Lev. 135. Sid. 153.

Raym. 163. Keb. 85. Salk. 231. 2 Mod. 9. 2 Vern. 711. Prec. Chan. 50. Eq. Cas. 173. 2 Stra. 1092. 2 Eq. Abr. 294. pl. 24. Andr. 263. S. C. S. P.

But however, all the Books agree in this, that a Devise to an Infant when he shall be born, or when God shall give him Birth, is good as an Executory Devise, and that the Freehold shall descend to the Heir at Law in the mean Time †. Sid 153. Lev. 135. Raym. 163. S. C. *Snow* and *Cutler*.

† At this Day it is clearly agreed that a Devise to an Infant in *Ventre sa mere* is good, though he be born after the Testator's Death, and he shall take by way of Executory Devise. 1 Freem. 244, 293. *Vide Fearne's Essay*, 3d Edition 429, &c.

So it is clear, that if Land be devised for Life, the Remainder to a posthumous Child, that this is a good Contingent Remainder; because there is a Person Moor 637. *Church* and *Wiat*.

3 Lev. 408. 4 Mod. 359. Salk. 227. pl. 6. Carth. 309. Perſon in Being to take the particular Eſtate; and if the Contingent Remainder veſts during the Continuance of the particular Eſtate, or *eo inſtanti* that it determines, it is ſufficient. *Reeve* and *Long*; & *vide* 10 & 11 *W.* 3. *c.* 16. ‡ and Head of *Remainder* and *Reverſion*.

‡ Which enables poſthumous Children to take a Contingent Remainder, which hath not any Truſt Eſtate to preſerve it.

Rol. Rep. 109, 138. 2 Bulſt. 273. Co. Copyh. 9. & *vide* Moor 637. Alſo it ſeems agreed, that a Man may ſurrender Copyhold Lands immediately to the Uſe of an Infant in *Ventre ſa Mere*; for a Surrender is a Thing executory, and nothing veſts before Admittance; and therefore, if there be a Perſon to take at the Time of the Admittance, it is ſufficient; and not like a Grant at Common Law, which putting the Eſtate out of the Grantor muſt be void, if there be no Body to take.

Hob. 240. If an Uſurpation be had on one in *Ventre ſa Mere*, at the next Turn after his Birth he ſhall be relieved on the Statute *Weſtm.* 2. *cap.* 5.

(D) How Infancy is to be tried.

Lev. 142. Sid. 321. Keb. 796. Cro. Jac. 59. 581. INFANCY is to be tried by Inſpection of the Court, or by Jury: And herein it is laid down as a Rule in ſome Books, that whereſoever it is alledged upon the Pleading, that the Party was and yet is under Age, there it ſhall be tried by Inſpection; but where the Infant is of full Age at the Time of the Plea, there it ſhall be tried *per Pais*.

Co. Lit. 380. Moor 76. 2 Rol. Abr. 15. 2 Inſt. 483. 2 Bulſt. 330. 12 Co. 122. But here we muſt obſerve, that as to judicial Acts, or Acts done by an Infant in a Court of Record, and which he is allowed to avoid, the Trial thereof muſt be by Inſpection; and therefore if an Infant levies a Fine, he muſt reverſe it by Writ of Error; and this muſt be brought during his Minority, that the Court may by Inſpection determine the Age of the Infant; but the Judges, as by *Adjuncta*, may in ſuch Caſes inform themſelves by Witneſſes, (*a*) Church-Books, &c.

(*a*) To prove the Nonage of a Deviſor, an Almanack, in which the Father had wrote the Nativity of his Son, was allowed to be ſtrong Evidence. Raym. 84.

Co. Lit. 380. Moor 884. *Keckwick*'s Caſe. If an Infant brings a Writ of Error to reverſe a Fine for his Nonage, and, after Inſpection, and Proof of Infancy by Witneſſes, dies before the Fine is reverſed, his Heir may reverſe it; becauſe the Court having recorded the Nonage of the Conuſor, ought to vacate his Contract, when he appeared to be under a manifeſt Diſability at the Time he entered into it.

Moor 189. & *vide* Cro. Jac. 230, 231. * Page 125 An Infant acknowledged a Fine, and the Conuſees omitting to have the Fine ingroſſed till he came of Age, in order to prevent the Infant from bringing a Writ of Error; yet the Court upon View of the Conuſance produced by the Infant, and upon his Prayer to be inſpected, and his Age examined, recorded his Nonage, to give him the Benefit of his Writ of Error, which he muſt otherwiſe loſe, his Nonage determining before the next Term.

(*b*) That if he ſuffers a common Recovery by Guardian, and having a Privy Seal for that Purpoſe, ſuch Recovery cannot be at any Time ſet aſide. But for this *vide* Tit. *Fines* and *Recoveries*, and *infra* Letter (I) 134, &c. So if an Infant ſuffer a common Recovery by appearing in (*b*) Perſon, this muſt be reverſed during his Minority by Inſpection of the Judges.

But it is said, that if an Infant suffers a Recovery, in which he appears by Attorney, he may reverse it after his full Age, as it may be discovered whether he was within Age when the Recovery was suffered; because it may be tried *per Pais* whether the Warrant of Attorney was made by him when he was an Infant. Sid. 321. Lev. 142.

It is said, that in all Cases where the Party pleads that he was within Age at *B.* and alledges a Place, that there the Trial may be well enough where it is alledged; where no Place is alledged, there in personal Actions where the Writ is brought, and in (*b*) real Actions where the Right of the Lands depends upon Infancy, the Trial is to be where the Land lies, and if not, where the Action is brought. Skin. 10. pl. 10. (*b*) Cro. Eliz. 818. S. P.

An Infant entered into a Recognizance of 100 *l.* as Bail to *J. S.* which became forfeited, and he taken in Execution; whereupon he brought an *Audita Querela*, suggesting his Infancy, and the Writ being brought into Court, he appeared *in propria Persona*; and it was moved that he might be inspected, and his Witnesses examined; and thereupon his Mother peremptorily deposed, that at that very Time he was twenty Years old, and no more, and a Maid Servant gave circumstantial Evidence to the same Purpose; and it was moved that he might be bailed: But *per Curiam*, it is a Matter of Discretion either to admit him to Bail, or to refuse it, he being in Execution; but if he had brought his *Audita Querela* before he had been taken in Execution, he must have a *Supersedeas* of course; and the Court would not bail him, though the long Vacation was near, but required the Evidence to be strengthened by a Copy of the Register where he was born, which being in *Yorkshire*, he appeared again in *Mich.* Term in Custody, and a Copy of the Register was produced, and sworn to be a true Copy, and the Mother and the Maid being again sworn, and all agreeing in the same Thing, he was discharged by the Court. Carth. 278. Trin. 5 *W.* 3. *Loyd* versus *Eagle*.

(E) Of what Things an Infant is capable in relation to the Publick, and in which he shall answer for his Neglect.

AN Infant seems capable of such Offices as do not concern the Administration of Justice, but only require Skill and Diligence; and these, it seems, he may either exercise himself, when of the Age of Discretion, or they may be exercised by Deputy; such as the Offices of Park-keeper, Forester, (*c*) Goaler, *&c.* Plow. 379, 381. 9 Co. 48, 97. *Vide* Tit. *Offices*.

(*c*) The Statute of *Westminster*, 2. c. 11. extends to an Infant Gaoler, so as to charge him in an Action of Debt for an Escape of one in Execution. 2 Inst. 382. 3 Mod. 222. S. P. cited.

* But it is said, that an Infant is not capable of the Stewardship of a Manor, or of the Stewardship of the Courts of a Bishop; because, by Intendment of Law, he hath not sufficient Knowledge, Experience and Judgment to use the Office, and also because he cannot make a Deputy. * Page 126 Co. Lit. 3. b. Roll. Abr. 731. 2 Roll. Abr. 153. March 41, 43. Cro. Eliz. 636. Cro. Car. 556.

An Infant cannot be an (*d*) Attorney, (*e*) Bailiff, Factor or Receiver.

If

F. N. B. 118.

Roll. Abr. 117. Co. Lit. 172. Cro. Eliz. 637. (*d*) Cannot be an Attorney, because he cannot be sworn. March 92. (*e*) Because not to be charged in any Account. Co. Lit. 172.——Not in an *Indebi-*

Roll. Abr. 530. *Furnes* and *Smith*, and a Prohibition denied to the Court of Admiralty.

If an Infant, being Maſter of a Ship at *St. Chriſtopher's* beyond Sea, by Contract with another, undertakes to carry certain Goods from *St. Chriſtopher's* to *England*, and there to deliver them; but does not afterwards deliver them according to the Agreement, but waſtes and conſumes them, he may be ſued for the Goods in the Court of Admiralty, though he be an Infant; for this Suit is but in Nature of a Detinue, or Trover and Converſion at the Common Law,

Roll. Abr. 2. Carth. 161. cited.

If an Infant keeps a common Inn, an Action on the Caſe upon the Cuſtom of Inns will not lie againſt him.

Carth. 160. *Williams* ver. *Harriſon*, adjudged on Demurrer.

So if an Infant draws a Bill of Exchange, yet he ſhall not be liable on the (*c*) Cuſtom of Merchants, but he may plead Infancy in the ſame Manner that he may to any other Contract of his.

(*c*) Not a Trader within the Statutes of Bankrupts. *Vide* Tit. *Bankrupt.*

Hob. 325. (*d*) But may be a Witneſs, if he appears to have Diſcretion. *Vide* Tit. *Evidence.*

An Infant cannot be a (*d*) Juror; and it is ſaid by *Hobart*, that by the Wiſdom of the Common Law a Perſon under forty-two could not be on a Trial *de Ætate probanda*, becauſe he then tried a Matter which might have happened before he was twenty-one.

2 Inſt. 47. (*e*) This is expreſly enacted by the 7 & 8 *W.* & *M.* c. 25. ſ. 8.

An Infant, or one under the Age of twenty-one Years, cannot be elected a Member of the Houſe (*e*) of Commons; nor can any Lord of Parliament ſit there until he be of the full Age of Twenty Years.

Vide Head of *Executors and Adminiſtrators*, Letter (A).

An Infant may be appointed Executor, but he cannot adminiſter till he is of the Age of ſeventeen; and before that Age, Adminiſtration is to be granted to ſome Friend of his; but an Infant cannot be an Adminiſtrator before the full Age of twenty-one Years, becauſe before that Age he cannot give Bond, as required by the Statute, to adminiſter faithfully.

The Court ſeemed to be of Opinion that an Infant cannot be a Mayor of a Corporation, nor be elected a Burgeſs of one. But the Law ſeems to remain unſettled. *Caſ. temp. Hardw.* 8. *Vide ante* Page 123.

(F) Of what Things capable, being for his own Advantage.

Co. Lit. 2, 8. 2 Inſt. 203.

AN Infant is capable of inheriting, for the Law preſumes him capable of Property; alſo an Infant may purchaſe, becauſe it is intended for his Benefit, and the Freehold is in him till he diſagree thereto, becauſe an Agreement is preſumed, it being for his Benefit, and becauſe the Freehold

* Page 127 * cannot be in the Grantor contrary to his own Act, nor can be in Abeyance, for then a Stranger would not know againſt whom to demand his Right; and if at his full Age the Infant agrees to the Purchaſe, he cannot afterwards avoid it; but if he dies during his Minority, his Heirs may avoid

Indebitatus upon an *Inſimul computaſſet*; for in this Action no Evidence ſhall be given of the Value or Neceſſity of the Things, but of the Account only, in which the Infant may be miſtaken. Latch 169. adjudged. Noy 87. S. C. adjudged, between *Wood* and *Whiterick*, & *vide* Palm. 528. 2 Roll. Rep. 271.——Nor can an Infant be charged as Bailiff, &c. in Equity farther than in Law; and therefore it is ſaid, that if ſuch a one is made Factor, his Friends ſhould give Security for his Accounting. Abr. Eq. 6.

avoid it; for they ſhall not be bound by the Contracts of a Perſon who wanted Capacity to contract.

If an Infant take a Leaſe for Years rendering Rent, if he enter upon the Land he ſhall be charged with an Action of Debt during his Minority, becauſe the Purchaſe is intended for his (*a*) Benefit; but he may wave the Term, and not enter, and if more Rent be reſerved upon the Leaſe than the Land is worth, he may avoid it. 2 Bulſ. 69.

(*a*) That the Court of Chancery will decree building Leaſes for 60 Years of Infants Eſtates, when it appears to be for their Good. 2 Vern. 224.

If an Infant be Lord of a Copyhold Manor, he may grant Copyholds notwithſtanding his Nonage; for theſe Eſtates do not take their Perfection from the Intereſt or Ability of the Lord to grant, but from the Cuſtom of the Manor, by which they have been demiſed, and are demiſeable, Time out of Mind. 4 Co. 23. b. Co. Copyholder, 79, 107. Noy 41. 8 Co. 63.

An Infant may preſent to a Church; and here it is ſaid, that this muſt be done by himſelf, of whatſoever Age he be, and (*b*) cannot be done by his Guardian, for the Guardian can make no Advantage thereof, and conſequently has nothing therein whereof he can give an Account, and therefore the Infant himſelf ſhall preſent. Co. Lit. 17. b. 89. a. 29 E. 3. 5. 3 Inſt. 156.

(*b*) But it is ſaid, that if the Heir be within the Age of Diſcretion, the Guardian may preſent in his Name. Cro. Jac. 99. & *vide Parſon's Law*, c. 20. fol. 76.——Alſo a Preſentment made by the Guardian, in the Name of the Heir is a good Title to the Heir in a *Quare Impedit*. 42 E. 3. 130.

(C) How far the Law takes care of his Intereſt, ſo as not to let him ſuffer by his Laches; and herein, where he muſt take notice and perform Conditions, &c.

THE Rights of Infants are much favoured in Law, and regularly their Laches ſhall not be prejudicial to them, upon a Preſumption that they underſtand not their Right, and that they are not capable of taking notice of the Rules of Law, ſo as to be able to apply them to their Advantage. Hence by the Common Law Infants were not bound for Want of (*c*) Claim and Entry within a Year and a Day, nor are they bound by a Fine and five Years Non-claim, nor by the Statutes of Limitation, provided they proſecute their Right within the Time allowed by the Statute after the Impediment removed. Plow. 358. a. 360. a. 4 Co. 125. a. *vide* Tit. *Fines and Recoveries*, and Tit. *Limitations*.

(*c*) Not bound by a *Ceſſavit per Biennium*, becauſe the Law intends that he doth not know what Arrearages to tender. 3 Mod. 223. Stra. 94, 168, 604. 2 Stra. 937. Barnard. K. B. 209. Fitzgib. 175. 2 Stra. 939.

If Lands are deviſed to Truſtees till Debts paid, and then to an Infant and his Heirs, and *J. S.* a Stranger enters on the Lands, and levies a Fine, and five Years and Non-claim paſs, and the Infant, when of Age, brings an Ejectment, but is barred, becauſe the Truſtees ought to have entered; yet Equity will relieve, and not ſuffer an Infant to be barred by the Laches of his Truſtees, not to be barred of a Truſt-Eſtate during his Infancy; and the Infant in this Caſe ſhall recover the meſne Profits. 2 Vern. 386. *Allen* ver. *Sayer*.

* It has been ruled in Chancery, that where one receives the Profits of an Infant's Eſtate, and ſix Years after his coming of Age he brings a Bill for an * Page 128

Preced. Chan. 518. *Lockey* and *Lockey*.

an Account, that the Statute of Limitations is a Bar to ſuch Suit, as it would be to an Action of Account at Common Law; for this Receipt of the Profits of an Infant's Eſtate is not ſuch a Truſt as, being a Creature of a Court of Equity, the Statute ſhall be no Bar to, for he might have had his Action of Account againſt him at Law, and therefore no Neceſſity to come into this Court for the Account; but the Reaſon why ſuch Bills are brought here is from the Nature of the Demand, that they might have the Diſcovery of Books, Papers, and the Party's Oath, for the more eaſy Taking of the Account, which they cannot ſo well do at Law; but if the Infant lies by for ſix Years after he comes of Age †, as he is barred of his Action of Account at Law, (*a*) ſo ſhall he be of his Remedy in this Court; and there is no Sort of Difference in Reaſon between the two Caſes.

† This muſt be where the Receiver ceaſes to receive for the ſix Years. See *infra* n.

(*a*) If a Stranger enters and receives the Profits of an Infant's Eſtate, he ſhall, in Conſideration of Equity, be looked upon as a Truſtee for the Infant. 2 Vern. 342. Vern. 295. S. C.—So if a Man, during a Perſon's Infancy, receives the Profits of an Infant's Eſtate, and continues to do ſo for ſeveral Years after the Infant comes of Age before any Entry is made on him, yet he ſhall account for the Profit throughout, and not during the Infancy only. Abr. Eq. 280. *Yallop* and *Holworthy*.

Lit. ſ. 402, 403. The Entry of an Infant is not taken away by a Deſcent caſt, by reaſon of his Weakneſs and Incapacity to claim, which is not to be imputed to him.

Co. Lit. 245. b. But if a Man ſeiſed of Lands in Fee die, his Wife *privement enſient* with a Son, and a Stranger abates, and dies ſeiſed, and after the Son is born, he ſhall be bound by the Deſcent; becauſe at the Time of the Deſcent he had no Right to enter, not being *in eſſe*, and by Conſequence had no Wrong then done him, and the Lord had none but the Heir to avow upon at the Time of the Deſcent.

Co. Lit. 246. a. *B.* Tenant in Tail, enfeoffs *A.* in Fee, who hath Iſſue within Age, and dies, *B.* abates and dies ſeiſed, the Iſſue of *A.* being ſtill within Age; this Deſcent ſhall bind the Infant, becauſe the Iſſue in Tail is remitted to his former and elder Right, which is to be preferred before the defeaſible Title of the Diſcontinuee's Heir.

Co. Lit. 244. 8 Co. 101. Sir *Richard Pexhall*'s Caſe. Plow. 372. It is a Rule in Law, that the Poſſeſſion and dying ſeized of a *Baſtard eigne* bars the *Mulier*; ſo if the *Mulier* be an Infant during the Poſſeſſion of the *Baſtard eigne*, yet he is barred by the Deſcent; for though no Laches can be imputed to an Infant, becauſe, not being of the Age of Conſent, his Permiſſion cannot be taken for a Conſent; yet in ſuch Caſes, where Time is limited by the Law for Pleas and Actions, Infants are included, unleſs ſpecially excepted, for here their Permiſſion is taken for a Conſent; becauſe they are ſuppoſed, to conſent to the eſtabliſhed Law, to which they are obliged for Protection during Minority; and the Law hath not thought fit in this Caſe, becauſe it might happen to be a public Miſchief in a very tender Point, for it might be any Man's Caſe to ſuffer by the Baſtardy of an Anceſtor; and the Law hath given the Infants Guardians to plead by, but it cannot revive the Evidence of Legitimation, which ſo eaſily periſhes with the Life of the Party.

2 Inſt. 303. If an Infant be Tenant by the Curteſy, or Leſſee for Life or Years, he ſhall anſwer not only for Waſte committed by himſelf, but alſo for permiſſive Waſte or Waſtes committed by a Stranger; for the Privilege of Infancy cannot prevail in a Matter that would be a Wrong and Diſheriſon to him who hath the Inheritance; nor is it in the laſt Caſe any Hardſhip to the Infant, becauſe he hath his Remedy over againſt the Wrong-doer.

2 Inſt. 703. If by Tenure or Preſcription certain Lands are obliged to the Repair of Bridges, Highways, &c. and ſuch Lands come to an Infant either by Deſcent or Purchaſe, he ſhall be obliged to repair, &c. in the ſame Manner as if he were of full Age.

If

* If an Infant preſent not to a Church within ſix Months, it ſhall lapſe; if the five Years for making a Claim after a Fine begin in the Anceſtor's Life, he muſt claim within them; if he does not claim a Villain, fled into ancient Demeſne, within a Year and a Day, he cannot afterwards claim him; and he ſhall be barred in an Appeal of the Death of his Anceſtor, if he do not bring it within a Year and a Day: If the King die ſeiſed, the Infant is driven to his Petition; for in theſe Caſes the Law prefers the Good of the Church, the public Repoſe of the Realm, Liberty, Life, and the King's Prerogative, before the Privilege of Infancy. *Page 129 Co. Lit. 246.

An Infant is bound by (*a*) all Conditions, Charges and Penalties, in an original Conveyance, whether he comes to the Eſtate by Grant or Deſcent. 2 Inſt. 233. 8 Co. 44. Latch 199.

2 Rol. Rep. 72. Leon. 100. Hard. 11. (*a*) Bound by Conditions annexed to the Eſtate at Common Law, becauſe *tranſit cum onere*: and therefore if the Infant will have the Eſtate, he muſt obſerve the Condition upon which it was granted. Carth. 43.

Therefore if a Perſon deviſe to his Grandaughter, who is not Heir at Law, Lands, upon Condition that ſhe marry with the Conſent of certain Truſtees, ſhe is obliged to take Notice, at her Peril, of the Condition, and likewiſe to perform it; but had ſhe been Heir at Law, ſhe muſt have had Notice given her of the Condition, to make the Marriage, without Conſent, a Forfeiture. Vent. 200. 2 Lev. 21. Mod. 86, 300. *Fry* and *Porter* adjudged. See

Raym. 236. 2 Keb. 756, 787, 814. 2 Chan. Rep. 26. Gilb. Eq. Rep. 26, 147, 188. 11 Mod. 48. pl. 16. 12 Mod. 182. 2 Vern. 333. Pre. Ch. 565. Eq. Caſ. Abr. 110, 282. Will. Rep. 284. pl. 67. 2 Wil. Rep. 419. pl. 134. (626). pl. 196. (628). Caſ. Temp. Talb. 164, 212. Comyns 726. pl. 281, 757. 3 Wil. Rep. 65. pl. 16. 238. Lord *Nettervil*'s Caſe in the Houſe of Lords, *April* 1737.

An Infant ſhall be bound by Conditions in Fact, and ſuch Conditions as he can perform, in Equity as well as in Law, as was adjudged in the preceding Caſe of *Fry* and *Porter*. 2 Vern. 343.

So where *A.* gave Lottery-Tickets amongſt her Servants, on Condition, that if any of them came up a Prize of 20*l.* or more, they ſhould give one half to her Daughter; the Ticket given the Foot-boy, who was an Infant, came up 1000*l.* Prize; and it was held in Chancery, that the Daughter was well intitled to a Moiety, for a Gift to an Infant, on Condition, binds him as well as another Perſon. 2 Vern. 560. *Scot* and *Houghton*.

If an Office in a Parkſhip be given or deſcends to an Infant, if the Condition in Law annexed to ſuch an Office (which is Skill) be not obſerved, the Office is forfeited. 3 Mod. 224.

If a Man make a Feoffment in Fee to another, reſerving Rent, and if he pay not the Rent within a Month, that he ſhall double the Rent, and the Feoffee dieth, his Heir within Age, the Infant payeth not the Rent, he ſhall not by his Laches herein forfeit any Thing; but otherwiſe it is of a Feme Covert; and the Reaſon of the Diverſity is, becauſe the Infant is provided for by the (*b*) Statute, *non currunt uſuræ contra aliquem infra ætatem exiſten', &c.* but that Statute doth not extend to a Feme Covert, neither doth it extend to a Condition of a Re-entry, which an Infant ought to perform, for the Forfeiture thereof cannot be called *uſura*. Co. Lit. 246. b. (*b*) Statute of *Merton*, c. 5.

It has been held by ſome (*c*) Opinions, where the Cuſtom of a Copyhold Manor was, that every Surrender, which is made *ſecundum conſuetudinem* out of Court, ſhall be preſented by the Homage at the next Court to be held for the ſaid Manor; and that upon ſuch a Preſentment Proclamation had been uſually made, and ſo for three Courts next following; and if upon the third Proclamation no Perſon came to be admitted, &c. that then the Lord of the Manor ſhould ſeize the Lands as forfeited; that this Cuſtom bound an Infant. (*c*) By *Holt* C. J. *verſ.* three Judges in the Caſe of *King* and *Dilliſton*, Carth. 41, &c. Salk. 386. pl. 1. Comb. 118. 3 Mod. 221. Show. 81. Ld. Raym. 765.

But this is now settled by the 9 *Geo.* 1. *cap.* 29. by which it is enacted, "That no Infant, or Feme Covert, shall forfeit any Copyhold, Messuages, &c. for their Neglect or Refusal to come to any Court or "Courts, to be kept for any Manor whereof such Messuages, &c. are *Page 130 "* Parcel, and to be admitted thereto; nor for the Omission or Denial "to pay any Fine or Fines imposed or set upon their, or any of their "Admittances to any such Copyhold, Messuages, &c."

a Salk. 415. pl. 2. *per Cowper* Lord Chancellor.

If a Legacy be devised generally, and no Time ascertained for the Payment, and the Legatee be an Infant, he shall be paid Interest from the Expiration of the first Year after the Testator's Death; but it seems a Year shall be allowed, for so long the Statute of Distribution allows before the Distribution be compellable, and so long the Executor shall have, that it may appear whether there be any Debts; but if the Legatee be of full Age, he shall only have Interest from the Time of his Demand after the Year; for no Time of Payment being set, it is not payable but upon Demand, and he shall not have Interest but from the Time of his Demand; otherwise it is in the Case of an Infant, because no Lache is imputed to him.

(H) Where punishable for Crimes and Injuries committed by him.

Hal. Hist. P.C. 16, &c. *Supra* Letter (A) 118. &c. Fost. Cr. Law. 70. See *ante* 122.

IT has been already observed, that one above the Age of fourteen, or of Years of Discretion, may be guilty of a Capital Offence in the same Manner as one of full Age; also that one under these Years, if above the Age of seven, may according to the Circumstances of the Case, as if in Murder he hides the Body slain by him, makes Excuses, or otherwise shews such Signs of Cunning as demonstrate him capable of discerning between Good and Evil, be guilty and convicted of a Capital Offence; but that in these latter Cases, the Judges may respite Judgment, or Execution, in order to the obtaining the King's Pardon.

Hal. Hist. P. C. 28, 9.

Also if an Infant, under the Age of fourteen, be indicted by the Grand Inquest, and thereupon arraigned, the Petit Jury may either find him generally Not guilty, or they may find the Matter specially, that he committed the Fact, but that he was under the Age of fourteen, *scilicet ætatis* 13 *annorum*, and had not Discretion to discern between Good and Evil, & *non per feloniam*; but if a Man be arraigned in such a Case upon an Indictment of Murder, or Manslaughter, by the Coroner's Inquest, there if the Party committed the Fact, regularly the Matter ought to be specially found; because if the Jury find the Party not guilty, they must inquire how he came by his Death; but if he be first arraigned, and acquitted upon the Indictment, he may plead that Acquittal upon his Arraignment upon the Coroner's Inquest, and that will discharge him; and the *Petit Jury* shall inquire farther how the Party came by his Death.

Hal. Hist. P. C. 20.

As to Misdemeanors and Offences that are not Capital, in some Cases an Infant is privileged by his Nonage; and herein the Privilege is all one, whether he be above the Age of fourteen, or under, if he be under one and Twenty Years, but with these Differences:

Bro. Saver Default 50. Plow. 364. a. Co. Lit. 246. b. 2 Inst. 703.

If an Infant under the Age of Twenty one Years be indicted of any Misdemeanor, as a Riot or Battery, he shall not be privileged barely by reason that he is under Twenty-one Years; but if he be convicted thereof by due Trial, he shall be fined and imprisoned; and the Reason is, because upon his Trial the Court *ex officio* ought to consider and examine the

the Circumſtances of the Fact, whether he was *doli capax*, and had Diſcretion to do the Act wherewith he is charged; and the ſame Law is of a Feme Covert; but if the Offence charged by the Indictment be a meer Nonfeazance, (unleſs it be of ſuch a Thing as he is bound to by reaſon of Tenure, or the like, as to repair a Bridge, *&c.*) there in ſome * Caſes he ſhall be privileged by his Nonage, if under Twenty-one, though above fourteen Years, becauſe Laches in ſuch a Caſe ſhall not be imputed to him. Cro. Jac. 465. Hal. Hiſt. P. C. 20. *Page 131

If an Infant in an Aſſiſe vouch a Record, and fail at the Day, he ſhall not be impriſoned, nor, it ſeems, a Feme Covert; and yet the Statute of *Weſtm.* 2. *cap.* 25. that gives Impriſonment in ſuch a Caſe, is general. Hal. Hiſt. P. C. 20.

If *A.* kills *B.* and *C.* and *D.* are preſent, and do not attach the Offender, they ſhall be fined or impriſoned; yet if *C.* were within the Age of Twenty-one Years, he ſhall not be fined nor impriſoned. Hal. Hiſt. P. C. 21.

Where the Corporal Puniſhment is but collateral, and not the direct Intention of the Proceeding againſt the Infant for his Miſdemeanor, there in many Caſes the Infant, under the Age of Twenty-one, ſhall be ſpared, though poſſibly the Puniſhment be enacted by Parliament. Hal. Hiſt. P. C. 21.

It is ſaid by *Hale*, that if an Infant, of the Age of eighteen Years, be convict of a Diſſeiſin with Force, yet he ſhall not be impriſoned, and yet a Feme Covert ſhall be impriſoned in ſuch Caſe. Hal. Hiſt. P. C. 21.

But herein the Law ſeems to be, that an Infant at the Age of eighteen, nay fourteen, or a Feme Covert, by their own Acts may be guilty of a forcible Entry, and they may be fined for the ſame; but it ſeems by the better Opinion, that the Infant cannot be impriſoned, becauſe his Infancy is an Excuſe by reaſon of his Indiſcretion, being not (*a*) particularly mentioned in the Statute againſt forcible Entries, to be committed for ſuch Fine. Bridg. 173. Cromp. Juſt. 61. Dalt. 302. Co. Lit. 357.

(*a*) That the Infant ought not to be impriſoned, becauſe he ſhall not be ſubject to corporal Puniſhment by force of the general Words of any Statute wherein he is not expreſly named. Hawk. P. C. 147.

But neither an Infant, nor Feme Covert, can be guilty of a forcible Entry or Diſſeiſin, by barely commanding one, or by aſſenting to one to their Uſe, becauſe every ſuch Command or Aſſent by Perſons under theſe Incapacities are void; but an actual Entry by an Infant, into another's Freehold, gains the Poſſeſſion, and makes him Diſſeiſor as well as it does a Feme Covert. Crom. 69. Co. Lit. 357. Hawk. P. C. 147.

Two Infants Joint-tenants, one releaſes to the other, by which the other holds the Whole, this ſeems a Diſſeiſin, becauſe the Releaſe being in no Manner for the Advantage of the Infant, is utterly void; then the Entry of the other being without Title is tortious, and a Diſſeiſin; but if there had been Livery made upon it, though between Joint-tenants, this is void; yet it ſeems no Diſſeiſin, for the Regard the Law has to the Solemnity of Livery, which ſhall continue till defeated by Act of equal Notoriety. Bro. Diſſeiſin 19.

If a Man carries an Infant into the Lands of *J. S.* and there claims the Lands to the Uſe of himſelf and the Infant, yet the Infant ſeems no Diſſeiſor, becauſe he made no Claim of it himſelf; and then ſhall not be charged with the Tort of another Perſon. Rol. Abr. 661.

If an Infant be convict in an Action of Treſpaſs *Vi & Armis*, the Entry muſt be *Nihil de fine, ſed pardonatur quia Infans*, for if a *Capiatur* be entered againſt him, it is Error, for it appears judicially to the Court that he was within Age when he appears by Guardian; the like Law is, that he ſhall not be *in Miſericordia pro falſo clamore* †. Cro. Jac. 274. Hal. Hiſt. P. C. 21.

† The *Capiatur pro Fine* taken away, and other Proviſions in lieu thereof. 5 *W.* & *M.* c. 12.

Plow. 364. Hal. Hiſt. P. C. 21. General Statutes, that give Corporal Puniſhment, are not to extend to Infants; and therefore if an Infant be convict in Raviſhment of Ward, he ſhall not be impriſoned, though the Statute of *Merton*, *cap.* 6. be general in that Caſe; but this muſt be underſtood where it is, as before ſaid, a Puniſhment as it were collateral to the Offence, as in the Caſes beforementioned.

Co. Lit. 247. Hal. Hiſt. P. C. 21, 22. *Page 132 But where a Fact is made Felony or Treaſon, it extends as well to Infants, if above fourteen Years, as to others; and this appears by ſeveral Acts of Parliament, (*a*) as by 1 *Jac.* 1. *cap.* 11. of Felony for marrying two Wives, *&c.* where there is a ſpecial Exception of Marriages within the Age of Conſent, which in Females is twelve, in Males fourteen Years; ſo that if the Marriage were above the Age of Conſent, though within the Age of Twenty-one Years, it is not exempted from the Penalty.

(*a*) So by the Statute of 21 H. 8. c. 7. concerning Felony by Servants that imbezil their Maſters Goods delivered to them, there is a ſpecial Proviſo, that it ſhall not extend to Servants under the Age of eighteen Years, who certainly had been within the Penalty if above the Age of Diſcretion, *viz.* fourteen Years, though under eighteen Years, unleſs a ſpecial Proviſion had been to exclude them. Hal. Hiſt. P. C. 22.—So by the 12 *Ann.* c. 7. where Apprentices, under the Age of fifteen Years, who ſhall rob their Maſters are excepted out of the Act.

Sid. 258. Lev. 169. 1 Keb. 905, 913. S. C. *Johnſon* and *Pie*. Infants are liable for Torts and Injuries of a private Nature; but if an Infant, affirming (1) himſelf to be of Age, borrows 100*l.* and gives his Bond for it, and being ſued upon the Bond, avoids it by reaſon of his Nonage, yet no Action lies againſt him for the Deceit; for though Infants ſhall be bound by actual Torts, (*b*) as Treſpaſs, *&c.* which are *Vi & Armis*, yet they ſhall not for thoſe that ſound in Deceit; for if they ſhould, all the Infants in *England* might be ruined; adjudged, and Judgment arreſted after a Verdict for the Plaintiff in an Action upon the Caſe for the Deceit.

(1) If a Minor goes about Town and pretending to be of Age defrauds by taking up Goods upon Credit, and then inſiſts on his Nonage, tho' the Perſons injured cannot recover back their Goods or the Value, yet they may indict and puniſh the Infant as a common Cheat. Barl. 100. and *Trevor* and *Parker*, C. J. ſaid that where a Perſon will take upon himſelf to trade and act as of Age, he ought to be preſumed of Age, and no Evidence of Parish Regiſters ought to be admitted againſt it. 12 Vin. Abr. 203. [T. C. 4.] pl. 3. ‡ (*b*) That an Action for Words lies againſt an Infant of the Age of ſeventeen, for *Malitia ſupplet Ætatem*. Noy 129.

‡ But *qu.* if this is Law? and *vide infra*, 133.

Keb. 778. *Greve* and *Nevil*. Sid. 258. Lev. 169. S. C. cited. So where an Action of Deceit was brought for affirming upon the Sale of a Horſe, that it was the Defendant's Horſe, whereas it was the Horſe of another Man, *&c.* the Defendant pleaded Infancy; and on Demurrer the Court, on the firſt Argument, inclined for the Defendant, for this Action depends upon the Contract; and though the Contract (it being an actual Delivery) be not void, but voidable, and this Action be brought upon the Wrong, and not upon the Contract, yet here, by this Plea, he ſhews that he elects to avoid the Contract, and then this Action falls; and afterwards it was adjudged for the Defendant; and the Court ſaid, that it was like an Action brought againſt an Infant for affirming himſelf to be of full Age.

Sid. 258. *per cur.* But if an Infant judicially perjure himſelf in Point of Age, or otherwiſe, it ſhall be puniſhed for the Perjury; ſo he may be indicted for cheating with falſe Dice, *&c.*

(1) Of

(I) Of the Acts of Infants as they are good, void or voidable: And herein,

1. Of their Contracts for Neceſſaries.

HERE we muſt obſerve, that, ſtrictly ſpeaking, all Contracts made by Infants are either void (1) or voidable, becauſe the Contract is the Act of the Underſtanding, which during their State of Infancy they are preſumed to want; yet Civil Societies have ſo far ſupplied that Defect, and taken care of them, as to allow them to contract for their Benefit and Advantage, with Power, in moſt Caſes, to recede from and vacate it when it may prove prejudicial to them; but in this Contract for Neceſſaries they are abſolutely bound, and this likewiſe is in Benignity to Infants, for if they were not allowed to bind themſelves for Neceſſaries, no Perſon would truſt them, in which Caſe they would be in worſe Circumſtances than Perſons of full Age.

10 H. 6. 14. 18 E. 4. 2. Rol. Abr. 729.

(1) That the Contract of an Infant is not abſolutely void, but only voidable at his *own* Election, is a Doctrine now ſettled and eſtabliſhed. Bur. 566. 2 Stra 938. 2 Barnard. K. B. 174.——[But not voidable for Neceſſaries, and what are and what are not Neceſſaries ſhall be determined by the Jury. *Vide infra* 133.—The Court, on Motion, will ſet aſide a Judgment on a Warrant of Attorney executed by an Infant. Hardw. 376.

* Therefore it is clearly agreed by all the Books that ſpeak of this Matter, that an Infant may bind himſelf to pay for his neceſſary Meat, Drink, Apparel, neceſſary Phyſick, and ſuch (*a*) other Neceſſaries, and likewiſe for his good Teaching and Inſtruction, whereby he may profit himſelf afterwards.

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Co. Lit. 172. a. &c.

(*a*) If an Infant at the Age of fifteen marries, he may take up Proviſion for his Wife and Children. Carter 215. ſaid.

But it muſt appear that the Things were actually neceſſary, and of reaſonable Prices, and ſuitable to the Infant's (*b*) Degree and Eſtate, which regularly muſt be left to the Jury; but if the Jury find that the Things were Neceſſaries, and of reaſonable Price, it ſhall be preſumed they had Evidence for what they thus fined; and they need not find particularly what the Neceſſaries were, nor of what Price each Thing was; alſo if the Plaintiff declares for other Things as well as Neceſſaries, or alledges too high a Price for thoſe Things that are neceſſary, the Jury may conſider of thoſe Things that were really Neceſſaries, and of their intrinſick Value, and proportion their Damages accordingly.

Cro Jac. 560. 2 Rol. Rep. 144. Poph. 151. Palm. 361. Goulſ. 168. Godb. 219. Leon. 114.

(*b*) That the Law diſtinguiſhes between Perſons as to Neceſſaries; as between a Nobleman and a Gentleman's Son; alſo in point of Time and Education, the Law diſtinguiſhes; as at School, *Oxford*, and Inns of Court; and that he is not to be looked upon in the ſame Condition when a School Boy, as when of riper Years. Carter 215.—Velvet and Sattin Suits laced with Gold held not neceſſary. Cro. Eliz. 583.

If an Infant promiſes another that if he will find him Meat, Drink and Waſhing, and pay for his Schooling, that he will pay 7*l.* yearly; an Action upon the Caſe lies upon this Promiſe; for Learning is as neceſſary as other Things; and though it is not mentioned what Learning this was, yet it ſhall be intended what was fit for him, till it be ſhewn to the contrary on the other Part; and though he to whom the Promiſe was made does not inſtruct him, but pays another for it, the Promiſe of Re-payment thereof is good; and it appears that the Learning, Meat, Drink, and Waſhing, could not be afforded for a leſs Sum than 7*l.* †

Rol. Abr. 729. Palm. 528. Jon. 182. S. C. *Pickering* ver. *Gunning* adjudged on a Motion in Arreſt of Judgment.

†See *infra* *Aſſumpſit* 134.

Carth. 110. *Huggins* and *Wiſeman.* *Aſſumpſit* for Labour and Medicines in curing the Defendant of a Diſtemper, &c. who pleaded *infra ætatem viginti & unius annorum*; the Plaintiff replied, it was Neceſſaries generally; and upon a Demurrer to this Replication it was objected, that the Plaintiff had not aſſigned in certain how or in what Manner the Medicines were neceſſary; but it was adjudged that the Replication in this general Form was good.

Rol. Abr. 729. Cro. Jac. 494. 2 Rol. Rep. 45. If an Infant be a Mercer, and hath a Shop in a Town, and there buys and ſells, and he contracts to pay a certain Sum to *J. S.* for certain Wares ſold to him by *J. S.* to re-ſell, yet he is not chargeable upon this Contract, for this Trading is not immediately neceſſary *ad victum & veſtitum*; and if this were allowed, Infants might be infinitely prejudiced, and buy and ſell and live by the Loſs.

S. C. adjudged between *Hill* and *Whittingham*, 279. pl. 4.

5 Mod. 368. Salk. pl. 2. 386, 387. Ld. Raym. 344. See 12 Mod. 197. & Stra. 1083. And as the Contract of an Infant for Wares, for the neceſſary carrying on his Trade, whereby he ſubſiſts, ſhall not bind him; ſo neither ſhall he be liable for Money which he borrows to lay out for Neceſſaries; and therefore the Lender muſt, at his Peril, lay it out for him, or ſee that it is laid out in Neceſſaries.

Salk. 386. pl. 2. *Earle* ver. *Peale.* As in Debt upon a ſingle Bill, the Defendant pleaded that he was within Age; the Plaintiff replied, that it was for Neceſſaries, *viz.* 10*l.* for Cloaths, and 15*l.* Money lent *pro & erga* his neceſſary Support at the Univerſity; the Defendant rejoined, that the Money was lent him to ſpend at Pleaſure; *abſque hoc*, that it was lent him for Neceſſaries; and Iſſue hereupon was found for the Plaintiff, who had Judgment in *C. B.* but was reverſed in *B. R.* on a Writ of Error; for the Iſſue only being, whether this Money was lent the Infant for Neceſſaries, not whether it was laid out in Neceſſaries, it cannot bind the Infant which ever way it is
Page 134 found; for it might have been borrowed for Neceſſaries, and laid out in a Tavern; and the Law will not intruſt the Infant with Application and laying of it out.

Salk. 279. pl. 4. So if one lends Money to an Infant, who actually lays it out in Neceſſaries, yet this ſhall not bind the Infant, nor ſubject him to an Action; for it is upon the Lending that the Contract muſt ariſe, and after that Time there could be no Contract raiſed to bind the Infant, becauſe after that he might waſte the Money, and the Infant's applying it afterwards for Neceſſaries will not by Matter *ex poſt facto* intitle the Plaintiff to an Action.

Cro. Eliz. 920. Moor 679. pl. 929. Co. Lit. 172. Rol. Abr. 729. Alſo although an Infant ſhall be liable for his Neceſſaries, yet if he enters into an Obligation with a Penalty for Payment thereof, this ſhall not bind him; for the entering into a Penalty can be of no Advantage to the Infant.

Caſes in Law and Eq. 185. † See *ante* 133. It is alſo ſaid, that an Infant cannot either by a Parol Contract or a Deed bind himſelf, even for Neceſſaries, in a Sum certain †; and that ſhould an Infant promiſe to give an unreaſonable Price for Neceſſaries, that would not bind him; and that therefore it may be ſaid, that the Contract of an Infant for Neceſſaries, *quatenus* a Contract, does not bind him any more than his Bond would; but only ſince an Infant muſt live as well as a Man, the Law gives a reaſonable Price to thoſe who furniſh him with Neceſſaries.

(*a*) Lev 86. *Ruſſel* and *Lee*, adjudged. Keb. 382, 416, 423. S. C. Yet it hath been (*a*) adjudged, and is admitted in ſeveral (*b*) other Books that if an Infant contracts for Neceſſaries, and enters into a ſingle Bill for Payment, that this ſhall bind him, and that an Action of Debt will lie on ſuch Obligation.

So

(*b*) Co. Lit. 172. S. P. and Diverſity taken between a ſingle Obligation and an Obligation with Penalty. Cro. Eliz. 910. S. P. and ſame Diverſity *per Curiam*. Rol. Abr. 729. S. P. though thereby the Defendant is ouſted of his Wager of Law.

So an Infant may bind himſelf in an *Aſſumpſit* for Payment of Neceſſaries, and an Action upon the Caſe lies againſt him upon the Promiſe for this, but in nature of an Action of Debt; and therefore where Debt lies, an Action on the Caſe lies againſt him. Rol. Abr. 729. Noy 85. Latch 157. & *vide* 3 Bulſ. 188. Rol. Rep. 328.

Alſo it ſeems clear, that if an Infant becomes indebted for Neceſſaries, and the Party takes a Bond from the Infant, that this ſhall not drown the ſimple Contract, becauſe the Bond has no Force. Cro. Eliz. 920.

But it is agreed, that an *Inſimul Computaſſet* will not lie againſt an Infant, though it be for Neceſſaries; for he, not having Diſcretion, is not to be liable to falſe Accounts. Co. Lit. 172. Latch 169. Noy 87.

If an Infant comes to a Stranger, who inſtructs him in Learning, and boards him, there is an implied Contract in Law, that the Party ſhould be paid as much as his Board and Schooling are worth; but if the Infant at the Time of his going thither was under the Age of Diſcretion, or if he were placed there upon a ſpecial Agreement with ſome of the Child's Friends, the Party that boards him has no Remedy againſt the Infant, but muſt reſort to them with whom he agreed for the Infant's Board, &c. † Allen 94. *Duncomb* and *Tickridge*.

† It hath of late Years been ſeveral Times determined that where a Parent or Relation, &c. places an Infant at a Boarding-School, the Credit being given to ſuch Parent, Relation, &c. the Maſter cannot have any Remedy againſt the Infant.——Neceſſaries for an Infant's Wife, are Neceſſaries for him, but not if provided in order for the Marriage. Stra. 168.—If Goods, not Neceſſaries, are delivered to an Infant, who after full Age promiſes to pay, he is bound. Stra. 690.

2. Of judicial Acts, or Acts done by him in a Court of Record.

As to judicial Acts, and Acts done by an Infant in a Court of Record, they regularly bind the Infant and his Repreſentatives, with the following Savings and Exceptions; as if an Infant levies a Fine, though the Judges ought not to admit the Acknowledgment of one under that Diſability, yet having once recorded his Agreement as the Judgment of the Court, it * ſhall for ever bind him and his Repreſentatives, unleſs he reverſes it by Writ of Error, which muſt be brought by him during his Minority, that the Court by Inſpection may determine his Age †. *Page 135 Co. Lit. 380. Moor 76. 2 Rol. Abr. 15.

2 Inſt. 483. 2 Bulſ. 320. 12 Co. 122. Yelv. 155. 3 Mod. 229. 12 Mod. 197, 243. Lord Raym. 443, 444. Atk. Rep. 146. pl. 86. Sel. Caſ. Temp. King. 46. Wil. Rep. 737.——† See *ante* 124. D.

So if an Infant levies a Fine, he is enabled by Law to declare the Uſes thereof, and if he reverſeth not the Fine during his Nonage, the Declaration of Uſes will ſtand good for ever; for though that be a Matter in *Pais*, and all ſuch Acts an Infant may avoid at any Time after his full Age, if he do not conſent; yet being made in purſuance of the Fine levied, which Fine muſt ſtand good for ever, (unleſs reverſed in the Manner as has been mentioned,) ſo will the Declaration of Uſes too. 2 Co. 58. a. 10 Co. 42. Moor 22. Dalſ. 47. 2 Leon. 159. Goulſ. 13. Jones 390. Winch 103, 104.

If there be Tenant for Life, the Remainder to an Infant in Fee, and they two join in a Fine, the Infant may bring a Writ of Error, and reverſe the Fine as to himſelf, but it ſhall ſtand good as to the Tenant for Life, for the Diſability of the Infant ſhall not render the Contract of the Tenant for Life, who was of full Age, ineffectual. Leon. 115, 317. 2 Sid. 55. 2 Jones 182.

If

Rol. Abr. 788. If an Infant brings a Writ of Error to reverſe a Fine for his Nonage, and his Nonage, after Inſpection, is recorded by the Court, but before the Fine reverſed he levies another Fine to another, this ſecond Fine ſhall hinder him from reverſing the firſt; becauſe the ſecond having entirely barred him of any Right to the Land, muſt alſo deprive him of all Remedies which would reſtore him to the Land.

Moor 74. but *quære.* If an Infant levies a Fine, and the Conuzee renders to him either for Life or in Tail, it is ſaid that he ſhall have no Writ of Error to avoid this Fine; becauſe the Reverſion of the Fine being only to reſtore him to the Land he parted with by the Fine, it would be fruitleſs to give him a Writ of Error, ſince he could not thereby be reſtored to the Land, which the Fine itſelf, which he would endeavour to reverſe, had before given him.

Rol. Abr. 731, 742. Co. Lit. 381. b. 2 Rol. Abr. 395. 10 Co. 43. a. Cro. Eliz. 471. Hob. 196, 197. Cro. Car. 307. 2 Bulſt. 235. Sid. 321, 322. Lev. 142. 2 Sand. 94. Vern. 461. 2 Salk. 567. pl. 1. As to Recoveries ſuffered by Infants, when theſe were improved into a common Way of Conveyance, it was thought reaſonable, that thoſe whom the Law had judged incapable to act for their own Intereſt ſhould not be bound by the Judgment given in Recoveries, though it was the ſolemn Act of the Court; for where the Defendant gives way to the Judgment, it is as much his voluntary Act and Conveyance, as if he had transferred the Land by Livery, or any other Act in *Pais*; and therefore, if an Infant ſuffers a Recovery, he may reverſe it as he may a Fine, by Writ of Error, during his Minority: And this was formerly taken to be Law, as well where the Infant appeared by Guardian, as by his Attorney, or in Perſon: But now the Diſtinction turns upon this Point, that if an Infant ſuffers a Recovery in Perſon, it is erroneous, and he may reverſe it by Writ of Error; but even in this Caſe, the Writ of Error muſt be brought during his Minority, that his Infancy may be tried by the Inſpection of the Court; for at his full Age it becomes obligatory and unavoidable; but in Caſes of Neceſſity the Court has admitted the Infant to appear by Guardian, and to ſuffer a Recovery, or come in as Vouchee; but this too is ſeldom allowed by the Court, unleſs it be upon Emergencies, when it tends to the Improvement of the Infant's Affairs, or when Lands of equal Value have been ſettled on him, and when he has had the King's Privy Seal for that Purpoſe; and theſe Recoveries have been allowed and ſupported by the Judges, and the Infant could not ſet them aſide or ſhake them; beſides, if ſuch Recoveries be to the Prejudice of the Infant, he has his Remedy for it againſt his Guardian, and may reimburſe himſelf out of his Pocket, to whom the Law had committed the Care of him.

Co. Lit. 171. b. Partition by Writ *de Partitione facienda* binds Infants, becauſe by Judgment in a Court of Juſtice, to which no Partiality can be imputed.

If an Infant acknowledge a Recognizance or Statute, it is only voidable; and the Infant, at his Peril, muſt avoid them by *Audita Querela*, as

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Moor, pl. 206. 2 Inſt. 483, 673. Co. Lit. 380. Kelw. 10. Reg. 149. 10 Co. 43. a. he muſt a Fine or Recovery by Writ of Error, during his Minority; for ſuch Conveyances, or other Acts of Record, become obligatory and unavoidable, if they be not ſet aſide before the Infant comes of Age; the Reaſon is becauſe theſe Contracts being entered into under the Inſpection of the Judge, who is ſuppoſed to do right, the Infant cannot againſt them aver his Diſability, but muſt reverſe them by a Judgment of a ſuperior Court, which by Inſpection hath the ſame Means to determine whether the inferior Juriſdiction has done right, that firſt received the Contract.

2 Inſt. 673. If an Infant bargain and ſell his Land by Deed indented and inrolled, yet he may plead Nonage; for notwithſtanding the Statute 27 *H.* 8. *cap.* 16. makes the Inrolment in a Court of Record neceſſary to complete the Conveyance, yet the Bargainee claims by the Deed as at Common Law, which was, and therefore ſtill is defeaſible by Nonage.

[3. Of his Act in *Pais*, where void or only voidable.

Infants are regularly allowed to reſcind and break through all Contracts in *Pais* made during Minority, except only for Schooling and Neceſſaries, be they never ſo much to their Advantage; and the Reaſon hereof is, the Indulgence the Law has thought fit to give Infants, who are ſuppoſed to want Judgment and Diſcretion in their Contracts and Tranſactions with others, and the Care it takes of them in preventing their being impoſed upon or over-reached by Perſons of more Years and Experience.

39 E. 3. 20. b. Rol. Abr. 729. Co. Lit. 172, 381.

And for the better Security and Protection of Infants herein, the Law has made ſome of their Contracts abſolutely void, *i. e.* all ſuch, in which there is no apparent Benefit, or Semblance of Benefit to the Infant; but as to thoſe from which the Infant may receive Benefit, and which were entered into with more Solemnity, they are only voidable; that is, the Law allows them when they come of Age, and are capable of conſidering over again what they have done, either to ratify and affirm ſuch Contracts, or to break through and avoid them.

Cro. Car. 502. Jones 405. 3 Mod. 310.

Hence it hath been agreed, that an Infant may purchaſe, becauſe it is intended for his Benefit, and that at his full Age he may either agree or diſagree to the ſame.

Co. Lit. 2, 8. 2 Vent. 203.

Alſo the Feoffment of an Infant is not void, but only voidable, not only becauſe he is allowed to contract for his Benefit, but becauſe that there ought to be ſome Act of Notoriety to reſtore the Poſſeſſion to him, equal to that which transferred it from him.

Co. Lit. 380. Dyer 104. 2 Rol. Abr. 572. 4 Co. 125. a. 8 Co. 42. Bro. Tit. *Diſſeiſin*, 63.

Therefore if an Infant make a Feoffment and Livery in Perſon, he ſhall have no Aſſiſe, *&c.* but muſt avoid it by (*a*) Entry; for it is to be preſumed in favour of ſuch Solemnity, that the Aſſembly of the *Pais* then preſent would have prevented it, if they had perceived his Nonage, and therefore the Feoffment ſhall continue till defeated *(b)* by Entry, which is an Act of equal Notoriety †.

(*a*) May avoid his Feoffment by Entry during his Minority, but muſt not have the Writ *dum fuit infra Ætatem* till his full Age. F. N. B. 192. Co. Lit. 380. Show. Parl. Caſes 153. Co. Lit. 247. a. ‡ (*b*) But if an Infant exchanges with another, if the other enters, the Infant may have an Aſſiſe. 18 E. 4. 2. Rol. Abr. 730. ——— † If an Infant makes a Feoffment, or conveys, by Leaſe and Releaſe, and re-enters within Age, ſtill the Feoffment or Conveyance is only voidable, and he may elect to confirm it, when of full Age; therefore a Stranger cannot avail himſelf of the Infant's Entry, for he cannot elect for him. 3 Bur. 1794.

‡ See *infra* 144. n.

But if the Infant had made a Letter of Attorney to deliver Seiſin, he might have an Aſſiſe, *&c.* becauſe the Letter of Attorney, like all other Acts of Agreements made by an Infant to his (*c*) Prejudice, muſt be void; and therefore whoever claims under it, or by Virtue of its Authority, muſt be (*d*) a Wrong-doer.

2 Rol. Abr. 2. Noy 130. Palm. 237. (*c*) But a Feoffment to an Infant, with a Letter of Attorney by him to accept Livery, is ſaid to be only voidable, becauſe for the Infant's Benefit. Rol. Abr. 730. (*d*) That the Attorney who executes it is a Diſſeiſor. Rol. Rep. 242.

* So if an Infant enfeoffs his Guardian, this is void, for the apparent Prejudice it muſt be to the Infant.

*Page 137 35 Aſſ. 8. Rol. Abr. 728.

If an Infant make a Leaſe for Years, reſerving Rent, it ſeems agreed, that ſuch a Leaſe is only voidable by the Infant.

Vide Head of *Leaſes and Terms for Years.*

But

Moor 105. pl. 248. 2 Leon. 216. Noy 130. Co. Lit. 45, 308. a. Jones 157. 4 Leon. 4. Brownl. 120. Hutton 102. Rol. Rep. 441. Lev. 6. Mod. 263. 3 Mod. 310.

But if he make a Leaſe for Years, without Reſervation of any Rent †, it ſeems by the Opinion of the greater Number of the Books, that from the apparent Prejudice and Hurt it muſt be to the Infant, that ſuch Leaſe is abſolutely void: But this Point does not appear to have been ever judicially determined; and indeed the Reaſons againſt it ſeem very cogent, and that it would be a greater Indulgence to the Infant, and more for his Service, to allow him when he comes of Age, and is capable of conſidering over again what he has done, either to ratify and affirm all his Contracts, or to break through and avoid them; and that this Power ſhould be extended to all Leaſes and Contracts made by Infants during their Minority, as well to thoſe which are for their Benefit and Advantage, as to thoſe which apparently tend to their Hurt and Prejudice; for if it were to be confined only to the laſt, it would exclude them from being Judges of either, ſince no Man can be ſuppoſed to know what is to his Diſadvantage, but as he is allowed to compare it with ſuch Things as are for his Advantage and Good; and therefore the Power of judging in general muſt be left to him; and, as a Conſequence thereof, it ſhould ſeem that he may, when he comes of Age, either affirm or avoid all Leaſes or Contracts made by him during his Minority, according as he judges them to be beneficial or hurtful to him, without any intervening Judgment of Law to condemn ſome only, and leave others to the Infant's Diſcretion, when he comes of Age; and the giving of Infants ſuch Power in general over all their Contracts, will ſufficiently ſecure them againſt the Danger of being impoſed on, or overreached by others; for when the Power is general, and all Perſons who deal with Infants know they are to be at their Mercy, when they come of Age, whether they will think fit to ſtand to their Bargain, or not, this will take off from the Temptation of impoſing upon them; or if any ſhould be ſo hardy as to do it, yet ſince the Infant is at Liberty, when he comes of Age, to reſcue himſelf by avoiding ſuch injurious Contract, there ſeems no poſſible Miſchief in the mean Time to ſuffer ſuch Contract to hang *in Equilibrio*, and defer pronouncing any Sentence upon it, ſince that, as hath been ſaid, would curtail the Infant's Power, and take off from his Freedom of judging at all; beſides that, the very Reaſon of giving to Infants ſuch Power, was to ſecure them againſt the Impoſition of others, which a Leaſe for Years, reſerving the full Rent, cannot be ſuppoſed to be; and therefore if they were only to uſe it in ſuch Caſes, it would be uſeleſs; and if they were denied it in the other, where no Rent at all is reſerved, (as they muſt be, if the Law prejudges for them) it would be no Power at all in them, or at moſt but an empty and idle one; therefore it ſeems by the ſtronger Reaſons, if an Infant make a Leaſe for Years, without Reſervation of any Rent, though this is apparently to his Hurt and Prejudice whilſt he continues a Minor, yet ſince when he comes of Age he may either by Aſſiſe or Treſpaſs recover the Poſſeſſion and meſne Profits, and ſo make himſelf whole *ab initio*, the Leaſe is good in the mean Time, and the rather, becauſe moſt of the Books agree, that if a Rent were reſerved on ſuch Leaſe, it would then be only voidable; whereas ſuch Rent may be ſo ſmall in proportion to the Value of the Land, that there may be more Reaſon to adjudge it abſolutely void, than if none at all were reſerved; becauſe in the one Caſe the Impoſition is apparent, but in the other it may be ſo miſrepreſented and coloured over as to deceive the Infant, even when he comes of Age, into ſome unwary Act of Ratification of it; beſides that, the Infant when he comes of Age may, if he think fit, make ſuch Leaſe for Years without reſerving any Rent: And why then may he not conſent to, and *Page 138* ratify ſuch Leaſe, though made before, which (if the Law permitted him) he might do by accepting of Fealty, which is incident to every ſuch Leaſe.

† A Leaſe on which no Rent is reſerved is not *abſolutely* void. An Infant may make a Leaſe, without Rent, to try his Title. 3 Bur. 1794. —The Leſſee cannot, in any Inſtance, avoid the Leaſe on Account of the Leſſor's Infancy, therefore it's not void. *Ibid.*

As

As to the Books before cited, that a Leaſe for Years by an Infant without any Reſervation of Rent ſhould be abſolutely void, they are only *obiter* Opinions; and there is but one Caſe where it is expreſly ſo held, and there only by two Judges; for *Gaudy* was of another Opinion, and the Judgment there given was upon the Right and Merits of the Caſe, not upon the Point of the Leaſe; though the two Judges, to enforce the Judgment for the Defendant, would have the Infant's Leaſe to the Plaintiff, upon which the Ejectment was brought, to be abſolutely void, and ſo no Title at all againſt the Defendant, who was in Poſſeſſion; beſides the Leaſe there was by Parol, not by Deed, which may make a conſiderable Difference.

Moor 105. 2 Leon. 216, 218.

Another Caſe, produced to inforce the Reaſon of ſuch Leaſes being abſolutely void, is, that a Surrender by an Infant to him in Reverſion hath been adjudged to be abſolutely void, whether it were a Surrender in Law by taking of a new Leaſe, or an expreſs Surrender, and that no Agreement by him at full Age ſhould make it good, ſo as to eſtabliſh the ſecond Leaſe; and the Reaſon there given was, becauſe there being no Increaſe of his Term, or Decreaſe of the Rent, the Surrender was abſolutely void at firſt; but there ſeems a much better Reaſon for the Judgment given in that Caſe; for the firſt Leaſe was made 1 *E.* 6. by a Dean and Chapter for fifty Years, and this Leaſe being afterwards aſſigned to Infants, they, 29 *Eliz.* took a new Leaſe of the ſame Lands from the then Dean and Chapter for the ſame Term, and under the ſame Rent and Covenants as were in the firſt; but this ſecond Leaſe not being warranted by 13 *Eliz. cap.* 10. the ſucceeding Dean and Chapter would have avoided it, and ſo ſtripped the Infants of any Intereſt at all in the Lands; to prevent which Miſchief, and help the Infants, the Court gave Judgment againſt the Surrender, that it was abſolutely void *ab initio*, and ſo the ſecond Leaſe never good; and this was but a juſt Conſtruction as this Caſe was; for if the Court had adjudged the Surrender to have been only voidable, then the Infants Agreement to the ſecond Leaſe when they came of Age, would have made the Surrender of the firſt abſolute, and then their Title ſtanding only upon the ſecond Leaſe, and that not warranted by 13 *Eliz. cap.* 10. they would have been defeated of both, which would have been a very ſevere Conſtruction in a Caſe of this Nature, where the Operation of the Law in working the Surrender of the firſt Leaſe might be eaſily ſuppoſed not to be thought of or underſtood by them †

Cro. Car. 502. Jones 405. Rol. Abr. 728. *Loyd* and *Gregory*. An Infant may ſurrender Leaſes in a Court of Equity in order to renew the ſame by Stat. 29 Geo. 2. c. 31.

† An Infant cannot execute a Power over a real Eſtate. 3 Atkyns 695. 1 Vezey 298.——All Gifts, Grants, or Deeds, which do not take effect by Delivery of his Hand are void. 3 Bur. 1794.———A Surrender by Deed is not abſolutely void; Infant ſurrenders an unprofitable Leaſe, Leſſor accepts, the Premiſes are burnt, he cannot ſay the Surrender is void. The *other Party* to a Deed can in no Caſe object on Account of Infancy. *Ibid.*—If there ſhould be a new Caſe, where it would be more beneficial to have it void, (as if he might otherwiſe be ſubject to Forfeiture, Damages, or Breach of Truſt,) the Reaſon of the Privilege would warrant an Exception to this general Rule. *Ibid.*———All Gifts, Grants, or Deeds, by Matter in Deed, or in Writing, which do take effect by Delivery of his Hand, are voidable by himſelf, his Heirs, or thoſe who have his Eſtate. 3 Bur. 1794.———The true Ground why an Infant's Deed is only voidable, is the Solemnity of the Delivery. *Semb. Ibid.*———But if otherwiſe, if an Infant receives Mortgage Money and conveys, it is ſuch Semblance of Benefit as makes Conveyance only voidable. *Ibid.* He may convey as Mortgagee, by Direction of Chancery, under the Stat. 7 Ann. c. 19.

Another Caſe produced is of a Surrender by a Perſon *Non compos*, &c. who being Tenant for Life, with Remainder to his firſt and other Sons, did before the Birth of any Son ſurrender to him in the Remainder, with intent to deſtroy the contingent Remainders to his Sons; but it was adjudged, that the Surrender was abſolutely void *ab initio*, and by conſequence the contingent Remainders not hurt thereby; and there it was ſaid, that the Grants of Infants and of Perſons *Non compos* were parallel both in Law and Reaſon; and the preceding Caſe was cited as an Authority in Point, that a

Show. Par'. Caſes 153. 3 Mod. 310. 2 Salk. 427. pl. 2. Ld. Raym. 313. Show. 296. Comyn 45. pl. 30. 12 Mod. 174.

Surrender

3 Salk. 300. pl. 10. 576. pl. 2. Carth. 211, 435. Comb. 439. S. C. *Thomſon* verſus *Leach.*

Surrender by an Infant was *ipſo facto* void, and ſo of a Perſon *Non compos*, *&c.* but the Caſe of an Infant has already received an Anſwer; and this of the *Non compos* may be eaſily anſwered too; for if the Surrender ſhould have been allowed, it would have been not only prejudicial to himſelf, but likewiſe to all his Sons after born, who were Strangers or third Perſons; and there could no Uſe be made of the Surrender but to do them Miſchief, which the Acts of a Madman ought not to be allowed to do, when by a reaſonable Conſtruction it is in the Power of the Court to help them, as in that Caſe they did, by adjudging the Surrender to be abſolutely void, rather than voidable: So that notwithſtanding the Caſes above cited, it does not ſeem clear that the Leaſe of an Infant, without Reſervation of any Rent, is

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* abſolutely void, but rather voidable, ſince their Power of avoiding it when they come of Age, ſufficiently guards them againſt the Unreaſonableneſs or Practice of others, which was only Miſchief the introducing this Law in favour of Infants deſigned at firſt to obviate and prevent.

Trin. 6 Annæ in *B. R. Hudſon* verſus *Jones.* But in 3 Mod. 310. it is ſaid *per Cur.* that if an Infant

Alſo it hath been held, that if an Infant grant a Rent-charge out of his Land, this is not abſolutely void, but only voidable by him when he comes of Age; for if the Grantee ſhould then diſtrain for the Rent, though the other may bring an Action of Treſpaſs, yet he cannot plead *Non conceſſit*; for the Deed is only voidable (*a*) by ſhewing of his Infancy, and not void becauſe it was delivered with his own Hands.

grants a Rent-charge out of his Lands, it is not voidable, but *ipſo facto* void; and that if the Grantee diſtrain for the Rent, the Infant may have an Action of Treſpaſs againſt him. (*a*) That to a Leaſe for Years made by an Infant, he can in no Caſe plead *Non eſt factum*, but muſt avoid it by pleading the ſpecial Matter of his Infancy. 5 Co. 115. 2 Inſt. 483. Cro. Eliz. 127. Moor, pl. 132. Poph. 178.

Cro. Eliz. 90. *Knight* verſus *Fortipan*; *& vide* Cro. Car. 103.

Copyhold was granted to one for Life, Remainder to an Infant in Fee; they both join in a Surrender to one, who was admitted; then the Tenant for Life dies, and after the Infant dies, and his Heir enters; and it was adjudged that he might well enter, without being put to the Writ of *Dum fuit infra Ætatem*; for ſuch Surrender was but a Conveyance by Matter *in Pais*, which cannot bind an Infant, but that he or his Heirs may enter, or bring Treſpaſs before Admittance.

Lit. ſ. 258. Co. Lit. 171.

If there be two Coparceners, and one of them an Infant, and they make an unequal Partition, this ſhall not bind the Minor; for though Partition, if equal, will bind an Infant, becauſe compellable to make Partition; and whatever one is compellable to may be done by the ſame Perſon voluntarily; yet when the Partition is unequal, and the leſſer Part allotted to the Minor, this ſhall not bind her; for then the Security the Law has provided for Infants, to prevent their being over reached, would be uſeleſs.

Co. Lit. 171.

But yet ſuch unequal Partition is not abſolutely void, but the Infant has Election either to affirm at full Age, by taking the Profits of the unequal Part allotted to her, or to avoid it, either during her Minority, or at full Age, by Entry into the other Part with her Siſter.

13 H. 4. 12. 10 H. 6. 14. March 111, 141. Rol. Abr. 730. Jones 164. Lev. 17.

If an Infant ſubmit to Arbitration, he may execute or avoid it at his Election, as he may all other his Contracts.

Perk. ſ. 12. 19. Rol. Abr. 730. 2 Rol. Rep. 408. Latch 10.

Alſo as to the Acts of Infants being void or voidable, there is a Diverſity between an actual Delivery † of the Thing contracted for, and a bare Agreement to deliver it only, that the firſt is voidable, but the laſt abſolutely void; as if an Infant deliver a Horſe or a Sum of Money with his own Hands, this is only voidable, and to be recovered back in an Action of Account.

† See *infra* 138. a.

But

But if an Infant agrees to give a Horſe, and does not deliver the Horſe with his Hand, and the Donee takes the Horſe by Force of the Gift, the Infant ſhall have an Action of Treſpaſs, for the Grant was merely void. Perk. ſ. 12 19. Mod. 137.

In Treſpaſs *quare Vi & Armis Inſultum fecit, & totum Crinem Capitis ipſius Annæ abſcindit*, the Defendant as to all the Treſpaſs *præter tonſuram Crinis* pleads Not guilty, and as to that, pleads that the Plaintiff was of the Age of ſixteen Years, and for a certain Sum of Money *licentiavit* the Defendant *duas uncias Crinis dictæ Annæ detondere & abſcindere*; and upon the Demurrer to this Plea the Court held, that the Contract was abſolutely void, and conſequently the Tonſure unlawful, and gave Judgment accordingly for the Plaintiff. Mich. 26 Car. 2. *Anna Sechrogham per Guardianum* verſus *Stuartſon.* 3 Keb. 369. S. C.

* And as an Infant is not bound by his Contract to deliver a Thing; ſo if one deliver Goods to an Infant upon a Contract, *&c.* knowing him to be an Infant, he ſhall not be chargeable in Trover and Converſion, or any other Action for them; for the Infant is not capable of any Contract, but for Neceſſaries; therefore ſuch Delivery is a Gift to the Infant: But if an Infant without any Contract wilfully takes away the Goods of another, Trover lies againſt him; alſo it is ſaid, that if he take the Goods under Pretence that he is of full Age, Trover lies, becauſe it is a wilful and fraudulent Treſpaſs. *Page 140 Sid. 129. Lev. 169. Keb. 905, 913.

Alſo it ſeems that if an Infant, being above the Age of Diſcretion, be guilty of any Fraud in affirming himſelf to be of full Age, or if by Combination with his Guardian, *&c.* he make any Contract or Agreement with an Intent afterwards to elude it, by reaſon of his Privilege of Infancy, that a Court of Equity will decree it good againſt him according to the Circumſtances of the Fraud; but in what Caſes in particular a Court of Equity will thus exert itſelf, is not eaſy to determine. *Vide* Vern. 132. 2 Vern. 224. 5.

Alſo notwithſtanding the Diſability of an Infant to contract, by the 7 *Ann. cap.* 19. it is enacted, "That it ſhall and may be lawful for any "Perſon under the Age of twenty-one Years by the Direction of the "High Court of Chancery, or the Court of Exchequer, ſignified by an "Order made upon hearing all Parties concerned, on the Petition of the "Perſon or Perſons for whom ſuch Infant or Infants ſhall be ſeized or poſ-"ſeſſed in Truſt, or of the Mortgagor or Mortgagors, or Guardian or "Guardians of ſuch Infant or Infants, or Perſon or Perſons intitled to the "Monies ſecured by or upon any Lands, Tenements or Hereditaments, "whereof any Infant or Infants are or ſhall be ſeiſed or poſſeſſed by way "of Mortgage, or of the Perſon or Perſons intitled to the Redemption "thereof, to convey and aſſure any ſuch Lands, Tenements or Heredita-"ments, in ſuch Manner as the ſaid Court of Chancery, or the Court of "Exchequer, ſhall by ſuch Order ſo to be obtained direct, to any other "Perſon or Perſons; and ſuch Conveyance, or Aſſurance, ſo to be had and "made as aforeſaid, ſhall be as good and effectual in Law to all Intents "and Purpoſes whatſoever, as if the ſaid Infants or Infant were, at the "Time of making ſuch Conveyance or Aſſurance, of the full Age of "twenty-one Years; any Law, *&c.*"

For the Manner in which Infant Truſtees are to convey the Eſtates devolved on them purſuant to this Act, *vide* Preced. Chan. 284. 7 Ann

How to bind themſelves by a Contract to ſerve in the Plantations, ſee 4 Geo. 1. c. 5. ſ. 1.

How to be admitted to a Copyhold, and how compellable to pay their Fines, ſee 9 Geo. 1. c. 29.

And it is further enacted by the ſaid Statute, "That all and every "ſuch Infant and Infants, being only Truſtee or Truſtees, Mortgagee or "Mortgagees as aforeſaid, ſhall and may be compellable, by ſuch Order "ſo as aforeſaid to be obtained, to make ſuch Conveyance or Conveyances, "Aſſurance or Aſſurances as aforeſaid, in like Manner as Truſtees or "Mortgagees of full Age are compellable to convey or aſſign their Truſt-"Eſtates or Mortgages."

If

[If an Infant covenants to levy a Fine, at ſuch a Time, to ſuch Uſes; before he comes of Age, levies the Fine, and by another Deed, made at full Age, declares it to other Uſes; the laſt Deed ſhall lead the Uſes. *Stra.* 94.——A Mother as Guardian for Six Infants grants a Building-Leaſe for Forty-one Years, the eldeſt Son aged Nineteen joins, Covenants for quiet Enjoyment, and that the Others when of Age ſhall confirm; they all attain Twenty-one, and accept the Rent for Ten Years after; Equity will eſtabliſh the Leaſe. 1 *Atkyns* 489.——By 29 *Geo.* 2. *cap.* 31. Infants, Lunaticks, and *Feme Coverts* may apply by Petition to the Chancery, *&c.* and by Leave Surrender Leaſes by Deed in order to Renewal. —— *A.* Mortgages to *B.* who dies, leaving *C.* his Son and Heir at Law, an Infant, and *D.* his Widow, Joint-Executors. *A.* borrows more Money of *C.* and with Part pays off *C.* and *D.* who by Leaſe and Releaſe convey to *E.* this Conveyance binds *C.* tho' an Infant. 3 *Burr.* 1794. —— The Acts of an Infant, which do not touch his Intereſt, but take effect from an Authority with which he is truſted, are binding. *Ibid.*——The Infant's Privilege ſhall never be turned to a Weapon of Fraud or Injuſtice. *Ibid.*]

4. Where voidable, as to the Infant, ſhall yet bind others.

Show. 171. 3 Mod. 248. It is laid down as a general Rule, that Infancy is a Perſonal Privilege, of which no one can take Advantage but the Infant himſelf, and that therefore, though the Contract of the Infant be voidable, that yet it ſhall bind the Perſon of full Age; for being an Indulgence which the Law allows Infants, to protect and ſecure them from the Fraud and Impoſition of others, it can only be intended for their Benefit, and is not to be extended to Perſons of the Years of Diſcretion, who are preſumed to act with ſufficient Caution and Security; and were it otherwiſe, this Privilege, inſtead of being an Advantage to the Infant, might in many Caſes turn greatly to his Detriment.

* Page 141 Sid. 446. Mod. 25. Sir *Will. Jones* 157, 405. Cro. Car. 502. Co. Lit. 308. Godb. 364. Noy 92, 130. 4 Leon. 4. 9 Mod. 103. 10 Mod. 26, 67, 85, 139. 12 Mod. 197, 243. Fitzgib. 175, 276, 278, 280. Will. Rep. 558. pl. 162, 718, 734. pl. 211, 737. 2 Will. Rep. 244, 298, 519, (645). 3 Will. Rep. 208. Ld. Raym. 443, 344. Atk. Rep. 146. pl. 86. Sel. Caſ. Temp. King. 46.

* Therefore it hath been adjudged, that if an Infant let a Houſe to *J. S.* reſerving Rent, and the Rent is in Arrear, that the Infant may diſtrain for the Rent, or bring an Action of Debt; though it was objected, that in the Inſtitution the Contract was not reciprocal.

Sid. 446. 2 Keb. 623. S. C. *Farmha* ver. *Watkins.* So where an Infant brought an Action on the Caſe by her Guardian, and ſet forth, that ſhe gave the Defendant 10 *l.* and put herſelf to be her Servant for ſeven Years, and that, in conſideration thereof, the Defendant promiſed to find her with all Neceſſaries, ſave only Apparel, and likewiſe promiſed to teach her to ſing and to dance; and that the Defendant within the Time turned her out of her Houſe, and did not teach her to ſing and dance; whereupon there was Judgment by Default, and a Writ of Inquiry, of Damages; and it was moved to ſtay the filing of the Writ of Inquiry becauſe here was no Conſideration, the Agreement not being reciprocal: But the Court held, that though the Contract might be void as to the Infant, yet it bound her Miſtreſs, who was of full Age; and therefore ordered the Writ of Inquiry to be filed.

Vent. 51. Mod. 25. 3 Keb. 581. So where an Infant brought an *Aſſumpſit* by his Guardian, and declared, that whereas the Defendant entered into his Cloſe, and cut his Graſs, that in conſideration he would permit him to make it Hay, and carry it away, he promiſed

promiſed to give him ſix Pounds for it: Upon this Declaration the Defendant demurred, ſuppoſing it to be no Conſideration; for the Infant was not bound by his Permiſſion, but might ſue him notwithſtanding; but the Court gave Judgment for the Plaintiff. S. C. *Smith* verſ. *Bowen*. See the Authorities above.

So a Promiſe to pay the Plaintiff, an Infant, the Value of ſuch Land, in conſideration the Plaintiff would ſuffer the Defendant to enjoy the ſaid Land after the Death of *A.* to the Time of his full Age, the Plaintiff had Judgment, though he was not bound by the Contract. 2 Sid. 109. *Davies* and *Manningston*.

So on a Promiſe to an Infant to do ſuch an Act, in conſideration that the Infant promiſed to pay ſuch a Sum, in *Aſſumpſit* by the Infant, he had Judgment, though the Money was not paid; for the Court held, that the Infant's Promiſe was only voidable at his own Election, and not at the Election of him to whom it was made. Sid. 41. Keb. 1. S. C. *Forreſter*'s Caſe.

So if a Man of full Age and a Female of fifteen promiſe to intermarry, and after Requeſt by her, he marries another Woman, an Action on the Caſe lies againſt him for the Violation of the Contract; for though objected that this was *Nudum Pactum*, and not reciprocal, as the Man could not compel her, being an Infant, to perform her Promiſe, yet being voidable as to herſelf only, as ſhe finds it for her Benefit, it ſhall bind him, being of full Age. Trin. 5 Geo. 2. *Holt* and *Ward*, adjudged. 2 Stra. 850, 937. Barnard. K. B. 290. Fitzgib. 175.

If an Infant loſe Money at Play, which the Winner takes, ſuch Taking is a Converſion, and Trover and Converſion lies for the Infant for the Sum ſo received; but if the Infant had won, he might have retained the Money, and no Action would have laid againſt him for it. Cited in the Caſe of *Holt* and *Ward*, to have been ſo held by *Holt* C. J. Hil. 3 Annæ, in *B. R.* in the Caſe of *Barker* and *Medlicot*; but the Action there brought was an *Indebitatus Aſſumpſit*, and for that Cauſe the Plaintiff was nonſuited, becauſe the Foundation of the Action was a Tort, and the Action brought founded in Contract.

5. At what Time voidable Acts are to be avoided.

Here we muſt obſerve a Diverſity between Matters of Record done or ſuffered by an Infant, and Matters in *Fait*; that he may avoid Matters in *Fait*, either within Age, or at full Age; but Matters of Record, as Statutes Merchant and of the Staple, Recognizances acknowledged by him, or a Fine levied by him, Recovery againſt him by Default in a real Action, (ſaving in Dower,) muſt be avoided, *viz.* the Statute, *&c.* by *Audita Querela*, and the Fine and Recovery during his Minority; * for being judicial Acts, taken by a Court or Judge, the Nonage of the Party to avoid the ſame ſhall be tried by Inſpection, and not by the Country. Co. Lit. 380. 2 Inſt. 483. Godb. 149. Winch 114. Yelv. 155. 12 Co. 121. 3 Mod. 229. 12 Mod. 197, 243. *Page 142 Will Rep. 737. Ld. Raym. 344, 443. And. 25, 228. N. Bendl. 80. pl. 123. Dyer 232. pl. 9. Moor 75, 460.

And as an Infant cannot avoid a Recognizance, *&c.* but during his Minority, ſo if an Infant enters into a Recognizance, *&c.* and brings an *Audita Querela* to reverſe it, and the Judges, upon Inſpection, find him within Age, and therefore adjudge the Recognizance void, and diſcharge the Infant; but the Conuzee after reverſes the Judgment in the *Audita Querela* for Error, the Infant, after his full Age, ſhall have no new *Audita Querela* to vacate the Recognizance, though it once appeared to the Judges that he was within Age when he entered into the Contract; and the Reaſon hereof is, becauſe the Infant in no Caſe after his full Age can ſet aſide the Recognizance or Statute: For, *1ſt*, The Writ in the Regiſter runs *quod Conuſor adtunc & adhuc infra Ætatem exiſtit*, and therefore cannot have it at full Age without altering the Form of the Writ. *2dly*, When the Judgment of the *Audita Querela* is reverſed by a Writ of Error, it is entirely ſet aſide, and in all Reſpects uſe- 2 And. 158. 10 Co. 43. a. Noy 16. Yelv. 88. Reg. 149, 150. 2 Bulſt. 320. F. N. B. 105.

leſs

leſs as if it had never been given, and conſequently can obtain no Credit, ſhould the Conuſor produce the Record. 3*dly*, When the Conuſor is of full Age, there will be no Averment admitted againſt the Recognizance, &c. which is an Act of Record; and it is preſumed by the Record that the Conuſor was of full of Age, ſince the Judge, or other Officer that took the Recognizance, &c. ſuffered them to enter into them.

2 Inſt. 673. But if an Infant bargain and ſell Lands by Deed indented and inrolled, he may avoid it at any Time.

Sid. 321. Lev. 142. 5 Mod. 209. Alſo it is ſaid, that if an Infant appears by Attorney, and ſuffers a Recovery, it may for this Error be reverſed after the Infant comes of Age, becauſe it ſhall be tried by the Country whether the Warrant of Attorney was made when under Age or not.

6. By whom to be avoided.

8 Co. 42. b. 2 Inſt. 483. Rol. Rep. 401. It ſeems agreed as a general Rule, that none but the Infant himſelf, or his Repreſentatives Privies in Blood, can avoid (*a*) a Conveyance made by the Infant during his Nonage.

(*a*) This muſt be underſtood ſuch a Conveyance as is, in its own Nature, voidable by the Infant, &c. ſuch as a Feoffment, &c. and not abſolutely void, as a Surrender, Grant, Releaſe, which being void *ab initio*, are ſo to all Men, and of which all Perſons may take Advantage. Carth. 436. 3 Mod. 301, &c.

8 Co. 42. b. As if an Infant ſeized in Fee make a Feoffment, and dies, his Heir ſhall enter.

8 Co. 43. a. So if ſeized in Tail Male, and he makes a Feoffment, and (*b*) dies, his Son being Heir general and ſpecial may enter.

(*b*) So though attainted of Felony. 8 Co. 43. a.——But by Co. Lit. 337. a. it is otherwiſe in ſuch Caſe, becauſe his Entry is not lawful in reſpect of his Eſtate only, but of his Blood alſo, which is corrupted.

8 Co. 43. And if he hath no Sons, but only Daughters, his Brother, being his ſpecial Heir *per Formam Doni* made to his Father, may avoid the Feoffment, becauſe he is Privy in Blood, and has the Land only by Deſcent.

8 Co. 43 a. But Privies in Eſtate cannot avoid (*c*) a Conveyance made by an Infant.

(*c*) But if Tenant in Tail within Age comes in as a Vouchee by Attorney in a Common Recovery, he in Remainder may aſſign this for Error; for he is Party in Intereſt to the Recovery; and where a Man's Intereſt is bound by another's Act, it is but reaſonable he ſhould be allowed to free himſelf from the Miſchief of it, by taking Advantage of any Error in it. But for this *vide* Rol. Abr. 755. Bridg. 75. Rol. Rep. 301. Cro. Eliz. 739. Palm. 123. Allen 75.

* Page 143 * As if Tenant in Tail, being within Age, makes a Feoffment, and dies without Iſſue, the Donor ſhall not enter, becauſe he was privy only in Eſtate, and no Right accrued to him by the Death of the Donee.

8 Co. 43. But in Palm. 254. this Caſe is cited and denied by *Houghton* Juſtice to be Law, who ſaid, the Feoffment by an Infant could not put him to his *Formedon* by a Diſcontinuance, and then if he could not enter, he would be without Remedy.

8 Co. 43. a. Co. Lit. 337. S. P. So if there be two Joint-tenants within Age, and one of them makes a Feoffment in Fee of his Moiety, and dies, the Survivor cannot enter; for by the Feoffment the Jointure was ſevered, ſo long as the Feoffment continued in Force, and therefore the Heir of the Feoffor may have a *Dum fuit infra Ætatem*, or enter into the Moiety.

8 Co. 43. a. But if both had joined in the Feoffment, and one had died, the Right had ſurvived to the other, and he ſhould have had the Land from the firſt Feoffor.

If

If a Man within Age, ſeiſed in Right of his Wife, makes a Feoffment, and dies, his Heir cannot enter, becauſe no Right deſcends to him; but inaſmuch as the Baron, if he had lived, might have entered in the Right of his Wife only, and not in reſpect of any Right which he himſelf had, the Wife (even before the 32 *H.* 8. *cap.* 28.) might in ſuch Caſe have entered in her own Right. Co. 43. b. Lit. ſ. 633.

But if the Feme, being only Tenant in Tail, and the Baron within Age, had made a Gift in Tail to another, by which the Baron gained a new Reverſion in Fee, and died, the Wife might enter, or the Heir of the Baron who had a new Reverſion deſcended to him; but if the Heir had entered, and defeated the Tail given by the Infant, his Eſtate vaniſhed, and, by Operation of Law, the Feme was immediately ſeiſed of her old Eſtate. 8 Co. 43. b. Co Lit. 337. a.

Privies in Law, as the Lord by Eſcheat, ſhall not avoid a Conveyance made by an Infant. 8 Co. 44. a.

As if an Infant makes a Feoffment, and dies without Heir, the Lord ſhall not avoid it; but becauſe that in this Caſe it appeared the Feoffment was executed by Letter of Attorney made by the Infant, it was reſolved to be void, and that the Land ſhould eſcheat to the Queen. 8 Co. 42, 45. *Whittingham*'s Caſe. Dyer 10. b. 2 Rol. Abr. 2. 3 Mod. 306.

7. In what Manner they are to be avoided.

As to Fines and Recoveries, they being, as hath been already obſerved, Matters of Record, are regularly to be avoided by Writ of Error, which muſt be brought during the Infant's Minority, that the Court may inſpect the Infant, and ſo vacate the Contract with the ſame Solemnity that it was entered into. Co. Lit. 380. 2 Inſt. 483.

Therefore if an Infant ſuffer a Common Recovery, in which he comes in as Vouchee in his proper Perſon, and not by Guardian, though this ſhall not bind him, but that he may in a Writ of Error avoid it, becauſe it is Error in Law; yet at his full Age he cannot enter into the Land, and avoid it by his Entry, before he has reverſed it by a Writ of Error; for Judgments are not to be ſubverted by Matter in *Pais* without Matter of Record. Rol. Abr. 742. Styl. 246.

If a Feme Covert, being under Age, levies a Fine, which ſhe is afterwards willing to reverſe, ſhe may be brought into Court by *Habeas Corpus*, that ſhe may be inſpected: and, it ſeems, the Fine may be ſet aſide on Motion: for the Huſband may not be willing, nor permit her to bring or proceed in a Writ of Error. 2 Vent. 30. Mod. 246. 3 Lev. 36. & *vide* Tit. *Fines and Recoveries*

Alſo it hath been held, that if a Feme Covert, being an Infant, is about to levy a Fine, her Relations may enter a *Caveat*, and that then the Court will ſet aſide all Proceedings after ſuch Entry, but that if they ſuffer the Fine to paſs, they cannot by any Means reverſe it after the Infant's Death; but it ſeems that the Fine being taken by Virtue of a *Dedimus Poteſtatem*, and the Commiſſioners knowing the Party to be an Infant, may be (*a*) fined at the Diſcretion of the Court, as they were in this Caſe, the one 300*l.* and the other 200*l.* Paſch. 30 Car. 2. *Rawlinſon* ver. *Owens*. *Page 144

(*a*) Where the Court ordered Informations to be filed againſt Commiſſioners who took a Fine from an Infant. 3 Lev. 36. But for this *vide* 12 Co. 124. 2 Rol. Rep. 113. Cro. Eliz. 531.

As Infants, at their Peril, are obliged to avoid Fines and Recoveries by Writ of Error, during their Minority, ſo muſt they avoid Recognizances and Statutes entered into by them, and this by (*b*) *Audita Querela* during their Dyer 232. Reg. 149. Moor 75. F.N.B. 105. 2 Inſt. 673. 10 Co. 43.

Noy 16. Cro. Jac. 5. 2 Rol. Abr. 57. 2 Bulſt. 320. 3 Mod. 229. (*b*) That an Infant may bring an *Audita Querela* to avoid a Statute for his Nonage, although it be not certified or returned in any

their Minority likewiſe, that the Courts may have the like Opportunity of determining by Inſpection as to their Nonage; for being Matters of Record, they muſt, according to the Rule, be diſſolved *eo ligamine quo ligatur*.

any Court. And. 228.—And there ſaid, that the common Practice was ſo, elſe the Conuſor might be of Age before the Conuſee would procure it to be certified; *& vide* 3 Bulſt. 307.

Yelv. 155. Cro Jac. 646. S.P. *& vide* Co. Ent. 87, 88.—Where an Infant was Bail; and taken in Execution, and he brought an *Audita Querela*, and moved to be inſpected; and the Court, as a Matter diſcretionary, refuſed to admit him to Bail till he corroborated his Allegation by the Oaths of Witneſſes; which he having done, and the Copy of the Regiſter where he was born being produced, he was diſcharged; but if he had brought his *Audita Querela* before he was taken in Execution, he muſt have a *Superſedeas* of Courſe. Carth. 278. *& vide ſupra* Letter (D) 125.

If *A.* being within Age, becomes Bail for *B.* and after two *Sci. Fa.* and *Nihil* returned, Judgment is given againſt *A. &c.* he may have an *Audita Querela* and avoid the Recognizance, and ſo the Judgment thereupon of conſequence ſhall be avoided.

Cro Jac. 694. But for this *vide* Tit. *Attorney*.

But if *A.* being within Age, enters into Bond to *B.* who procures *C.* without any Warrant to appear for *A.* and confeſſes a Judgment thereupon, yet *A.* ſhall not have an *Audita Querela*, but he muſt take his Remedy by Action of Deceit againſt the Attorney.

Co. Lit. 247. b. 248. a. (*c*) But tho' the Infant may avoid his Feoffment by Entry during his Nonage, yet he cannot have a *Dum fuit intra Ætatem*, till he comes to his full Age; for he is allowed to enter, that he may ſave to himſelf the Profits in the mean Time; but ſuch Entry, being the Act of an Infant, ſeems to be as voidable at full Age as his Feoffment; but if he was to recover in a Writ of *Dum fuit infra Ætatem*, it would for ever bind him, and therefore it can only be brought when he comes of full Age. F. N. B. 192. See *ante* 136.

If an Infant makes a Feoffment, he may enter, (*c*) either within Age, or at full Age; and if he dies, his Heir may enter or have a *Dum fuit infra Ætatem*.

Co. Lit. 337. a. F. N. B. 192.

If Huſband and Wife are both within Age, and they by Indenture join in a Feoffment, and the Huſband dies, the Wife may enter, or have a *Dum fuit infra Ætatem*.

Co. Lit. 337. a. (*d*) *Quære* if ſhe was within Age and the Baron of full Age. F. N. B. 192.

But (*d*) if ſhe was of full Age, ſhe ſhall not have a *Dum fuit intra Ætatem* for the Nonage of her Huſband, though they be but one Perſon in Law.

Co. Lit. 337. a. F. N. B. 192. S. P.

If two Joint-tenants, being within Age, make a Feoffment, though they may join in a Writ of Right, yet they cannot in a *Dum fuit infra Ætatem*; for the Nonage of One, is not the Nonage of the other.

*Page 145 Cro. Eliz. 90. Leon. 95. adjudged.

If an Infant furrenders a Copyhold Eſtate, and dies, his Heir may enter without being put to his Writ of *Dum fuit infra Ætatem*; for ſuch * Surrender was but (*e*) a Conveyance by Matter in *Pais*, which cannot bind an Infant, but that he or his Heirs may enter, or bring Treſpaſs.

(*e*) That Surrenders, Grants, Releaſes, *&c.* which are ſaid to be void *ab initio*, they may be avoided by Entry, Aſſiſe, *&c.* at any Time. Cro. Car. 103. 2 Rol. Abr. 728. Show. P. Caſes 153. Carth. 436.—But a Feoffment by an Infant with Livery cannot be avoided by Aſſiſe without Entry. Bro. Diſſeiſin 63.——*Secus* if the Livery was by Letter or Attorney. Bro. Diſſeiſin 63.

Bro. Tit. *Leaſes* 50. Cro. Eliz. 857. 10 Co. 43.

If an Infant make a Leaſe for Years, though he reſerve no Rent thereon, he cannot plead *Non eſt factum*, but muſt avoid it by pleading the ſpecial Matter of his Infancy.

5 Co. 119. 2 Inſt. 483. Moor, pl. 132. Poph. 178.

So if an Infant enter into an Obligation, which takes effect by Sealing and Delivery, and consequently (*b*) a deliberate Act, he can only avoid it by pleading the special Matter of his Infancy. Salk. 279. pl. 4. *per Treby* C. J. (*b*) The Deeds of Infants have the Form, though not the Operation of Deeds; so that *Non est factum* cannot be pleaded thereto, without shewing some special Matter to make them of no Efficacy. 3 Mod. 310. *per Cur.*

But in *Assumpsit* against an Infant, he may give Infancy in Evidence, and need not plead it; for the Promise of an Infant is absolutely void. 2 Lev. 144. Salk. 279. pl. 4.

If the Heir within Age assign to the Wife more Land in Dower than she ought to have, he himself shall have a Writ of Admeasurement of Dower at (*c*) full Age, by the Common Law: So if too much be assigned in Dower by the Heir within Age, or his Guardian in Chivalry, and the Heir dies, his Heir shall have such Writ to rectify the Assignment; but the Heir, in whose Time the Assignment of too much was by the Guardian, cannot have such Writ till his full Age, because till then the Interest of the Guardian continues, and if any Wrong be done, it is to the Guardian himself, and not to the Heir. F. N. B. 148. Co. Lit. 39. a. 2 Inst. 367. (*c*) *Quære*, if not within Age.

If the Heir within Age, before the Guardian enters, assigns too much in Dower, the Guardian shall have a Writ of Admeasurement of Dower by the Statute of *W.* 2. *cap.* 7. before which Statute the Guardian had no Remedy; because the Writ of Admeasurement being a real Action lay not for the Guardian, who had but a Chattel: Also by the same Statute it is provided, that if the Guardian pursue such Writ faintly, or by Collusion with the Wife, the Heir at full Age shall have a Writ of Admeasurement, and may alledge the faint Pleading or Collusion generally. 2 Inst. 367.

8. Of the Confirmation of voidable Acts.

The Privilege the Law allows Infants being intirely calculated for their Benefit; hence at their full Age they are allowed to ratify and confirm their Contracts, or to rescind and break through them, as it shall seem most for their Advantage; and therefore the Purchase of an Infant is only voidable, and vests the Freehold in him till he disagrees thereto; and his continuing in Possession after he comes of Age is a tacit Consent and Confirmation thereof, since it is to turn to his Advantage. Co. Lit. 3. a. 2 Vent. 203.

If an Infant take a Lease for Years of Land, rendering Rent, which is in Arrear for several Years, then the Infant comes of Age, and still continues the Occupation of the Land; this makes the Lease good and unavoidable, and by consequence makes him chargeable with all the Arrears incurred during his Minority; for though at full Age he might have departed from his Bargain, and thereby have avoided Payment of the Arrears which the Lessor suffered to incur during his Minority; yet his Continuance in Possession after his full Age ratifies and and affirms the Contract *ab initio*, and so gives Remedy for the Arrears of Rent incurred from the Time of the Contract made. Cro. Jac. 320. Godb. 120. 2 Bulst. 69. Rol. Abr. 731. S. C. adjudged, between *Kettley* and *Elliot*. *Page 146

But it is said, that if an Infant possessed of a Term for Years sells it for Money, and after he comes of full Age receives Part of the Money for it, he shall avoid the Grant notwithstanding; for the Contract being void in the Commencement, it cannot be made good by any subsequent Act †. Dalt. 64. *per Curiam.*

† *Sed qu.* if this is not an Affirmance of the Contract? *vide infra.*

Yet it hath been ruled in Chancery, that if an Infant makes an Agreement, and receives Interest under it after he comes of full Age, such Agreement shall be decreed against him. Vern. 132.

2 Vern. 225. *per Curiam.* So if an Infant make an Exchange of Lands, and continues in Poſſeſſion after he comes of Age, he ſhall be bound by it.

2 Vern. 224. Alſo where an Infant deſired the Lands ſubject to a Truſt for Payment of younger Childrens Portions might not be ſold, and offered by his Anſwer to ſettle other Lands for raiſing the Portions, it was held, that he ſhould be bound by the Offer made by him in his Anſwer, if the other Side were thereby delayed, and if the Infant did not immediately after his coming of Age apply to the Court, in order to retract his Offer, and amend his Anſwer.

4 Leon. 4. An Infant made a Leaſe for Years, and at full Age ſaid to the Leſſee, *God give you Joy of it*; this was held by *Mead* a good Affirmation of the Leaſe; for this is a uſual Compliment to expreſs one's Aſſent and Approbation of what is done.

3 Leon. 164. 4 Leon. 5. Godb. 158. Leon. 114. N. Dyer 272. Cro. Eliz. 127 But Cro. Eliz. 700. S. P. *cont.* by *Fenner* cont. *Clinch*, and Rol. Abr. 18. S. P. *cont.* & *vide* Poph. 178. Latch 21. Owen 74.* If an Infant enters into an Obligation for Payment of Money, and the Obligee when he comes of Age threatens to ſue him, and the Infant being of full Age promiſes, in conſideration of Forbearance, that he would pay him, this Promiſe is good, and ſhall bind him, though he might have avoided the Obligation by Plea.

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* *Qu.* if the Text is not Law, and if an Action may not be maintained on ſuch Promiſe, the Forbearance ſaving the Defendant Trouble and Expence?

Comb. 381. *per Holt* at the Sittings in *Guildhall.* Alſo it is ſaid to have been ruled, where the Defendant under Age borrowed Money of the Plaintiff, and afterward at full Age promiſed to pay it him, that this is a good Conſideration for the Promiſe, and the Defendant ſhall be charged.

Abr. Eq. 282, 3. Alſo it is ſaid to have been decreed in Chancery, that if an Infant borrows a Sum of Money, for which he gives a Bond, and deviſes his Perſonal Eſtate (being of ſufficient Capacity) for the Payment of his Debts, particularly thoſe he had ſet his Hand to, this Bond-Debt ſhall be paid.

(K) Of the Privileges of Infants in Suits and Actions by and againſt them: And herein,

1. How far the Courts take care of the Intereſt of Infants.

INFANTS have divers judicial Privileges, which Perſons of full Age have not; as if Judgment be given againſt an Infant by (*a*) Default, after the Default he ſhall have a Writ of Error, and reverſe the Judg-
*Page 147 * ment for his Nonage; but if an Infant after Appearance make Default,
Cro. Jac. 464. *per Houghton* Juſtice, in Judgment ſhall be given againſt him.

the Caſe of *Holtford* and *Platt*, which *vide*, and Hob. 266. 2 Rol. Rep. 14, 22. S. C. (*a*) That this muſt be underſtood of an Hereditary Right, in which the Infant ſhall not loſe by Default; but there is a Difference betwixt thoſe Things which concern the Hereditary Right, for which the Parol ſhall demur, and thoſe Actions which are brought and grounded *de ſon Tort demeſne*, as in Waſte, Diſſeiſin, or the like; for in theſe the Infant ſhall not be privileged, *quia Malitia ſupplet Ætatem.* Cro. Jac. 467. *per Croke*, Juſtice.

In

In an Aſſiſe againſt two, of which one is an Infant, if they make Default by which the Aſſiſe is awarded, and after the Aſſiſe remains for Default of Jurors, yet the Infant ſhall be received to plead afterwards. 29 Aſſ. 36. Rol. Abr. 731. S. C.

In an Aſſiſe by an Infant, if the Tenant pleads an Ill Bar, and the Infant replies, by which he makes the Bar good, if the Plaintiff had been of full Age, yet this ſhall not make the Bar good againſt the Infant; but if the Judgment be for the Tenant thereupon, this is Error; for the Court ought to (*a*) plead for the Infant, for the Tenderneſs of his Age. 37 Aſſ. 5. Rol. Abr. 731. S. C.

(*a*) That in caſe of an Infant, the Judges ought to be his Counſellors. Cro. Jac. 466.

In Debt againſt an Infant for Rent Arrear, the Defendant demurred to the Declaration, and afterwards pleaded to Iſſue, and the Court held that the Infant may waive his Demurrer in the ſame Term, but not in a ſubſequent one †. 2 Bulſ. 69.

† *Sed qu.* if the Court would not on Motion give leave, in the ſecond Term to waive the Demurrer?

If in a *Formedon* in Remainder the Tenant pleads Infancy, and that the Remainder deſcended to him, and prays his Age, and the Defendant pleads that the Remainder did not deſcend to him, and thereupon Iſſue is joined, and found for the Demandant, a final Judgment ſhall be given, notwithſtanding the Infancy of the Tenant; for in all Caſes where the Iſſue is upon a Dilatory Plea, and tried *per Pais*, the Judgment is peremptory. Lev. 163. Sid. 118, 252. *Amcot* and *Amcot*, adjudged.

An Infant ſhall be privileged from Fine and Impriſonment in thoſe Caſes in which Perſons of full Age ſhall be thus puniſhed; as if an Infant in an Aſſiſe vouch a Record, and fail at the Day, he ſhall not be impriſoned, although the Statute of *Weſtm.* 2. *cap.* 25. that gives Impriſonment in ſuch a Caſe, is general; ſo if guilty of a forcible Entry, though he may be fined for the ſame, yet he cannot be impriſoned; ſo if an Infant be convict in an Action of Treſpaſs *Vi & Armis*, the Entry muſt be *Nihil de fine, ſed pardonatur quia Infans* ‡. Hal. Hiſt. P. C. 20, 21. Co. Lit. 357. Bridg. 173. Cro. Jac. 274.

‡ The *Capiatur pro fine* is taken away by 5 *W. & M.* c. 12.

An Infant being Plaintiff or Demandant ſhall not be amerced; and this is the Reaſon (*b*) he ſhall not find Pledges. Co. Lit. 127. 8 Co. 61. 3 Bulſt. 276.

Palm. 518. Rol. Abr. 214, 288. (*b*) That he ſhall not find Pledges, Cro. Car. 161. adjudged.

But an Infant Defendant ſhall be amerced if he pleads with the Demandant, and the Matter is found againſt him; (*c*) but he ſhall be pardoned of courſe. Rol. Abr. 214. Cro. Car. 410.

(*c*) And the Entry in ſuch Caſe is *Ideo in miſericordia, ſed pardonatur quia Infans.* 8 Co. 61. Palm. 518. *Nihil in miſericordia quia Infans.* Cro. Car. 410. See the Note *ſupra.*

But if an Infant bring an Action by his *Prochien Amy*, and pending the Action comes of full Age, and makes an Attorney, and after his nonſuit, he ſhall be amerced. Dyer 338. pl. 41.

If an Infant brings an Action of Treſpaſs by Guardian againſt two, and the Defendants plead Not guilty, and at the *Niſi prius* the Plaintiff appears in Perſon, and a Verdict is found for the Plaintiff for Part, and Not guilty for the reſt, and one of the Defendants is found Not guilty, and Judgment is given for the Plaintiff, for that for which the Verdict is given for him, *& quod nil capiat per Billam* for the reſt, *ſed nihil de miſericordia pro falſo clamore, &c. quia querens tempore tranſgreſſionis prædict' fact' intra ætatem exiſtabat*, yet this is good, and no Error. Rol. Abr. 214. *Methwold* and *Anguiſh* adjudged.

If

5 Co. 49. Moor 394. Rol. Rep. 294.

If a *Præcipe* be brought againſt an Infant, and pending the Plea he comes of full Age, he ſhall be amerced for the Delay after he comes of full Age.

3 Bulſ. 151. *Vide* Tit. *Ejectment.*

If an Infant by his Guardian or *Prochien Amy* brings an Ejectment which is found againſt him, and the Guardian, *&c.* becomes inſolvent, the Infant himſelf muſt anſwer the Coſts; becauſe the Rule was entered

*Page 148 *into for the Infant's Benefit; and Infants muſt not diſturb the Poſſeſſion of others by unlawful Entries, without being puniſhed with Coſts.

2 Vern. 342. *per Holt* C. J. This Argument of the Caſe of Lord *Falkland* and *Bertie.*

The Intereſt of Infants is ſo far regarded and taken care of in the Court of (*a*) Chancery, that no Decree ſhall be made againſt an Infant without giving him a Day to ſhew Cauſe againſt it, when he comes of Age. An Infant may by his *Prochien Amy* call his Guardian to an Account, even during his Minority. If a Stranger enters, and receives the Profits of an Infant's Eſtate, he ſhall in conſideration of this Court be looked upon as a Truſtee for the Infant.

(*a*) That this Court will decree building Leaſes for ſixty Years of Infants Eſtates, when it appears to be for their Advantage. 2 Vern. 224.—That Court will not ſuffer an Infant to be prejudiced by the Laches of his Truſtees. 2 Vern. 368.—Nor of his Guardian. Preced. Chan. 151.—That a Court of Equity may, by the Approbation of an Infant's Relations, allot the Infant Maintenance out of a Truſt Eſtate, though there be no Proviſion in the Truſt for that Purpoſe; and this is founded on natural Juſtice. 2 Vern. 236.

Vern. 295. 2 Vent. 351. 2 Vern. 232.

If there are ſeveral Parties to a Suit in Chancery, and it appears that any one of the Defendants is an Infant, and any Thing is prayed againſt him, by the Decree, he muſt have a Day given him to ſhew Cauſe; the Words of which Decree are thus; *viz. And this Decree is to be binding to the ſaid* J. S. *the Infant, unleſs he ſhall within ſix Months after he ſhall attain his Age of twenty-one Years, (being ſerved with* (*b*) *Proceſs for that Purpoſe,) ſhew unto this Court good Cauſe to the contrary.*

(*b*) This Proceſs is by way of *Subpœna*, to be ſerved on the Defendant at his coming of Age, and it is a judicial Writ, and muſt be returned in Term-time.

Abr. Eq. 280, 1.

If he ſhews no Cauſe, the Decree is made abſolutely upon him; but when he comes of Age, and ſhews Cauſe within the ſix Months, he may put in a new Anſwer, and make a new Defence; for it would be highly unreaſonable to conclude him by what his Guardian had done, who perhaps made an improper Defence, or miſtook the Nature of his Caſe; and if the Infant notwithſtanding were to be bound thereby, it would be to no Purpoſe to give him a Day to ſhew Cauſe.

Carth. 79. 3 Mod. 259. Show. 89. S.C. *Eccleſton* and *Petty.* 2 Vent. 72. Ld. Raym. 311.

Therefore if a Guardian put in an Anſwer to a Bill in Chancery for an Infant on Oath, ſuch Anſwer ſhall not conclude the Infant, nor be (*c*) read in Evidence againſt him; for the Effect of an Infant's Anſwer to a Bill in Chancery is to no other Purpoſe than to make proper Parties, ſo as to have an Opportunity to take Depoſitions, and to examine Witneſſes, to prove the Matter in Queſtion.

Chan. Preced. 229. 9 Mod. 103, 153. Gilb. Eq. Rep. 4. Wil. Rep. 504. pl. 145. 2 Wil. Rep. 387. 401. pl. 126, 519, (543) pl. 202. 3 Wil. Rep. 237. Stra. 506, 548. 2 Stra. 1026. (*c*) If an Infant put in an Anſwer by Guardian, and there is a Decree againſt him without any Day given him to ſhew Cauſe, ſuch Anſwer ſhall not be read or admitted as Evidence againſt him when he comes of Age; but if a ſuperannuated Defendant puts in an Anſwer by his Guardian, it ſhall be read againſt him at any Time after; for he is ſuppoſed to grow worſe, and is not to have a Day to ſhew Cauſe. Abr. Eq. 281. *Levin* and *Caverly.*

2 Vern. 429. *Coke* and *Parſons* decreed. Preced. Chan. 185. P. C. and S. P.

But it ſeems that if Lands are deviſed to be ſold for Payment of Debts, the Lands may be decreed to be ſold without giving the Heir who is an Infant a Day to ſhew Cauſe when he comes of Age; for nothing deſcends to him; but if he is decreed to join in the Sale, he muſt have a Day after he comes of Age.

2. How they are to appear when they ſue or are ſued.

Regularly an Infant Plaintiff muſt appear by *Prochein Amy* or Guardian, but muſt defend by Guardian; but in neither Caſe can he appear by Attorney †, for an Attorney's appearing for him is without Warrant, for an Infant cannot give him Authority *ad perdend' & lucrand'*, as the Warrant of Attorney purports; and therefore is to appear by Guardian * aſſigned either by the Court, or by Writ out of Chancery, and ſuch Guardian hath his Warrant from the Court, not from the Infant, and ought to be one of an Eſtate; for if he miſbehaves himſelf, an Action of Deceit lies againſt him. Palm. 225, 250. Rol. Abr. 287-8. † See *infra* 139. * Page 149

If a Judgment be againſt an Infant, and the Infant brings a Writ of Error to reverſe the Judgment, he ought to aſſign the Error by Guardian, and not by Attorney. Co. Ent. 289. Cro. Jac. 25.

In Replevin the Defendant being an Infant appeared for two Terms by Attorney, and the third Term by Guardian, and for this Cauſe the Judgment was reverſed: But an Infant may appear by Guardian, and when he comes of full Age he may make an Attorney in the ſame Suit, and this ſhall not be Error. Moor 665. Palm. 229.

If in a Writ of Right the Demandant ſues by *Prochein Amy*, and Iſſue is joined upon the Plea of Non-tenure, and before Trial the Demandant comes of full Age, though he was well admitted to ſue by *Prochein Amy*, yet now he ought to appear by Attorney: But the Tenant not having taken Exceptions to the Trial, but admitted him to be of full Age, whether this could afterwards be aſſigned for Error *dubitatur*. Cro. Jac. 580. *Stone* and *March*. Bulſ. 24. S. C. and S.P. ſeems to be admitted; but adjudged *per totam Curiam*, that it could not be aſſigned for Error, and therefore the firſt Judgment was affirmed.——And now by the 21 Jac. 1. c. 13. it is enacted, that after Verdict given in any Court of Record, Judgment ſhall not be ſtayed or reverſed by reaſon the Plaintiff in Ejectment, or other Perſonal Action, being under Age did appear by Attorney, and the Verdict paſs for him.

In an Ejectment againſt an Infant the Defendant cannot appear by *Prochein Amy*; for a Guardian and *Prochein Amy* are diſtinct, and the Suit by *Prochein Amy* was not before the Statute of *Weſtm.* 1. *cap.* 47. and *Weſtm.* 2. *cap.* 15. and is given in caſe of Neceſſity, (*a*) where an Infant is to ſue his Guardian, or is eſloigned, or that the Guardian will not ſue for him; adjudged by three Judges againſt one, upon a Writ of Error upon a Judgment given in *Durham*, and the firſt Judgment reverſed accordingly. Cro Jac. 640. Palm. 295. Rol. Rep. 257. *Simpſon* and *Jackſon*. S. C. adjudged. Hutton 92. S. C. cited.

F. N. B. 27. S. P. Styl. 369. S. P. (*a*) But for the Profits received after fourteen, the Infant was admitted by Guardian to ſue an Account againſt his Guardian in Socage; for he muſt charge him as Bailiff. Cro. Jac. 219.

But in all Caſes where an Infant is Plaintiff, unleſs in theſe ſpecial Caſes, the Suit ſhall be by Guardian, and not by *Prochein Amy*. Palm. 296. *per Dod.*— But 2 Inſt. 390. it is ſaid, whether the Infant be eſloigned or no, he may ſue by *Prochein Amy*; but perhaps in all Caſes where he is Plaintiff, except theſe, he may ſue by Guardian or *Prochein Amy*; and for this *vide* F. N. B. 27. 2 Inſt. 261, 390. Co. Lit. 135. b. Cro. Car. 86. Hutt. 92. Jones 177. Hetl. 52. Lit. Rep. 60. Cro. Jac. 161, 641. Bridg. 74. [and ſee *ſupra* n.]

The reſpective Courts in which the Suit is commenced muſt (*b*) aſſign a proper Guardian to the Infant; and therefore if an Infant be ſued, the Plaintiff muſt move to have a proper Guardian aſſigned him. Styl. 369. Bridg. 74. An Rol. Rep. 303.

(*b*) That the Courſe hath been to allow ſome of the Officers of the Court, who, by reaſon of their Skill, make the beſt Guardians, and *Prochein Amys*, for the Advantage of the Infants. 2 Inſt. 261.— That

*Page 150 Rol. Abr. 288.

* An Appeal of Death by an Infant must be profecuted by Guardian; yet if the Infant comes into Court, and fays that he will relinquifh it, and yet the Guardian will profecute it, the Court may in Difcretion difcharge fuch Guardian, and affign another; for it is not reafonable that an Infant be bound to continue a Suit againft his Will, which demands nothing but Revenge, and will be chargeable to him.

26 Aff. 40. Rol. Abr. 288. S. C.

In an Action againft Baron and Feme, the Feme being within Age, the Feme ought to appear by Guardian.

Rol. Abr. 288. Bridg 74, 228. Palm. 224, 244, 250, &c. Cro. Eliz. 379. S. C. *Holland* and *Lee*.

If a Common Recovery be fuffered, and the Baron and Feme, in Right of the Feme, (the Feme being within Age) are vouched, and they appear by Attorney, and vouch over, and fo a Common Recovery is had, this is Error; for though the Baron is of full Age, yet the Feme being within Age, fhe ought to have appeared by (*a*) Guardian; for the Hufband cannot make an Attorney for his Wife in a Matter that concerns her Inheritance, for then he might defeat her of her Inheritance, efpecially in a Common Recovery, which is now but a Common Affurance, and their coming in as Vouchees makes it the ftronger; for the Vouchee lofes all the Right to the Land, and gives Recompence to the Tenant.

(*a*) That the Hufband cannot difavow a Guardian made by the Court for his Wife. Vent. 185.

Vent. 185. *Freeman* and *Boddington*, adjudged. 2 Lev. 38.

If in an *Aſſumpſit* (*b*) againft Baron and Feme, the Feme, being within Age appears by Attorney, and thereupon Judgment is given againft them, this is Error.

S. C. 2 Keb. 878. S. C. becaufe the Appearance was *per Attornatum* of the Hufband only, and there faid, tho' in a real Action, the Wife muft appear by Guardian; yet perhaps it may be otherwife in a perfonal Action, for the Damages will furvive. (*b*) But if they bring an Action, they may fue by Attorney, and the Baron fhall name an Attorney for both. 2 Sand. 213. *per curiam arguendo.*

Rol. Abr. 287-8. Poph. 130. Cro. Jac. 420. Rol. Rep. 380. S. C.

If an Action of Debt be brought againft an Infant Executor, he cannot appear by Attorney, but ought to appear by Guardian, elfe it is Error, becaufe otherwife he might be at great Prejudice; for Aſſets may be found in his Hands, and fo Judgment fhall be given to recover the Debt, Damages, and Coſts againft him *de Bonis Teſtatoris, ſi, &c. ſi non*, the Damages and Coſts *de Bonis propriis*, (as it was done in this Caſe,) and perhaps the Infant had a Releafe of Acquittance to plead, and fo he fhall be charged *de Bonis propriis* by his ill Pleading, without any Remedy againft the Attorney; but if a Guardian mifpleads, and lofes thereby, an (*c*) Action lies againft him, and therefore his being Executor cannot make him as a Man of full Age.

(*c*) That an Action in fuch Caſe lies againft a Guardian.

Palm. 229. 2 Leon. 59. Cro Jac 641. Mod. 49.——But no Action lies againft a *Prochein Amy*; for if he lofes in fuch Action, he is not concluded thereby, but may refort to his Action of a higher Nature. Palm. 296. *per Dedr*

That the Court of Chancery may affign one of the fix Clerks to be Guardian to an Infant. 2 Chan. Ca. 163.——But if there be a Guardian appointed by the Father, or *ex proviſione Legis*, as Guardian in Socage, who acts accordingly, he only fhall be admitted to fue for the Infant, unleſs he hath mifdemeaned himſelf. Sid. 424.——That the Court may difcharge one Guardian, and appoint another. Styl. 456.———Where in the *Common Pleas* a Record of Admittance is made, but in the *King's Bench* it is only recited in the Count. J. S. *per* A. B. *Guardianum ſuum ad hoc per Cur. ſpecialiter admiſſum queritur, &c.* 3 Co. 53. b. and *vide* Sid. 173, 342. Cro. Eliz. 158. 2 Inſt. 261. 3 Mod. 236. Bridg. 74. Lib. Intr. 45. Hutt. 92. 4 Co. 53. Litl. 92. Heil. 52. 3 Cro. 158. Moor 434. Hob. 5. 2 Vern. 342. Pre. Ch. 376. 8 Mod. 25. Fitzgib. 1, 114, 164. 2 Will. Rep. 119, 297. pl. 80. 3 Will. Rep. 140. pl. 32. 2 Barnes 326 Stra. 114, 304, 445, 708. 2 Stra. 1076. Lev. 224 ——The Appearance muſt be entered in the Name of the Infant, *ſcilicet, prædict'* Katherina *per* J. S. *Guardian' venit, & dicit, quod ipſa, &c.* not *ipſe, &c.* 3 Mod. 236. and the above Authorities. If the Guardian for the Defendant is admitted *ad proſequend'*, this is erroneous. Cro. Jac. 641. Palm. 296.—But an Admiſſion *quod ſequatur* is good in a Common Recovery. Sid. 446. Mod. 48. 2 Sand. 95.---The Infant cannot revoke the Authority of the Guardian. Palm. 252, *& vide* Salk. 176. Holt 153. pl. 1. 12 Mod. 372. Ld. Raym. 555. A Guardian ordered to acknowledge Satisfaction for fo much as he received upon a Judgment. Moor 852.

But

But if an Infant (*d*) Executor brings an Action as Executor by Attorney, and hath Judgment to recover, this is not erroneous, becauſe for his Benefit. Poph. 130. Cro. Jac. 441. S. C. and

there ſaid, there is a Difference where an Infant Executor is Plaintiff, and where Defendant, and being Plaintiff, where he recovers or not; for if Judgment is given againſt him where he is Plaintiff, it ſeems all one as if he were Defendant. (*d*) That if an Infant Adminiſtrator appears by Attorney, it is Error, tho' Judgment be given for him. 3 Bulſ. 180. but Rol. Abr. 288. *cont. & vide* Vent. 103. Cro. Eliz. 541. 2 Sand. 213. Mod. 47, 298. [See *infra* 149. n.]

If an Infant and Man of full Age are made Executors, they may (*e*) bring an Action as Executors, and the Infant may ſue by Attorney * without making any *Prochein Amy*, (*f*) becauſe he ſues in the Right of the Teſtator, and not in his own Right. *Page 151 Rol. Abr. 288. Counteſs of *Rutland*'s Caſe

adjudged, in which the Executors recovered in the Action. Cro. Eliz. 278. S. C. 2 Sand. 212, 213. S. P. adjudged *per Cur. cont. Twiſden*; for he that is of full Age may make an Attorney for him that is within Age. Mod. 47, 72, 296. adjudged by three Judges againſt Twiſden. Vent. 102. adjudged. Sid. 449. adjudged. Ld. Raym. 232, 600. 2 Ld. Raym. 1449. 8 Mod. 25. 2 Barnes Notes C. P. 326. 2 Stra. 784. (*e*) But if an Action is brought againſt them, he that is under Age muſt appear by Guardian. Styl. 318. adjudged; & *vide* 3 Mod. 236. ſaid to be agreed. (*f*) This is founded upon another Reaſon, *viz.* upon Neceſſity; for it is abſolutely neceſſary that all who are appointed Executors by the Will ſhould be made Parties to the Action, and where there are ſeveral Executors, the Act of one ſhall conclude his Companion, and therefore the general Appearance *per Attornatum* is good for all of them. Carth. 124. *per Holt* C. J.

In Replevin in *C. B.* againſt *A. B.* and *C.* they all *per J. S. Attornat'* made Conuſance as Bailiffs to *J. N.* and at the Trial the Plaintiff was nonſuit, and the Defendants had Judgment upon a Writ of Error in *B. R.* It was aſſigned for Error, that *A.* one of the Deſendants, was an Infant, and yet had appeared and pleaded by Attorney; but notwithſtanding the Judgment was unanimouſly affirmed, tho' for different Reaſons; three of the Judges held, that it ought to be affirmed becauſe the Defendants are *in Auter Droit*, and they all make but as one Bailiff, and that the Diſability of the Servant ſhall not prejudice his Maſter, and they agreed that the Caſe of Executors is the ſame in Reaſon with the preſent Caſe; they agreed likewiſe, that there is a Difference where the Infant is Plaintiff, and where he is Defendant, and that an Avowant is in Nature of a Plaintiff, and ſo are the Bailiffs who make Conuſance: But *Holt* C. J. differed; he held, that this Appearance of the Infant was irregular, for he ought to plead *per Guardianum*, and the joining the other Defendants with him ſignified nothing, ſo as to charge the Infant, for if the Judgment paſs againſt him it ſhall be for the Damages *de Bonis propriis*, and he ſhall be amerced; therefore where he is joined, or where he is ſingle, there is no Manner of Difference in Reaſon, for in both Caſes the Loſs is the ſame, if Judgment is againſt him; but he agreed that in this Caſe the Judgment ſhould be affirmed, (*g*) becauſe the Plaintiff did not take Advantage of the Infancy in Time, according to the general Rule which he laid down, *viz.* that a Man ſhall never aſſign that for Error which he might have pleaded in Abatement; for it ſhall be accounted his Folly to neglect the Time of taking that Exception. Carth. 122. 179. *Coan* verſus *Bowles*, adjudged. Show. 13, 165. S. C. Salk. 93. pl. 2. 205. pl. 1. S. C. adjudged, becauſe the Plaintiff might have pleaded this in Abatement. 4 Mod. 7. S. C. but not the S. P. (*g*) But one of the Judges was of Opinion, that this Matter might be

aſſigned for Error, tho' it was pleadable in Abatement of the Conuſance. Carth. 123.

The Teſtator had obtained a Judgment, and made a Perſon of full Age and two Infants Executors; he of full Age proved the Will, and he alone brought a *Scire Facias*, ſetting forth the Truth of the Caſe, and had Judgment, whereon Error was brought, and aſſigned that all ought to have (*h*) Lev. 181. *Hatton* and *Maſcal*, adjudged in the Exchequer Chamber on a Writ of Error out of *B. R.* & *vide* Raym. 198. S. C. (*h*) *Et vide* Yelv. 130. where it is held, that an Infant cannot be ſummoned and ſevered.

joined

joined in the *Scire Facias*; but by all the Juſtices, on Advice with the Civilians, it was ruled not to be Error; for the others cannot prove the Will during their Nonage; and the Judgment was affirmed; for the Execution of the Judgment ſhall not be delayed till the Infants come of full Age.

Carth. 256. The Plaintiff being an Infant had ſued by his Guardian, but the Entry on the Roll was no more but *per T. S. Guardianum ſuum*, omitting the Clauſe *ad hoc per Curiam ſpecialiter admiſſ.* as the common Courſe is, and as it was alledged it ought to be; but *per Curiam* the Entry is ſufficient; for in Fact, if the Guardian was not admitted by the Court, a Writ of Error lies.

An Infant cannot bring a Bill in Chancery but by his *Prochein Amy*, and ſuch *Prochein Amy* muſt take care of it; for if the Bill is diſmiſſed, he muſt (*d*) pay the Coſts thereof.

(*d*) And therefore any Perſon may bring a Bill as *Prochein Amy* to an Infant without his Conſent, becauſe it is at his Peril that he brings it, to be anſwerable for the Event. Abr. Eq. 72. *Andrews* and *Cradock*.—— [But generally the Infant, at full Age, may, if he pleaſes, ſhew Cauſe againſt the Decree.

*Page 152 * And it is ſaid, that in Chancery a Guardian cannot be otherwiſe appointed than by (*e*) bringing the Infant into Court, or his praying a Commiſſion to have a Guardian aſſigned him.

Abr. Eq. 260. *Lloyd* and *Carew*.

(*e*) That the Court cannot appoint a Guardian unleſs the Heir be in Perſon before them. 2 Leon. 189.——A Guardian is always admitted before a Judge, and that Admiſſion carried to the Clerk of the Rules, who enters the Rule; but the Court uſually examines a *Prochein Amy*, *per* Sir *Samuel Aſtry*, Comb. 331.——Though the Court ſeldom admits a Guardian unleſs the Infant be there in Perſon, yet they may do it. Comb. 330. *per Holt*, C. J.—That the Court will admit one to ſue by Guardian upon a Motion, though not preſent, nor any Affidavit made. Comb. 256.

Where a Bill is brought againſt an Infant (if in Town) he muſt appear in Court, and have a Guardian aſſigned him, by whom he may defend the Suit; if in the Country, he ſues out a Commiſſion to aſſign a Guardian, and put in his Anſwer; and whether he pleads, anſwers, or demurs, ſtill it muſt be done by his Guardian; for if it is the Plea, Anſwer, or Demurrer of the Infant, without doing it by the Guardian, it will be irregular.

But when the Infant neglects to appear, or to have a Guardian aſſigned, it is a Motion of Courſe (he being in Contempt to an Attachment) to pray for a Meſſenger to bring him into Court, and when he is there, the Court always aſſigns him a Guardian: But it is doubted whether this can be done againſt a Peer of the Realm who is an Infant, and whoſe Perſon is not ſacred, but only privileged.

(L) Of the Privilege of Infancy as to the Parol's demurring: And herein,

1. In what Actions the Parol ſhall demur.

3 Bulſ. 143. Rol. Rep. 225. THE Parol's Demurring until the full Age of the Infant is a dilatory Plea or temporary Bar, and peculiar only to the Feudal Law; for in the Civil Law, the Guardian was Party to the Suit inſtead of the Infant; and if there was *Mala Fides* in his Defence, he was to anſwer it to the Infant; but the Wardſhip in the Feudal Law was of another Nature, for the Guardian has the whole Profits of the Eſtate, and alſo the Marriage of the Infant, which was to breed him up to Arms, and to marry him to ſuch

Perſon

Perſon as they thought might continue the Martial Strain, that ſo the Ward might ſubſerve the original Deſign of the Tenure.

Hence it was that the Guardian was not truſted with the Action, nor could the Infant, by reaſon of his Imbecillity and Want of Underſtanding, be admitted to proſecute or defend; but this Eſtabliſhment was confined to ſuch Caſes where the Right of the Inheritance was in Demand, and was not allowed to Actions touching the Poſſeſſion; and the Reaſon was from Neceſſity; for if the Infant was not allowed to defend his Poſſeſſion, an Infant would be ſtript of all he had, during Minority; and ſo of Injuries done by an Infant the Parol ſhall not demur, becauſe then a general Licence would be given for Infants to commit Injuries; and therefore the Proſecution of theſe Actions are committed to the next Friend, and the Defence of the Actions againſt an Infant to a ſpecial Guardian aſſigned by the Court. 6 Co. 3. b. *Markal's* Caſe.

And therefore in all Caſes where a naked Right in Fee † deſcends from any Anceſtor to an Infant, there in every Action Anceſtoral brought by the Heir within Age, the Parol ſhall demur; for the Law in this Caſe * judges it leſs prejudicial that the Infant ſhould be delayed of his Right, than that he ſhould run the Hazard of loſing it for ever, which he might be in Danger of by his Want of Knowledge in ſetting forth his Title as he ought to do. 6 Co. 3. b. Dyer 133. *Page 153

†If Lands in Fee deſcend on an Infant, the Parol ſhall demur in *Equity*, as in Law; but where a Leaſe is made to a Man and his Heirs for their Lives, the Heir does not take by Deſcent, but as a ſpecial Occupant, and ſhall not demur. 3 P. Will. 365.

Hence if an Infant brings a Writ of Right as Heir to his Anceſtor, and lays the Eſplees in his Anceſtor, the Tenant may pray that the Parol demur. Rol. Abr. 137. 6 Co. 3. b.

So in a *Formedon in Reverter* the Parol ſhall demur, becauſe he claims as Heir in Fee-ſimple to the Reverſion, and muſt lay the Eſplees in the Donor. 6 Co. 3. b.

So in all Caſes on the Fee, as if an (*a*) Action of Debt on the Obligation of the Anceſtor be brought againſt the Heir, there the Parol ſhall demur, becauſe that lays a Burden on the Fee, which by Law is to be preſerved intire until the Infant come of Age. 2 Inſt. 89. Moor 74. Dyer 239. pl. 39. And. 10.

(*a*) In a Writ of Debt againſt an Heir he ſhall have his Age, becauſe at his full Age he may diſcharge himſelf by ſaying he hath *Riens per Diſcent*. Rol. Abr. 120. If an Anceſtor dies indebted by Bond, in which the Heir is expreſly bound, and leaves no Perſonal Aſſets, and the Lands deſcend on an Infant Heir, whether Equity will during the Minority of the Heir decree Satisfaction, is made a *Quære*, 1 Vern. 173. and there ſaid, that Infants may be ſued in Equity, and that there is no Precedent that the Parol ſhould demur; and in 1 Vern. 428. it is ſaid by the Maſter of the Rolls, that he thought ſuch a Decree reaſonable; but the Reporter adds a *Dubitatur* to it.

But regularly in all real Actions brought by an Infant of his own Poſſeſſion the Parol ſhall not demur; for the granting that the Parol ſhall demur is a Law introduced, not for the Delay or Prejudice of the Infant, but for his Advantage. 6 Co. 3. b. Cro. Jac. 467.

Therefore in Aſſiſes of *Novel Diſſeiſin* and *Mort d'Anceſtor*, the Infant has not his Age, becauſe theſe Actions are brought of his own Seiſin, or his Anceſtor's dying ſeiſed, which may be proſecuted during Minority. 6 Co. 4. b.

So if in Aſſiſe the Infant pleads a flat Bar, and the Bar is found againſt him, yet the Aſſiſe ſhall be taken at large; becauſe the Law not allowing the Parol to demur in this Action, which is *feſtinum Remedium*, they inquire of the Seiſin and Diſſeiſin, that the Infant's whole Title may be before the Court, and he not ſuffer by his Pleading. 48 E. 3. 33. b. Rol. Abr. 140. 2 Inſt. 411. 8 Co. 50. a. 6 Co. 4. b.

In a Writ of Annuity againſt an Heir he ſhall have his Age, becauſe he may diſcharge himſelf by ſaying he hath nothing by Deſcent. Rol. Abr. 140.

So

Co. Lit. 290. Rol. Abr. 140. So if a Man ſues Execution upon a Statute Merchant againſt an Heir within Age, and ouſts him thereby, (*b*) an Aſſize lies for the Heir, for he ſhall have his Age.

(*b*) For the Extent is void, which is made upon the Poſſeſſion of the Infant. Hetl. 54.

3 Co. 13. Co. Lit. 290. 2 Inſt. 89. Rol. Abr. 140. So if a Man ſues Execution upon a Recognizance againſt an Heir within Age, he ſhall have his Age, though he be charged partly as Tertenant.

Bro. Statute Merchant 33. Co. Lit. 290. a. Moor, pl. 203. Dyer 239. a. Co. Ent. 12. So upon a Recognizance in Nature of a Statute Staple on the 23 *H.* 8. *cap.* 6. the Infant ſhall have his Age; for the Statute in this Particular is founded on the Reaſon, and follows the Courſe of the Common Law; and this Privilege of Infancy does not only protect the Infant, but (*c*) all others who are affected by the Judgment; as if there be Father and two Daughters, and the Father dies, one of the Daughters being within Age, Partition being made, the eldeſt ſhall not be charged alone, but ſhall have the Benefit of her Siſter's Minority, which puts a Stop to the Execution.

(*c*) As if the Conuſor of a Statute Merchant die, and his Heir within Age endow his Mother, the Land in Dower ſhall not be extended during the Minority of the Heir. Co. Lit. 290.—But though upon a Judgment in Debt, or upon a Statute or Recognizance there can be no Proceeding againſt an Infant at Common Law during his Minority, yet it is ſaid there may be in Chancery. 2 Chan. Ca. 164. *& vide* Lev. 197-8.

*Page 154 Rol. Abr. 140. * So if a Man recovers in an Action of Debt againſt the Father, who dies, in a *Scire facias* againſt the Heir, upon this Judgment he ſhall have his Age.

Co. Lit. 290. Rol. Abr. 140. Co. Lit. 290. In a *Scire facias* againſt a Tertenant to have Execution of Damages recovered againſt *J. S.* if the Tertenant be within Age, and in by Deſcent, he ſhall have his Age.

Rol. Abr. 139, 141. 9 Co. 85. a. In a Writ of Cuſtoms and (*d*) Services, which is a Writ of Right in its Nature, and in which Judgment final ſhall be given, an Infant in by Deſcent ſhall have his Age.

(*d*) Yet he may be diſtrained for Rent during his Minority. 9 Co. 95. a.

Co. Lit. 380, 381. Rol. Abr. 138. In a *Ceſſavit* by (*e*) Deſcent, though it be of his own Ceſſer, the Infant ſhall have his Age, becauſe he cannot tell what Arrears there accrued; and if he does not make a true Tender, he loſes the Whole for ever.

(*e*) But if it be a Purchaſe it ſeems otherwiſe, becauſe that is not an antient Inheritance of the Family, for which he was to be in Ward; for which *vide* Plow. 364. b. 6 Co. 4. b. 2 Inſt. 401. Raym. 118. 3 Mod. 222. 8 Mod. 193, 247, 304.

Rol. Abr. 137. 3 Bulſ. 141. In *(f)* a Writ of Dower the Parol ſhall not demur for Favour of Dower; for the Wife muſt be ſubſiſted.

Rol. Rep. 323. Cro. Jac. 393. 2 Brownl. 118. *(f)* So if a Woman brings a *Quod ei deforceat* upon a Recovery had of Land which ſhe claimed to hold in Dower, the Parol ſhall not demur, becauſe it is of the Nature of a Writ of Dower. Rol. Abr. 137. 3 Bulſt. 135, 138. Rol. Rep. 251. —But if Tenant in Dower be diſſeiſed, and the Diſſeiſor dies ſeiſed, his Heir ſhall have his Age againſt the Feme. Rol. Abr. 137. 3 Bulſ. 142.

Cro. Jac. 111. Cro. Eliz. 309, 638. 2 Brownl. 118. 2 Leon. 59. So in Dower againſt an Infant, who makes Default upon the *Grand Cape* returned, it was held, that Judgment ſhall be given upon the Default; for the Infant ſhall not have his Age in Dower, which being but for Life, ſhe may be totally defeated thereof by his frequent Defaults.

Cro. Jac. 392. But in Error to reverſe a Fine levied by the Plaintiff and her Huſband, the Heir is ſummoned as Tertenant, and appears, and pleads that he is within

within Age, and prays that the Parol may demur; Plaintiff counterpleads the Age, ſhewing that ſhe was intitled to have Dower before the Fine levied, and now is barred of her Dower by this Fine, which is erroneous, and ſets forth the Errors, and ſeeks to be reſtored to her Writ of Dower: But upon Demurrer and ſolemn Argument it was adjudged, that the Parol ſhall demur, and that ſhe ſhall not have the Advantage to take from him his Age, having by the Fine, ſo long as it ſtands in Force, barred herſelf of her Dower; and therefore the Law ſhall rather favour the Infant, whoſe Privilege is immediate, than hers, which is but mediate after the Fine reverſed: But in *Moor* it is ſaid, if he had not been Tertenant, he ſhould not have had his Age in this Writ of Error; the Reaſon ſeems, becauſe then ſhe ſhould not have recovered her Dower againſt him, and then it is not reaſonable his Nonage ſhould ſtand in the Way to hinder her from recovering her Dower againſt another. Moor, pl. 148. *Herbert* and *Binion*.

In an Attaint againſt the Heir of the (*d*) Feoffee, the Parol ſhall not demur for the Nonage of the Defendant, for the Miſchief of the Death of the Petit Jury, before his full Age. Rol. Abr. 137.

(*d*) The ſame Law in an Attaint againſt Tenant in Dower within Age, who was the Wife of the Recoveror, and is endowed of his Poſſeſſion. 1 Rol. Abr. 738-9.

In a *Quare Impedit* the Paroll ſhall not demur for the Nonage of the Patron Defendant, becauſe the Lapſe may incur during his Nonage. Rol. Abr. 138. 3 Bulſ. 131, 142.

So if the King preſents, in Right of the Heir in Ward, to a Church of which another is Patron, of the Grant of the Father of the Ward, with Warranty of the Land to which this is appendant, who left Aſſets to the * Ward, and the Patron ſues by Petition to the King to repeal his Preſentation, ſhewing the Matter, the Parol ſhall not demur for the Nonage of the Ward for the Miſchief of the Lapſe, and this Suit is in the Nature of a *Quare Impedit*. Rol. Abr. 138. Rol. Rep. 324. * Page 155

In a Writ of Eſtrepement againſt an Infant he ſhall not have his Age, becauſe this Action is in Nature of a Treſpaſs, and this is done by himſelf. Dyer 104. pl. 13. 2 Inſt. 328.

In a Writ of Partition between (*e*) Coparceners, Age does not lie for the Defendant, for nothing is demanded but a Partition. 6 Co. 4. b. Co. Lit. 171. a.

(*e*) The ſame Law of Jointenants and Tenants in common. Hob. 179. adjudged.

In a (*f*) *Per quæ Servitia* the Defendant ſhall not have his Age, but ſhall be compelled to attorn, for he is not prejudiced in the Inheritance by the Attornment; for when he comes of full Age he may diſclaim to hold of him, or ſay that he held by leſs Service, notwithſtanding this Attornment. 9 Co. 85. Co. Lit. 315. 2 Brownl. 84. Rol. Abr. 138.

(*f*) The ſame Law in a *quid juris clamat* againſt an Infant. Co. Lit. 315. Rol. Abr. 138.

In a *Per quæ Servitia* if the Tenant ſays the Conuſor is dead, his Heir within Age, the Parol ſhall not demur for his Nonage, though it may be the Conuſor was Tenant in Tail; for, it ſeems, the Heir, if he was of full Age, could not come to plead this, but the Tenant may plead it, if it be true. Rol. Abr. 138.

In a *Quid juris Clamat* by him in Reverſion, againſt Tenant in Dower, the Parol ſhall not demur for the Nonage of the Demandant; for be he of full Age, or within Age, he ought to warrant the Land to the Tenant in Dower, becauſe of the Reverſion, by Force of an Act in Law. Rol. Abr. 138.

But if an Infant in Reverſion brings a *Quid juris Clamat* againſt Tenant for Life, the Parol ought to demur; (*g*) for he hath a Warranty againſt his Rol. Abr. 138. 6 Co. 4. a.

(*g*) So where the Tenant for Life hath a Privilege not to be impeached of Waſte, &c. Co. Lit. 320. a. 3 Bulſ. 137. 9 Co. 85. Rol. Rep. 323.

his Leſſor by ſpecial Deed, to which the Plaintiff who is within Age cannot bind himſelf.

6 Co. 3. b. 9 Co. 85. Rol. Abr. 138-9. In a Writ of *Meſne* the Parol ſhall not demur for the Nonage of the Demandant, becauſe it is brought for the Wrong and Damage done to the Demandant himſelf.

Rol. Abr. 139. In a *Contributione facienda* by one Coparcener againſt another, the Parol ſhall not demur for the Nonage of the Tenant, though he ſays that his Anceſtor died ſeiſed, and held *ſine Contributione facienda.*

Rol. Abr. 139. In a *Scire facias* (*d*) againſt the Heir of him againſt whom the Recovery was had, if the Heir be in by Deſcent from another Anceſtor, than he againſt whom the Recovery was had, he ſhall have his Age.

(*d*) But in a *Scire facias* brought by an Infant the Parol ſhall not demur for the Nonage of the Demandant. Rol. Abr. 139.—But where it ſhall demur in a *Scire facias* to execute a Remainder limited to the Anceſtor, *vide* Moor 16. pl. 59, 35. pl. 114. And. 24. Dalſ. 37. Kelw. 204. N. Bendl. 121. pl. 152.

Rol. Abr. 139. But where Age ſhall be granted in a Writ of Error, and where not, *vide* 3 Bulſ. 138, 142. Rol. Rep. 323. Cro. Jac. 392. Moor 847. pl. 1148. If a Man brings a (*e*) Writ of Error againſt the Heir of him that recovered, being within Age, and in by Deſcent in the Land, the Parol ſhall not demur for his Nonage, tho' perhaps he hath a Releaſe, or other Matter to bar the Plaintiff, which he hath not Knowledge to plead within Age.

(*e*) Age lies not in a Writ of Deceit, *per* Bulſ. 3, 135. Rol. Rep. 251. becauſe the Summoners and Pernors may die. Cro. Jac. 392.

Dyer 136. Dalſ. 22. Moor 35. Kelw. 205. In a Petition to the King in the Nature of a *Formedon* in Remainder the Parol ſhall demur for the Nonage of the Petitioner.

*Page 156 Dyer 137. 2 Hawk. P. C. 161, 162. * In an Appeal of Murder the Parol ſhall not demur for the Nonage of the Plaintiff, 2 *Inſt.* 320. ſaid to have been adjudged and approved by continual Experience of late Time; and the Reaſon of Failure of Battle is of no Force; for a Man of Seventy may have an Appeal, and the Defendant ſhall be ouſted of Battle.

2 Inſt. 257. At Common Law if a Man had been diſſeiſed, and the Diſſeiſee or Diſſeiſor had died, the Heir within Age, in a Writ of Entry *ſur Diſſeiſin*, brought by the Heir of the Diſſeiſee, or againſt the Heir of the Diſſeiſor, being within Age, the Parol ſhould have demurred till the full Age of the Heir reſpectively.

2 Inſt. 257. So notwithſtanding the Diſſeiſor had died (*f*) pending a Writ of *Novel Diſſeiſin* againſt him.

(*f*) But by the Common Law, if the Grandfather had been diſſeiſed, and brought an Aſſiſe, and died pending the Writ, and after the Father had brought a Writ of Entry *ſur Diſſeiſin*, and pending this Writ the Father had died, if the Son had immediately brought a Writ of Entry, the Parol ſhould not have demurred for his Nonage. 6 Co. 4. b.

2 Inſt. 291. At Common Law in a *Mortdanceſtor*, *Aiel*, *Beſaiel* or Coſinage, if the Tenant had pleaded a Feoffment or Releaſe from a collateral Anceſtor, with Warranty, in Bar, &c. the Parol ſhould have demurred.

(*g*) 3 E. 1. c. 47. By the (*g*) Statute of *Weſtm.* 1. *cap.* 47. it is enacted, "That if "one (*b*) Purchaſe an Aſſiſe, and the principal Diſſeiſor dies before "the Aſſize paſſed, the Plaintiff ſhall have a Writ of Entry (*i*) againſt "(*k*)

(*b*) So though he dies before Purchaſe of the Writ; for this is put only to ſhew the Miſchief of this particular Caſe, whereas the Body of the Act is general. 2 Inſt. 257. (*i*) This extends only to a Writ in the *Per*, and not in the *Poſt*; ſo that if the Heir of the Diſſeiſor makes a Feoffment in Fee, and the Feoffee dies, his Heir within Age, in a Writ of Entry againſt him ſhall have his Age. 2 Inſt. 257.—So it extends not

to

" (*k*) his (*l*) Heir or Heirs, of what Age ſoever; (*m*) ſo if the Diſſeiſee die before he hath purchaſed, his Heir or Heirs ſhall have, &c. ſo that for the Nonage of the Heirs of either, &c. the Plea ſhall not be delayed, but as much as can, freſh Suit muſt be made (*n*) after the Diſſeiſin; ſo in caſe of Prelates, &c. where there can be no Deſcent, &c".

to the Vouchee or *Prayee in Aid.* 2 Inſt. 257. 2 Leon. 148. If the Heir of the Diſſeiſor takes Huſband, and has Iſſue within Age, and dies, and the Diſſeiſee brings a Writ of Entry againſt the Tenant by the Curteſy, and he prays in Aid of the Heir within Age, he ſhall have his Age; for this is a Writ of Entry in the *Poſt*, being againſt Tenant by Curteſy. 2 Inſt. 257. (*k*) This extends to the Heir of the Heir; ſo that in this ſpecial Caſe a Writ of Entry in the *Per* and *Cui* is within the Act. 2 Inſt. 257-8. (*l*) Special Heir, as in Gavelkind, Borough Engliſh, &c. within this Act. 2 Inſt. 258. (*m*) By this Clauſe expreſs Proviſion is made in caſe the Diſſeiſee dies before Purchaſe of his Writ. 2 Inſt. 528. (*n*) Intended after the Death of the Diſſeiſor, and freſh Suit regularly is within a Year and a Day after his Death, within which Time continual Claim is to be made. 2 Inſt. 258.

By the Statute of (*o*) *Glouceſter, cap.* 2. " Where an Infant is held from his Inheritance after the Death of his (*p*) Father, Couſin, Grandfather, &c. ſo that he is drove to his Writ, and the Tenant pleads a Feoffment, or other Matter, whereby the Juſtices award an Inqueſt, the Inqueſt ſhall paſs as if of full Age."

(*o*) 6 *E.* 1. c. 2. (*p*) This put only for Example; for it extends to Mother, Brother, Siſter, Uncle, &c. after the Death of any of which a *Mortdanceſter* lies. 2 Inſt. 291.—— But this Act extends not to Actions *Anceſtorial Droiturel*, but giving the Infant a Trial during his Minority, it gave it in ſuch Actions as he might not be foreclоſed of his Right; but at his full Age might have Recourſe to a Writ of a higher Nature, and therefore it extends not to any *Formedon, Dum non compos, infra Ætatem, Sur cui in vita*, &c. 2 Inſt. 129. yet *vide* Bro. Age 5.

2. Where the Parol ſhall demur without any Plea pleaded.

The general Rule herein is, that where a naked Right in Fee deſcends, of which the Anceſtor was once in Poſſeſſion, there in an Action Anceſtorel brought by the Infant, the Parol ſhall demur, without Plea; but the Parol ſhall not demur without Plea where the Anceſtor died ſeiſed, or where the Action is brought of the Seiſin or Poſſeſſion of the Infant. 6 Co. 3. b. 4. a. Dyer 137. a.

* Therefore in a Writ of Right, as Heir to his Anceſtor, (*q*) the Parol ſhall demur without any Plea, becauſe this is an Action *Anceſtorel Droiturel*, and he lays the Eſplees in his Anceſtor. *Page 157

6 Co. 3. b.— And this is not altered by the Statute of *Glouceſter*, c. 2. 2 Inſt. 291. (*q*) Though the Battel may be deraigned by Champions. Dyer 137. pl. 24.

So in a *Formedon in Reverter* the Parol ſhall demur without Plea, becauſe he claims as Heir in Fee-ſimple to the Reverſion, and not *per Formam Doni*, and therefore the Right of the Fee would be bound. Rol. Abr. 137. 6 Co. 3. Dyer 137.

But on a *Formedon in Deſcender* and *Remainder*, the Parol ſhall not demur without Plea, (*r*) becauſe *Voluntas Donatoris in Charta ſua manifeſte expreſſa de cætero obſervetur*, and being founded on what is exactly expreſſed in the Deeds, though it be a *Droiturel* Action, yet it may be proſecuted during Minority; but if the Tenant plead in bar a Warranty and Aſſets, there the Parol ſhall demur, becauſe that concerns alſo all the other Inheritance of the Infant. Rol. Abr. 137. 2 Inſt. 291. 6 Co. 4. a. (*r*) Becauſe this is a Writ of Poſſeſſion. Rol. Abr. 137.

In a *Sur cui in Vita* the Parol ſhall demur for the Nonage of the Demandant, without any Plea pleaded. Rol. Abr. 137.

In a Writ of *Warrantia Chartæ* brought by an Infant the Parol (*s*) ſhall not demur for his Nonage, though the Warranty was made to his Anceſtor. Rol. Abr. 137. (*s*) Otherwiſe if the Defendant denies the Deed. Rol. Abr. 141.

In

Rol. Abr. 140. In Replevin againſt an Infant, if he avows upon the Plaintiff, and the Plaintiff ſhews forth the Releaſe of the Father of the Infant to hold by leſs Services, yet the Parol ſhall not demur.

Rol. Abr. 140. In Treſpaſs *Vi & Armis* againſt an Infant, who juſtifies, for a Rent *aut hujuſmodi*, as Heir to his Father, if the other ſhews forth a Deed made by the Anceſtor in Diſcharge, yet the Parol ſhall not demur, but he ought to anſwer to the Deed immediately.

Rol. Abr. 137. 2 Inſt. 112. In a Writ of *(d)* Right of Ward the Parol ſhall not demur for the Nonage of the Demandant, though this be a Writ of Right.

(d) So in *Eſcheat*, *Ceſſavit*, *Droit ſur Diſclaimer* brought by an Infant, becauſe he hath the Seignory in Poſſeſſion, in reſpect of which he claims, and no Right to the Land was ever in the Anceſtor. 6 Co. 3. b. Dyer 137. pl. 25.

Dyer 104. pl. 10. And this is not altered by the Statute of *Gloucester*, c. 2. 2 Inſt. 291. If an Infant aliens within Age, and dies within Age, and his Heir brings a *(e) Dum fuit infra Ætatem*, the Tenant may pray that the Parol may demur, and yet the Action did not deſcend, but the Right only; for the Father could not have this Action, becauſe he died within Age, ſaid in *(f)* *Markal*'s Caſe, and ſeems to be intended without Plea pleaded.

(e) So in a *Dum non fuit compos Mentis*. 6 Co. 4. *(f)* 6 Co. 4. b.

And. 24. *Sandys* and Sir *Edward Bray* adjudged. Dalſ. 37. If in a *Scire facias* to execute a Fine, by which a Remainder was limited to the Grandmother of the Plaintiff, whoſe Heir, *&c.* the Defendant prays the Parol may demur, yet he ſhall anſwer over, becauſe he does not plead the Deed of his Anceſtor.

S. C. adjudged; the rather, becauſe no Freehold is demanded by the Writ, but an Execution of the Fine only. Kelw. 204. S. C. adjudged, upon the Reaſon in Dalſ. Moor 35. pl. 114. S. C. adjudged. Moor 16. pl. 59. ſeems to be the ſame Caſe adjudged, though the particular Eſtate was determined in the Life of the Demandant's Father; and ſaid, if the Defendant had pleaded the Deed of the Anceſtor, *&c.* it ſhould have demurred. N. Bendl. 121. S. C. adjudged. 6 Co. 3. a. S. C. cited. Dyer 138. pl. 27. like Point cited.

*Page 158 * 3. Upon what Plea pleaded the Parol ſhall demur.

6 Co. 3. b. Rol. Abr. 141. In an Action of the Poſſeſſion of the Infant himſelf, the Parol ſhall not demur upon any Plea pleaded.

6 Co. 3. b. Rol. Abr. 141. As in a Writ of Entry of a Diſſeiſin done to himſelf, brought by an Infant, if the Tenant pleads the Feoffment of the Father of the Demandant, with Warranty to him, yet the Parol ſhall not demur, becauſe this is brought of his own Poſſeſſion.

2 Inſt. 411. 8 Co. 50. 6 Co. 4. b. So in an Aſſiſe the Parol ſhall not demur for the Nonage of the Demandant, though the Deed of his Anceſtor be pleaded in bar, becauſe this is brought of his own Poſſeſſion, and the Circumſtances ſhall be inquired in it.

Roll. Abr. 141. In a *Formedon in Deſcender* if the Tenant pleads the Feoffment of the Anceſtor of the Demandant, with Warranty and *(g)* Aſſets, and the Demandant *(h)* denies the Deed, the Parol ſhall demur for the Nonage of the Demandant.

(g) The ſame Law, if a collateral Warranty be pleaded in bar of this Action. Roll. Abr. 141. *(h)* But whether without denying the Deed the Parol ſhall demur, *quære*; & *vide* Rol. Abr. 141. [*vide infra.*]

Rol. Abr. 141. In a *Quare Impedit* if a Feoffment of an Acre to which an Advowſon is appendant, with Warranty of the Anceſtor of the Defendant, is pleaded, with Aſſets from the ſame Anceſtor, though the Defendant be within Age, yet the Parol ſhall not demur, for the Miſchief of the Lapſe incurring in the mean Time.

In

In an Action Real if the Tenant pleads in bar the Feoffment of the Anceſtor of the Demandant, with Warranty to *J. S.* and his Aſſigns, whoſe Aſſignee he is, and ſays, that Aſſets deſcended to the Plaintiff; to which the Demandant ſays, nothing deſcended; in this Caſe the Parol ſhall demur, becauſe though the Feoffment and Warranty is not in queſtion, but only the Aſſets, which the Infant may well try, yet if he takes this Iſſue, the Deed of the Anceſtor ſhall be held to be confeſſed by him. Rol. Abr. 142.

So, for the ſame Reaſon, if in a *Formedon in Deſcender* the Tenant pleads a Feoffment by the Anceſtor of the Demandant to *A.* and *B.* the Father and Mother of the Tenant, and to the Heirs of the Father with Warranty, and that they are dead, and avers that Aſſets are deſcended to the Demandant within Age, though the Demandant ſays, that *B.* the Mother of the Tenant, is yet living. Rol. Abr. 142.

In an (*c*) Aſſiſe (*d*) againſt an Infant if the Iſſue be, whether the Tenant be a *Baſtard* or *Mulier*, which is to be tried by the Biſhop, by which his Blood is to be bound perpetually, yet the Parol ſhall not demur, becauſe this is of his own Wrong, and there ſhall be no Delay in this Writ. Rol. Abr. 142.

(*c*) But otherwiſe it is in a *Formedon in Deſcender*; for there if the Iſſue be, whether the Tenant be a Baſtard, the Parol ſhall demur. Rol. Abr. 142.

(*d*) But otherwiſe it is if the Iſſue be, whether the Demandant be a Baſtard. Rol. Abr. 142.

4. For the Nonage of what Perſon the Parol ſhall demur.

The Parol ſhall not demur for the Nonage of the King, becauſe the Law always adjudges him of full Age. Rol. Abr. 142.

In an Action brought by Baron and Feme for the Inheritance of the Feme, the Parol ſhall not demur for the Nonage of the Baron, becauſe in the Right of the Feme. Rol. Abr. 142.

In a Writ of *Meſne* brought by Baron and Feme in Right of the Feme, the Parol ſhall not demur for the Nonage of the Feme. Rol. Abr. 142.

* In *Detinue* againſt an Executor upon a Delivery to the Teſtator, the Parol ſhall not demur for the Nonage of the Executor. *Page 159 Rol. Abr. 142.

In an Action of Debt brought againſt Baron and Feme, upon an Obligation of the Anceſtor of the Feme, the Parol ſhall demur for the Nonage of the Feme. Rol. Abr. 142.

In a *Præcipe quod reddat* againſt Baron and Feme of Land that the Feme had by Deſcent, the Parol ſhall demur for the Nonage of the Feme, though the Baron be of full Age. Rol. Abr. 142.

A Feme received for Default of her Huſband ſhall have her Age, though the Baron was of full Age. Rol. Abr. 142.

5. In reſpect to what Eſtate or Intereſt the Parol ſhall demur *. * *Vide ante* 152. (L.)

If an Infant be in by (*a*) Purchaſe, he ſhall not have his Age. Carter 88. Rol. Abr. 143.

(*e*) If an Infant be in by Abatement, and not by Deſcent, he ſhall not have his Age. Rol. Abr. 143.——But if the Heir of the Diſſeiſee enters, he ſhall have his Age. Rol. Abr. 144.——So if the Tenancy eſcheats to an Infant who is in by Deſcent in the Seignory, he ſhall have his Age. Keilw. 105.

As if there be a Leaſe for Life, the Remainder to the right Heirs of *J. S.* who is dead at the Time, his Heir within Age, he ſhall not have his Age when he comes in by *Aid Prayer*, for he hath it by Purchaſe. Rol. Abr. 143.

Rol. Abr. 143. If an Infant hath an Eſtate in Poſſeſſion by Purchaſe ſufficient to anſwer the Action, though he hath the Reſidue of the Eſtate by Deſcent, he ſhall not have his Age.

Rol. Abr. 143. And if the Father and Son and Heir purchaſe to them and the Heirs of the Father, and after the Father dies, and a real Action is brought againſt the Son, he ſhall not have his Age, although he hath the Remainder in Fee by Deſcent.

Rol. Abr. 143. If Leſſee for Life (*b*) ſurrenders to an Infant who hath the Reverſion by Deſcent, he ſhall not have his Age.

(*b*) For *quoad* Strangers the Eſtate for Life hath Continuance. Co. Lit. 338. b.

Rol. Abr. 143, 144. If the Father enfeoffs his Son and Heir in Fee (*c*) with Warranty, and dies, the Son ſhall have his Age, becauſe the Warranty is extinct, and therefore in lieu thereof he ſhall be adjudged (*d*) in by Deſcent.

(*c*) So if he be infeoffed by his Father without Warranty; for he may elect to be in of the one Eſtate or of the other. Rol. Abr. 144.

(*d*) So if Tenant in Tail enfeoffs his Iſſue, and dies, the Iſſue ſhall have his Age, for he is remitted, and ſo in by Deſcent. Rol. Abr. 144.

Rol. Abr. 144. If an Infant be enabled by Cuſtom to have and alien his Land at a certain Time, as at fifteen Years of Age, or when he can meaſure a Yard of Cloth, after this Time, and before his full Age of twenty-one, he ſhall have his Age; for the Cuſtom being to be conſtrued ſtrictly, does not extend to this collateral Thing.

Rol. Abr. 143. In a *Formedon in Reverter*, if the Demandant makes himſelf Heir to the Donor, as Heir at Common Law, and the Tenant claims as younger Son, as Heir to the Donor by the Cuſtom, and prays the Parol to demur for his Nonage, yet it ſhall not demur, becauſe they both claim to be Heir to the ſame Perſon.

Rol. Abr. 143. 6 Co. 4. b. S. P. cited and ſaid, for it is principally to try the Privity of Blood. In a *Nuper obiit* by the Aunt againſt the Niece, and a Demand of the Seiſin of the Father of the Aunt, who was the Grandfather of the Tenant, the Tenant, who is in by Deſcent from her Mother, ſhall not have her Age, becauſe they are one Heir, and of equal Condition as to Privity of Blood, where the common Anceſtor died laſt ſeiſed, as the Caſe muſt be intended.

*Page 160 Rol. Abr. 143. * But if Land deſcends to *A.* and *B.* Coparceners, and they enter, and have Iſſue, and die ſeiſed, in a *Nuper obitt* by one of the Iſſue againſt the other, within Age, the Parol ſhall demur for the Nonage of the Tenant, becauſe their common Anceſtor did not die laſt ſeiſed.

Rol. Abr. 144. If a Deviſe be to the Heir in Tail, and if he dies, *&c.* that another ſhall ſell it, the Deviſee ſhall not have his Age, becauſe he hath the Eſtate-Tail by Purchaſe.

Rol. Abr. 144. If a Gift be made to the Father for Life, the Remainder in Tail to the Son, the Remainder to the right Heir of the Father, and after the Father dies, and the Fee deſcends upon the Son within Age, yet he ſhall not have his Age, becauſe he hath the Eſtate Tail by Purchaſe.

Rol. Abr. 144. So if a Gift be made to the Father for Life, the Remainder to a Stranger in Tail, the Remainder to the Son in Tail, the Remainder to the right Heirs of the Father, and after the Stranger dies without Iſſue, and after the Father dies, and the Fee deſcends upon the Son within Age, yet he ſhall not have his Age, becauſe he hath the Tail by Purchaſe.

N. Bendl. 256. *Waller* and *Lamb*, adjudged. If *A.* being Tenant in Tail, infeoff *B.* to the Uſe of *A.* and his Wife for Life, and after to the Heirs of *A.* and *A.* dies, and the Wife grants her Eſtate to *C.* and his Heirs, during the Life of the Wife, and *C.* enters, and

And. 21. S. C. adjudged. Carter 88. S. C. cited.

and dies, and the Lands descend to his Heir, against whom the Issue in Tail brings a *Formedon*, the Defendant shall not have his Age, because he is in only as an Occupant, and no Estate of Inheritance descended.

6. Where for the Nonage of the Vouchee.

If an Infant be (*a*) vouched and bound to Warranty by the Deed of his Ancestor, the Parol shall demur for the Nonage of the Infant. Rol. Abr. 144.

(*a*) When for the Nonage of the Vouchee in a Writ of Entry *sur Disseisin*, notwithstanding the Statute of *Westminster* 1. c. 46. *vide* 2 Inst. 257. Dyer 137. pl. 24.

If two Coparceners in Gavelkind are vouched as one Heir, the Parol shall demur for the Nonage of the youngest, if he be seised; yet he is vouched but for his Possession. Rol. Abr. 144.

So if one Coparcener be vouched, and hath Aid of the other Coparcener, who is within Age, the Parol ought to demur. Rol. Abr. 144.

If a Feme Tenant in Dower vouches the Heir of her Husband, and the Husband of the Heir, the Parol shall not demur for the Nonage of the (*b*) Baron, his Wife being of full Age, because the Baron is vouched only for the Inheritance of the Feme. Rol. Abr. 144.

(*b*) But the Parol ought to have demurred, if both had been within Age, or the Feme only. Rol. Abr. 144, 145.

If the youngest Son enter into the Inheritance descended, the Parol shall not demur for his Nonage, if he be vouched as Heir within Age, if the eldest Son be of full Age, who is Heir in Right, because he cannot be Heir by Continuance. Rol. Abr. 145.

If a Bastard be vouched within Age by reason of his Possession, the Parol shall demur for his Nonage, because he may be Heir by Continuance all his Life, without Claim to the contrary. Rol. Abr. 145. Co. Lit. 244. 8 Co. 101.

If an Infant be vouched by Lessee for Life, by reason of the Reversion, which he hath by Descent, the Parol shall demur, although he hath not the Freehold by Descent. Rol. Abr. 145.

At Common Law if the Husband had aliened the Lands of his Wife, with Warranty, and died, and in a *Cui in Vita* by the Wife, or a *Sur cui in Vita* by the Heir of the Wife, the Alienee had vouched the Heir of the Husband within Age, the Parol should have demurred till the full Age of the Vouchee. 2 Inst. 455.

* But by the Statute of (*c*) *Westm.* 2. *cap.* 40. it is enacted, That if the Husband aliens the Right of his Wife, (*d*) the Suit of her or her Heir, after the Death of her Husband, shall not be delayed by the Nonage of the Heir (*e*) that ought to warrant, but the (*f*) (*g*) Purchasor shall (*h*) tarry till the Age of his Warrantor to have his (*i*) Warranty. *Page 161

(*c*) 13 E. 1. c. 40. But since the 32 H. 8. c. 28. (by which an Entry is given to the Wife or her Heir after an Alienation by her Husband) this Act is of little Use. 2 Inst. 456. (*d*) Extends only to a *Cui* or *Sur cui in Vita*, which are the prper Actions upon an Alienation by the Husband; for if the Wife is Tenant in Tail, and the Baron aliens, and dies, and she dies, her Issue cannot have a *Sur cui in Vita*, but a *Formedon*, in which the Purchaser may vouch the Heir of the Baron, and for his Nonage the Parol shall demur. 2 Inst. 455. (*e*) So that it extends only to the Heir of the Baron that aliened. 2 Inst. 445. (*f*) Intended only of *Ipse emptor*, not his Heir. 2 Inst. 456 ——So of the immediate Purchaser, and not his Alienee, though he may vouch the Heir of the Baron as Assignee. 2 Inst. 455. 4 Co. 50. a.——So intended only where the Purchaser is Tenant in Deed, not where he comes in as Vouchee or Tenant by Receipt, and vouches the Heir, &c. 2 Leon. 148. 1 Co. 15. a. 4 Co. 50. a. (*g*) Of any Estate of Freehold. 2 Inst. 546. (*h*) When he shall have a Re-summons. 2 Inst. 456. (*i*) Whether in Law or Deed. 2 Inst. 456.

7. Where for the Nonage of the *Prayee in Aid.*

Rol. Abr. 145. (*h*) But if

If in (*h*) Action againſt Tenant by the Curteſy he prays (*i*) in Aid of the Heir within Age, the Parol ſhall demur.

Error is brought againſt Tenant by the Curteſy, the Parol ſhall not demur for the Nonage of him in Reverſion, *per* Rol. Rep. 251. ſaid by *Houghton arguendo*, *quod Coke conceſſit*, becauſe he is not Tenant. (*i*) Where for the Nonage of the *Prayee in Aid* and Tenant by *Receipt* in a Writ of Entry, notwithſtanding the Statute of Weſtm. 1. c. 46. *vide* 2 Inſt. 257. Dyer 137. pl. 24. 2 Leon. 148.

Rol. Abr. 145. (*k*) So if Leſſee for Life hath Aid of him in Reverſion by Deſcent. Rol. Abr. 145.

If Leſſee for Life hath Aid of him in (*k*) Remainder within Age, who is in by Deſcent, the Parol ſhall demur; *ſecus* if he were in by Purchaſe.

Rol. Abr. 145.

If there be Leſſee for Life, the Remainder to the right Heirs of *J. S.* who is dead, and after the right Heir dies, his Heir within Age, and the Leſſee hath Aid of him, the Parol ought to demur, for he is in by Deſcent.

Rol. Abr. 145.

So if *J. S.* at his Death hath two Daughters his Heirs, and after the one dies, and her Part deſcends to her Daughter within Age, the Parol ought to demur for her Nonage, though the Aunt is in by Purchaſe.

Rol. Abr. 145. Rol. Rep. 323. S. C. cited.

In an Annuity againſt a Parſon, if he hath Aid of the Ordinary and Patron within Age, yet the Parol ſhall not demur for the Nonage of the Patron; for the Charge lies not upon the Patron, but upon the Parſon.

Rol. Abr. 145.

If two in Reverſion by Deſcent are received upon Default of the Leſſee, and the one is within Age, the Parol ſhall demur.

2 Inſt. 342. (*l*) Viz. 13. E. 1. c. 3. which *vide* explained 2 Inſt. 341.

If a Feme in by Deſcent be received for Default of her Huſband, the Parol ſhall demur for her Nonage, though the (*l*) Statute be *parata petenti reſpondere.*

Rol. Abr. 145-6.

In an Avowry for a Rent-charge reſerved upon a Purparty, if the Plaintiff Leſſee for Life hath Aid of him in the Reverſion within Age, who is in by Deſcent in the Reverſion, yet the Parol ſhall not demur, becauſe the Land is not in Demand.

Page 162 8. In what Caſes if the Parol demur againſt one it ſhall againſt another.

45 E. 3. 23. Rol. Abr. 146.

If two are vouched, if the Parol demurs for the Nonage of one, it ſhall for the other alſo.

Rol. Abr. 146.

If Aid is prayed of two Coparceners, *viz.* the Aunt and the Niece, and the Aunt hath the Remainder by Purchaſe, and the Niece is in within Age, and hath the Remainder by Deſcent, the Parol ſhall demur for both.

Rol. Abr. 146.

So if Aid be prayed by one Coparcener of two other Coparceners, of which one is within Age, and the other of full Age, the Parol ſhall demur for all.

Rol. Abr. 146.

If the Tenant vouch himſelf and *J. S.* as Heirs, and *J. S.* is within Age, the Parol ſhall demur for both.

In

In a (*a*) *Dum fuit infra Ætatem* by two Coparceners of the Seiſin of their Anceſtor, for the Nonage of one Demandant the whole Parol ought to demur. Rol. Abr. 146.

(*a*) So in a *Non compos Mentis* by two Coparceners of a Seiſing of their Anceſtor the Parol ſhall demur for both, for the Nonage of one. Rol. Abr. 146.

In a Writ of Entry *ſur Diſſeiſin* by two Coparceners, of which one is within Age, *qui non proſequitur* upon the Summons, yet the Parol ſhall demur againſt the other alſo. Rol. Abr. 147.

If a Writ of Error be brought againſt the Heir of the Recoverer within Age, and a *Scire Facias* againſt the Tertenant, if the Parol demurs for the Heir, yet it ſhall not demur as to the Tertenant; for the Heir ſhall not be at any Prejudice if it is reverſed as to the Tertenant. Rol. Abr. 147.

If four enter into (*b*) a Recognizance, and after one dies, his Heir within Age, in a *Scire Facias* againſt the Heir and the reſt, the Parol ſhall demur againſt all. Rol. Abr. 147. 3 Co. 13. a.

(*b*) So where two are bound in a Statute, and one dies, his Heir being within Age. Hetl. 59. Lit. Rep. 72.

In a *Scire Facias* againſt the Tertenants to have Execution of Damages recovered againſt *J. S.* if the Parol demurs againſt one of the Tertenants for his Nonage, it ſhall demur againſt all. Rol. Abr. 147.

In a *Scire Facias* if two Coparceners are received upon the Default of the Leſſee, and the Parol demurs for the Nonage of one of the Coparceners, it ſhall demur for both. Co. Lit. 146. a. 3 Co. 13. a.

If in Debt upon an Obligation againſt *B.* and *C.* Sons and Heirs of the Obligor, and againſt *D.* the Daughter and Heir of *A.* who was another of the Sons and Heirs of the Obligor in Gavelkind, Proceſs is continued till the Uncles are outlawed, and the Niece waived, and after the Uncles are pardoned, and bring a *Scire Facias* againſt the Plaintiff, who thereupon declares againſt them *ſimul cum* the Niece, and the Uncles plead their Niece is but of the Age of ſeven, *unde non intendunt quod durante Minori Ætate ſua* they ought to anſwer, *&c.* yet the Parol ſhall not demur; for the Niece is out of Court, and *quoad* her the Original is determined, and at her full Age no Re-ſummons could be ſued againſt her, but the Uncles only becauſe ſhe never appeared in Court. Dyer 239. pl. 39. *Hawtry* ver. *Anger.* N. Bendl. 148. pl. 205. Moor 74. pl. 203. And. 10. pl. 22. S. C. adjudged.

*9. In what Caſes the Demurrer of the Parol for Part ſhall be for all. *Page 163

In a Writ of Error upon a Judgment for divers Things againſt an Infant upon a Recovery by his Anceſtor, if the Infant diſclaims for Part, by which the Judgment is to be reverſed for Error therein, yet for the Nonage of the Infant the Parol ſhall demur for the reſt, and this ſhall make the Parol to demur alſo for that in which the Infant hath diſclaimed, becauſe it is but one Record; and therefore if he hath his Age as to Part, he ſhall have it for the Whole. 47 Aſſ. 4. Rol. Abr. 147.

The ſame Law in an Action againſt an Infant if he acknowledges the Action of the Demandant for Part, (*c*) yet if the Parol demurs for the reſt, it ſhall demur for all. Rol. Abr. 147.

(*c*) In a *Precipe quod reddat* the Tenant may confeſs the Action for Part, and pray his Age for the reſt. Bro. Age 9.

If an Infant brings a Writ of (*d*) Entry *ſur Deſſeiſin* to his Father, and the Tenant pleads the Releaſe of the Father as to Part of the Land in Demand, by which the Parol is to demur for this, yet it ſhall not demur for the reſt. Rol. Abr. 147.

(*d*) In a Writ of Entry *ſur Diſſeiſin* the *Per* Age is taken away by Weſtm. 2. c. 47. which *vide* 2 Inſt. 256.

In

Rol. Abr. 147. (c) This must be intended of an Aſſiſe of *Mortdanceſter*; for in an Aſſiſe of *Novel Diſſeiſin*, even at Common Law the Parol ſhould not have demurred. Rol. Abr. 141.

In an (c) Aſſiſe by three Coparceners, if the Tenant claims as Tenant by the Curteſy of the Whole, and prays in Aid of one of the Plaintiffs in Reverſion within Age, and hath Aid of him, by which the Parol ought to demur for the third Part that belongs to the Infant, and not for the reſt, yet becauſe the Aſſiſe ſhall not be taken by Parcels, it ſhall demur for the Whole.

10. Of the Prayer of Age and Counterplea.

6 Co. 5. a. The granting that the Parol ſhall demur in Judgment of Law is in favour of the Infant, therefore the Court *ex Officio* ought to grant it, though the Tenant will anſwer.

2 Inſt. 258. Raſt. Ent. 360. Where Age is granted, or the Parol demurs, the Writ does not abate; but the Plea is put without Day until full Age, at which Time there ſhall be a Re ſummons

Dyer 79. pl. 48. In a *Formedon* if the Tenant vouches *J. S.* as Couſin and Heir of, *&c.* and for his Nonage prays that the Parol may demur, he ought to ſhew how he is Couſin.

6 Co. 5. a. If in Dower the Tenant vouches one within Age, in favour thereof, he ought to ſhew a Deed.

Rol. Abr. 146. 4 Leon. 201. Dyer 256. pl. 4. N. Bendl. 118 pl. 151. If a Man hath Aid of an Infant, and of the King, becauſe the Infant is in Ward to him, after a *Procedendo* the Parol ſhall not demur upon Demand for the Nonage of the Ward; though this ought to have been granted, if he had demanded it at the Time of the *Aid Prayer*; for the *Procedendo* commands the Juſtices to proceed, and he ought to have ſhewn this in Chancery to ſtay the *Procedendo*.

3 Bulſ. 144. A Counterplea of Age is like an Eſtoppel, and therefore ought to be very plain and certain to every Intent.

Rol. Abr. 146. If a Man ſays in an Action (in which Age lies) that his Anceſtor was ſeiſed in Fee, and died ſeiſed, and this deſcended to him within Age, *Page 164* and prays his Age, (d) it is a good Counterplea (e) that his Anceſtor did not die ſeiſed.

(d) That he is a Baſtard, hath an elder Brother, or that his Father was attainted, *&c.* Dyer 137. pl. 26. 3 Bulſ. 144. *vide* and the ſeveral Authorities there cited, Rol. Rep. 325. and the Books there cited. Cro. Jac. 393.

(e) In a like Caſe the Demandant traverſes the Deſcent, and Day given the Tenant to adviſe what to do. Hob. 266.

32 E. 3. 55. Rol. Abr. 146. If an Infant upon Default of the Tenant prays to be received, becauſe the Tenant is Tenant by the Curteſy after the Death of his Mother, the Reverſion to him by Deſcent as Heir to his Mother, and prays the Parol may demur, it is a good Counter-plea of the Age, that the Land was given to the Mother and her firſt Huſband in ſpecial Tail, and the Huſband died without Iſſue, and ſhe took the Tenant for her ſecond Huſband, ſo the ſecond Huſband in by Abatement.

Amcotts ver. *Amcotts*. Sid. 252. Lev. 163. Raym. 118. Keb. 869, 900. S. C. adjudged. In a Writ of Error out of the Common Pleas the only Queſtion was, whether upon a Plea by the Defendant to have the Parol demur, (Iſſue being joined by the Infant that ſued by his Guardian, and it being tried, and found againſt the Infant) a peremptory Judgment ſhould be given againſt him, or only a *Reſpondeas Ouſter*: It had been argued and much laboured in *C. B.* that it ſhould be only a *Reſpondeas Ouſter*; but after great Debate, they held the Law to be manifeſtly clear, that every dilatory Plea that receives its Trial by the Country ſhall be peremptory, let it be of what Nature ſoever, though this Caſe was a Caſe of as much Compaſſion as could be, and the Court would have ſhewn the Infant any lawful Favour; and of the ſame Opinion was the Court of *B. R.* upon the Writ of Error.

If

[If Error is brought on a Judgment, that the Parol ſhall demur, the Nonage cannot be pleaded to the Writ of Error, but the Infant ſhall anſwer to the Errors aſſigned. 2 *L. Raym.* 1433. *Stra.* 861.]

INFORMATIONS.

(A) Of the Nature and ſeveral Kinds of Informations. 164.
(B) In what Caſes they lie. 166.
(C) In what Manner they are to be laid. 169.
(D) Of filing an Information, the Proceedings thereon, and the Proviſions made herein by Statute. 169.

(A) Of the Nature and ſeveral Kinds of Informations.

AN Information may be defined an Accuſation or Complaint exhibited againſt a Perſon for ſome criminal Offence, either immediately againſt the King, or againſt a private Perſon, which, from its Enormity or dangerous Tendency, the Public Good requires ſhould be reſtrained and puniſhed, and differs principally * from an Indictment in this, that an Indictment is an Accuſation found by the Oath of twelve Men, whereas an Information is only the Allegation of the Officer who exhibits it.

* Page 165

This Difference between Informations and Indictments has made(*a*) ſome Men conceive, that this kind of Proceeding was utterly unlawful, as being not only contrary to the original Frame and Nature of our Laws, but alſo contrary to (*b*) *Magna Charta*, and ſeveral other Statutes, which require that no Man ſhall be put to anſwer, *&c.* but upon Indictment or Preſentment.

(*a*) *Vide* Sir *Francis Winnington*'s Argument. 5 Mod. 456. and Show. 106, *&c.*—

And in 2 Hawk. P. C. it is ſaid to have been holden, that the King ſhall put no one to anſwer for a Wrong done principally to another, without an Indictment or Preſentment, but that he may do it for a Wrong done principally to himſelf; for which is cited Theol. b. 1. c. 4. ſ. 9, 10, *&c.* Finch 336. Fitz. *Action ſur le Caſe*, *&c.*——Alſo from the Abuſes made of them they have been complained of as unlawful, as particularly in the Reign of *H* 7. when by Force of a Statute made in the 11th Year of that Reign, which impowered Juſtices of Aſſiſe and Peace to proceed on all Penal Statutes by Information, they were made uſe of by *Empſon* and *Dudley* to the great Oppreſſion of the People: But this Statute was repealed by 1 *H.* 8. c. 6. 2 Hal. Hiſt. c. 20. (*b*) Cap. 29. and 5 E. 3. c. 9. 25 E. 3. c. 4. 28 E. 3. c. 3. and 42 E. 3. c. 3.

But though, as my Lord *Hale* obſerves, in all Criminal Cauſes the moſt regular and ſafe Way, and moſt conſonant to the Statute of *Magna Charta*, *&c.* is by Preſentment or Indictment of twelve ſworn Men, yet he admits that

2 Hal. Hiſt. P. C. c. 8.

(c) But no Information will lie for a capital Crime, or for Miſpriſon of Treaſon.

that for Crimes (c) inferior to Capital ones, the Proceedings may be by Information; and this, from the (d) long and frequent Practice, is now certainly eſtabliſhed as Part of the Law of the Land; and therefore at this Day the following Kinds of Informations may be exhibited, wherever the Nature of the Offence deſerves ſuch a Proceeding.

2 Hawk. P. C. 260. 2 Hal. Hiſt. P. C. c. 20. (d) That Informations were at Common Law. 5 Mod. 463. *per Holt* C. J. & *totam Curiam.*—*Et vide* Show. 106, &c.

2 Hawk. P. C. 260. & *vide* Carth. 465-6. That no ſuch Information can be brought on a Penal Statute.

1*ſt*, For an Offence principally and more immediately againſt the King an Information may be exhibited in the Name of the King's Attorney General, and ſuch Information may be filed without any Application or Leave of the Court, and the Party ſhall be obliged to anſwer the ſame; alſo the Statute 4 & 5 *W. & M. cap.* 18. (*infra* 170.) which requires a Recognizance for Payment of Coſts from Perſons exhibiting and proſecuting Informations, does not extend to Informations filed by the King's Attorney General, and it is (e) ſaid that the Court will not quaſh ſuch Information on Motion, but will oblige the Party to demur or plead thereto.

(e) Salk. 372. pl. 13. Ld. Raym. 370. 2 Hawk. P. C. 261. 2 Hal. Hiſt. P. C. c. 20.

2*dly*, On Application, and Leave of the Court, grounded on Motion and Affidavit of ſome Miſdemeanor, which if true, doth from its evil Tendency merit ſuch Proſecution, the Court allows of the filing of an Information in the Name of the Maſter of the Crown-Office; and of ſuch Kind of Informations there are numberleſs Precedents in the Crown-Office ‡.

‡ See the Statute 4 & 5 *W. & M.* c. 18. *infra* 170.

But for this *vide* Tit. *Actions Qui tam*, or *Actions on Penal Statutes*, & *ſupra* n.

3*dly*, Where by many Penal Statutes the Proſecution upon them is by the Acts themſelves limited to be by Bill, Plaint, Information, or Indictment, there, without Doubt, the Proſecution may be by Information as well as by any other of theſe Methods; alſo of common Right ſuch an Information, or an Action in the Nature thereof, may be brought for Offences againſt Statutes, whether they be mentioned by ſuch Statutes or not, unleſs other Methods of Proceeding be particularly appointed, by which all others are impliedly excluded.

4*thly*, Informations in Nature of (f) a *Quo Warranto* may be, and frequently are, exhibited, with Leave of the Court, for uſurping Privileges, Franchiſes, &c. which in ſome Reſpects is (g) a Civil Suit, as it is uſed as a proper Means to try a Right, though it puniſhes the Miſdemeanor, ſuch as the Uſurpation, &c.

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(f) For the Writ of *Quo Warranto*, and how it differs from an Information in Nature of a *Quo Warranto*, *vide* 2 Inſt. 282, 495. Latch 46. Sid. 86. Old N. B. 107. Cro. Jac. 259, 260, 528. 3 Bulſ. 54. Cro. Car. 311.—Of the Proceſs on ſuch Information, Carth. 503, Ld. Raym. 426. Salk. 55. Comb. 19. pl. 4. Salk. 374. pl. 15. —For the Judgment thereon, Palm. 1, 2. 2 Rol. Rep. 113. Cro. Jac. 260. Salk. 374. pl. 15. 4 Mod. 55, 58. Carth. 218. (g) And being a kind of Civil Proceeding, there ought to be no great Fine ſet on the Party.

[Information in Nature of a *Quo Warranto* in what Manner grantable, and where ſeveral Defendants may be put in one Information. See 9 *Ann. cap.* 20. *ſect.* 4.—What Judgment ſhall be given and Coſts recovered by or againſt the Relator, *Id. ſect.* 5.——The Statute of Jeofails extended to ſuch Informations. *Id. ſect.* 7. See *infra* 171-2.]

(B) In what Caſes an Information will lie.

2 Hawk. P. C. 260. and ſeveral Authorities there cited.

HERE we ſhall lay down what hath been collected by Serjeant *Hawkins*, and is, as he ſays, every Day's Practice, agreeable to numberleſs Precedents, *viz.* either in the Name of the King's Attorney General, or of the Maſter

Maſter of the Crown Office, to exhibit Informations for Batteries, Cheats, ſeducing a young Man or Woman from their Parents, in order to marry them againſt their Conſent, or for any other wicked Purpoſe, *(a)* ſpiriting away a Child to the Plantations, reſcuing Perſons from legal Arreſts, Perjuries, and Subornations thereof, Forgeries, Conſpiracies, (whether to accuſe an innocent Perſon, or to impoveriſh a certain Set of lawful Traders, *&c.* or to procure a Verdict to be unlawfully given, by cauſing Perſons bribed for that Purpoſe to be ſworn on a *Tales*,) and other ſuch like Crimes, done principally to a private Perſon, as well as for Offences done principally to the King; as for Libels, ſeditious Words, Riots, falſe News, Extortions, Nuſances, (as in not repairing Highways, or obſtructing them, or ſtopping a common River, *&c.*) Contempts, as in departing from the Parliament without the King's Licence, diſobeying his Writs, uttering Money without his Authority, eſcaping from legal Impriſonment on a Proſecution for a Contempt, neglecting to keep Watch and Ward, abuſing the King's Commiſſion to the Oppreſſion of the Subject, making a Return to a *Mandamus* of Matters known to be falſe; and in general any other Offences againſt the Public Good, or againſt the firſt and obvious Principles of Juſtice and common Honeſty †.

(a) Skin. 47. pl. 19. S. P.

†The Court will grant an Information againſt ſeveral Perſons, for taking a young Woman from her Guardian aſſigned in Chancery, and marrying her, though ſhe went voluntarily, and though Chancery has committed Defendants for a Contempt. Stra. 1107. Andr. 310.——The Court will grant an Information for taking away a Natural Daughter under Sixteen from her putative Father, under Stat. 4 & 5 *P. & M.* c. 8. Stra. 1162.—The Court will not grant an Information againſt a Juſtice, for refuſing to condemn an Horſe under Stat. 5 Geo. c. 12. on the Oath of the Perſon ſeiſing, and in the Abſence of the Owner. Stra. 1181.—If an Attorney, a Commiſſioner to take Affidavits, in *B. R.* examines on Oath, without putting in Writing, upon an Arbitration, the Court will grant an Information. Wilſ. 7.—So if a Juſtice commits a Man for Non-payment of an illegal Fee, as One Shilling for diſcharging his Warrant. Wilſ. 7.—If the Overſeers of the Poor procure a Man (for Ten Pounds and a fat Hog) to marry an Ideot, chargeable to their Pariſh, whereby ſhe and her Child become chargeable to the Man's Pariſh, the Court will grant an Information. Wilſ. 41.——The Court never grants an Information (on a Penal Statute) where the Penalty veſts in the Crown only; the Attorney-general muſt file it. Stra. 1234——Therefore if the Suit on a Penal Statute, as on 12 Ann. c. 16. for Uſury, is lapſed by Time to the Crown, the Court will not grant an Information. *Ibid.*——The Court will not grant an Information againſt a Man for ſending a Challenge, if it appears that the Party applying had previouſly ſent Letters to him, which imported a Challenge; though, if both Parties apply for Informations, the Court will grant them. 1 Bur. 316.——The Court will not grant it on the Application of notorious Cheats, againſt other Cheats, for a Conſpiracy to cheat them at a Race. 1 Bur. 548.——The Court will not grant an Information againſt a Juſtice of Peace, though he has acted irregularly, (as by committing a Man without the Proſecutor's Oath and Recognizance) if it appears clearly that he acted without any bad, oppreſſive, or injurious Intention, but they will not give him Coſts. 2 Bur. 719, 1162.——Nor againſt a Juſtice who hears a Charge and does not proceed on it, becauſe he thinks it is not within the Proviſion of any Law; even if ſuch Opinion is erroneous: if it is right, they will diſcharge the Rule to ſhew Cauſe with Coſts. 2 Bur. 785.——The Court will grant an Information for detaining a Woman addicted to drinking, and uſing Arts to prevail with her to make a Will. 2 Bur. 1099.——The Court will not grant an Information on the Application of the Attorney-general, in Caſes proſecuted by the Crown, for he may exhibit one himſelf. 3 Bur. 1564.—An Information lies againſt a Juſtice, without whom a Seſſions cannot be held, for voluntarily abſenting himſelf. Stra. 21.——For refuſing to put an Act in Execution. *Id.* 413.—For bribing Perſons to vote at Corporation Elections. 2 Ld. Raym. 1377.——For publiſhing an obſcene Book. Stra. 788.——For Blaſphemy, *Id.* 834.——Againſt Judges of an inferior Court, for unduly diſcharging a Debtor. Hardw. 135.——Againſt a Captain of a Man of War, in Harbour, for refuſing to let Coroner come on Board to take an Inquiſition. Andr. 231. Stra. 1097.——For keeping great Quantities of Gunpowder, as for a Nuiſance. Stra. 1167.——With Reſpect to Juſtices, in making Orders of Removal, and not ſummoning the Party, *&c.* ſee Andr. 238.—And in other Caſes for not ſummoning. Andr. 272.——An Information does not lie for Facts committed on the High Seas; for an Information is local. Stra. 918. See farther on the Subject generally. 6 Com. Dig. 359. *&c.*

An Information was exhibited againſt *D.* an Attorney of *C. B.* for ſpeaking ſcandalous and reproachful Words of Sir *John Kay*, Knight of the Shire for the County of *York*, and a Juſtice of Peace, *&c.* concerning his ſaid Office of Juſtice of Peace, and the exerciſing thereof; and upon Demurrer to this Information it was argued, that it would not lie for ſcandalous

Carth. 14, 15. The *King* ver. *Darby.*

lous Words ſpoken only of a particular Perſon, becauſe he might have an Action on the Caſe to recompence him in Damages; though it was admitted, that ſuch a Proceeding might be warranted for Libels, or for diſperſing defamatory Letters, becauſe by ſuch Means the public Peace might be diſturbed, and Diſcords fomented among Neighbours, which might at laſt be a public Injury, but that there was no ſuch Miſchief in the preſent Caſe. On the other Side it was inſiſted, that this Information was founded on ſufficient Matter, becauſe this Proſecution is not only as it reſpects the Perſon of Sir *John Kay*, but it relates to him as he is a publick Magiſtrate, and one who is ſubordinate to the Government, and therefore ſuch defamatory Words are a Reproach to the ſupreme Governor, by whom Magiſtrates are intruſted, and from whom they derive their Authority, and it will not be denied but that Words reflecting on the public Government are puniſhable at the Suit of the King by Information; and for this Reaſon the Court held that an Information would lie, and thereupon gave Judgment againſt the Defendant, and fined him an hundred Marks.

An Information was exhibited by the Attorney General for conſpiring to deſtroy the King's Revenue of the Exciſe: And whereas the King by Indenture, *&c. prolat'*, had farmed the Exciſe of *London*, *Middleſex*, and *Southwark* to *A. B.* and *C.* rendering 11800*l. per Ann.* Monthly, *&c.* (*a*) that the Defendants, and others *ignot'. &c. illicite, factioſe, & ſeditioſe conſultaverunt & conſpiraverunt ad deſtruend' & depauperand' Farmarios Exciſæ prædict'*, *&c.* and many other Facts were laid in the Information tending to the deſtroying the Exciſeman, depauperating them, deſtroying the King's Revenue of Exciſe, pulling down the Exciſe-houſe, raiſing a Tumult amongſt the poor People, *&c.* But the Jury that were to try the Iſſue were unwilling to find this Matter, though expreſly proved, fearing it might be conſtrued no leſs than Treaſon, and ſo would only find that ſuch and ſuch of the Defendants *illicite, factioſe, & ſeditioſe ſe aſſemblaverunt, & illicite, factioſe, & ſeditioſe conſultaverunt, & conſpiraverunt ad depauerand' Farmarios Dom' Regis Exciſæ prædict', prout prædict' Attornat' Gen' Dom' Regis, &c. & quoad totam aliam materiam in Informatione contentam* find them Not guily, and find *J. S.* Not guilty generally. It was moved in Arreſt of Judgment, that here is no Offence at all found; for to conſpire to depauperate the King's Farmers is no Offence, for it may be done by lawful Means; and that they are laid to be the King's Farmers is but a Deſcription of their Perſons, not that it was at the King's Revenue of Exciſe the Conſpiracy ſtruck, and the *aſſemblaverunt* is not the Charge, for then it ought to have been laid *rioioſe & routoſe*, but only leading to the Conſpiracy; for they muſt aſſemble before they can conſult and conſpire. It was anſwered by the King's Counſel, that the *illicite aſſemblaverunt* is an Offence againſt the Law, and as properly and fully laid as could be; for *rioioſe* is where the Aſſembly is within Intent to commit a Riot, and *routoſe* for a Rout; but an Aſſembly may be illegal and puniſhable, and yet the Intention of that aſſembling may be good, as 21 *H.* 7. *Bro.* Tit. *Riots* 1. *per Fineux*; as if Men meet to prevent the Breach of the Peace between *A.* and *B. A.* going to Market, and *B.* threatening to beat him there, and to this Aſſembly no properer Epithet could be given than *illicite*; but beſides, all Manner of Combinations and Confederacies are unlawful without Reſpect to their End, 27 *Aſſ.* 44. *Moor*, Lord *Gray*'s Caſe, and *Cro Ja.* the Caſe of the Puritans petitioning; but this Conſpiracy, being to depauperate another Man, is unlawful in its End; and to anſwer the Objection that hath been made, it might be ſaid, that

*Page 167 Hil. 15 & 16 Car. 2. in B. R. *Rex* verſus *Starling* and other Brewers of *London*. Lev. 125. Sid. 174. Keb. 650. S. C.

(*a*) For a Challenge (to fight with Piſtols) denied, becauſe the Perſon applying was the firſt Sender of it, and ought therefore to be left to his ordinary Remedy, Bur. Rep 316. ſee *Id.* 402. This extraordinary Remedy ſhall not be allowed to *Cheats*, againſt other *Cheats*, *Id.* 548. againſt Juſtices of Peace, or refuſing to grant a Victualler's Licence under Stat. 26. Geo. 2. c. 31. denied; but if in ſuch Caſe they act partially, maliciouſly, or corruptly, an Information ſhall be granted, *Id.* 561. See 2 Bur. Rep. 653. for more of granting or refuſing Informations againſt Juſtices of Peace, ſee 2 Bur. Rep. 654, 720, 722, 985. againſt ſeveral Perſons for publickly ſinging in the High Street before a Tradeſman's Door libellous Songs, 2 Bur. Rep. 983.

altho'

altho' the depauperating of another Man may be by lawful Means, and the Conſequence of a lawful Act, yet that is becauſe it is not in the Intention of the Party, but it is *Damnum abſque Injuria*; but for a Number of Men to deſign and conſpire the depauperating of another, cannot certainly be lawful, for there the Damage to the third Party is their only Aim and End, and it is as well againſt the Law of Charity and common Society; and this might be ſaid, if there were nothing of the King's Farmers in the Caſe; but here the Inducement to the whole Charge in the Information is, that the Defendants, *&c. machinantes defraudare & deprivare dictum Dom' Regem de Redditu ſuo prædict'*, *& prædictos Farmarios, &c. deſtruere & depauperare*, did ſo and ſo; now this Inducement in the whole is applicable to every Branch of the Charge, and the Jury having found thoſe Charges as they are laid, *ſcilicet Modo & Forma prout*, *&c.* they have found conſequently that it was done by the Defendants, *machinantes*, *&c.* which makes it in their Intention to ſtrike at the King's Revenue, as well as in Conſequence. It was alſo urged for the Defendants, that for a bare Conſpiracy, without any Act done in Proſecution of it, no Information would lie: But *Curia cont.* for though there muſt be ſome Fact to be as Evidence of the Conſpiracy, as 9 *Co. Poulter*'sCaſe, yet it is the Conſpiracy that is the Crime, and that being found, it is enough. It was alſo urged by the King's Counſel, that the *Modo & Forma prout* in the Verdict extends to all the Charges of Fact that were done in Proſecution of this Conſpiracy, and the Acquittal *quoad tot' al' materiam*, *&c.* extends to the diſtinct Charges of Facts that have no Relation to this Conſpiracy: * But *Windham* Juſtice ſaid, the *Modo & Forma prout* could by no means make the Verdict comprehend other Matter of Fact than was expreſly found. It was moved by the King's Counſel, that they might inform the Court of the Heinouſneſs of this Conſpiracy, and how it was proved to be upon Evidence to the Jury that tried it, to aggravate the Offence, and induce the Diſcretion of the Court to increaſe the Fine; and the Caſe of *Machin* and *Tully* was cited, where a Battery being found by *Niſi Prius* againſt them, the Court informed themſelves of the Heinouſneſs of it by Affidavit, and thereupon vacated a Fine that was ſet in a Judge's Chamber, and ſet a high Fine upon the Defendants: But the Court refuſed it, ſaying, that were a Way to let in thoſe Matters of which the Jury has acquitted them, by ſuffering Affidavits to be made, but in *Machin*'s Caſe the Jury found the Defendants guilty of the Whole; and what needs Aggravation of this, which appears ſo foul as it is found? The Court after unanimouſly concurred, that Judgment ought to be given for the King, though as to the Offence found there was ſome Variety of Opinion. *Windham* diſtinguiſhed betwixt a Confederacy and a Conſpiracy, that for a Conſpiracy there ought to be ſome Fact done in Execution of it; ſo an Indictment cannot be maintained of a Man as a common Thief, or Champerter, or Foreſtaller, without laying ſome Fact of thoſe Offences; and in this he grounded himſelf upon 29 *Aſſ.* 45. but he held, that here the Defendants are found guilty of a Confederacy, which is not a Word of Art, but may be expreſſed in other Terms, and ſuch an Offence will this Matter found amount unto; he held the Information as to the unlawful Aſſembly not good, becauſe they wanted *Vi & Armis*; as to all the ſubſequent Facts, he held the Defendants acquitted; and as to the Intention of defrauding the King of the Rent, *&c.* he held the Acquittal did extend, becauſe they were acquitted of the Facts to which that was to be applied; but as to the Confederacy the Verdict has found enough, and tho' it were to a private End it were unlawful; but here it is more, and that which will aggravate it highly; for the Cuſtomers of the King are public Perſons, as the King's Revenue is of a public Concern, and it is ſet forth in the Information that theſe were Farmers of a very great Value; it is one Thing to beat a private Man, and another Thing to beat a public Officer, or the King's Servant; if a Man ſhall ſtrike the Sheriff, that has the Character of a pub-

* Page 168

a public Officer, it would be a high Offence. *Twiſden* held, that *Vi & Armis* was not neceſſary, and that they are found guilty of an unlawful Aſſembly; and in that my Lord Chief Juſtice concurred; as alſo that the Intention of defrauding and depriving the King of his ſaid Rent is implicitly found within the *Modo & Forma prout*, &c. for ſo ſhall the *machinantes*, &c. be applied. *Twiſden* and *Keeling* concurred, that for a Conſpiracy alone without any Proſecution, Information lay; and *Twiſden* ſaid, a Confederacy is a farther Degree of a Conſpiracy; and they all agreed, that the King's Revenue being concerned did highly aggravate the Offence; 2 *H.* 4. 7. and 8 *H.* 5. *b.* were cited, that for Maintenance of that a Monk ſhould be able to contract, and *Probi Homines de Dale* ſhould be a Corporation. Lord Chief Juſtice cited old *Magna Charta*, where there is a Statute againſt ſuch as ſhould undervalue Lands in the King's Hands. So Judgment was given for the King; but the ſettling of the Fine was reſpited, becauſe they would conſider as well *Qualitatem Delinquentis* as *Quantitatem Delicti*. In this Caſe were cited, 3 *E.* 3. 19. 43 *Aſſ. pl.* 38. Afterwards, the ſame Term, *Starling* was fined 300 Marks, and the reſt of the Brewers 100 Marks a-piece, but with ſome Apology by the Court for the Smallneſs of the Fine.

[An Information, by the Attorney-General, lies againſt one for unſhipping, &c. though another is in Execution on a Judgment for the ſame Offence. *Bunb.* 311.]

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*Page 169 * (C) In what Manner they are to be laid.

Vide Tit. *Indictments.*

(*a*) Salk. 375. pl. 18. Raym. 34. 2 Hawk. P. C. 261.

REGULARLY the ſame Certainty that is required in an Indictment is in like manner required in an Information; but it has been (*a*) held not to be neceſſary to repeat the Words *dat' Cur' hic intelligi & informari* in the Beginning of every diſtinct Clauſe, if the Want of them may be ſupplied by a natural and eaſy Conſtruction.

Carth. 226. The *King* ver. *Roberts.*

In an Information againſt *Roberts* the Ferryman over the River *Mercy*, which parts *Angleſea* from *Carnarvonſhire* in *Wales*, it was laid generally, *viz.* that this was an antient Ferry Time out of Mind, and that 1*d.* was the uſual Rate for the Paſſage of a Man and Horſe, 7*d.* for 20 Cattle, 2*d.* for 20 Sheep, &c. that *Roberts* being the common Ferryman, between 7 *Septembris Anno* 2. &c. and the Day of exhibiting this Information, *injuſte, oppreſſive, & deceptive cepit & extorſit de diverſis Ligeis & Subditis Domini Regis ignotis* to the Attorney General, paſſing that Way, *diverſas Denariorum ſummas exceden' antiquam Ratam & Pretium pro Paſſagio & Tranſportatione ſuis & Averiorum ſuorum, videlicet, pro Paſſagio & Tranſportatione cujuſlibet Perſonæ cum Equo ſuo* 2*d.* & *pro quibuſlibet* 20 *Catallis* 2*s.* & *ſic ſecund' Ratam prædict' pro majori vel minori numero Averiorum*, &c. The Defendant was found guilty, and it was moved in Arreſt of Judgment, that the Information was *too general and uncertain*, becauſe it did not alledge that any particular Perſon, or any certain Number of Cattle, were ferried over within the Time laid in the Information; neither did it mention any particular Perſon from whom the extorted Rates were taken, which it ought to do, that the ſingle Offence might certainly appear to the Court; and after great Deliberation *the whole Court was of that Opinion*; and *per Holt* Ch. Juſtice, in every ſuch Information a ſingle Offence ought to be laid and aſcertained, becauſe every Extortion from every particular Perſon is a ſeparate and diſtinct Offence; and therefore they ought not to be accumulated under a general Charge, as it is done in this Caſe, becauſe each Offence requires a ſeparate and diſtinct Puniſhment, according to the Quantity

tity of the Offence; and it is not poſſible for the Court to proportion the Fine or other Puniſhment to it, unleſs it is ſingly and certainly laid.

(D) Of filing an Information, the Proceedings thereon, and the Proviſions made herein by Statute.

IT ſeems to be the eſtabliſhed Practice at this Day not to admit of the filing of any Information (except thoſe exhibited in the Name of his Majeſty's Attorney General) without firſt making a Rule on the Perſons complained of to ſhew Cauſe to the contrary; which Rule is never granted but upon Motion made in open Court, and grounded upon Affidavit of ſome Miſdemeanor, which, if true, doth either for its Enormity or dangerous Tendency, or other ſuch like Circumſtances, ſeem proper for the moſt public Proſecution; and if the Perſon, on whom ſuch Rule is made, having been perſonally ſerved with it, do not at the Day given him for that Purpoſe give the Court good Satisfaction by Affidavit that there is no reaſonable Cauſe for the Proſecution, the Court generally grants the Information; and ſometimes, upon ſpecial Circumſtances, will grant it againſt thoſe * who cannot be perſonally ſerved with ſuch Rule; as if they purpoſely abſent themſelves, *&c.* 2 Hawk. P. C. 262. *Page 170

But if he ſhew good Cauſe to the contrary, as that he has been indicted for the ſame Cauſe, and acquitted, or that the Intent is to try a Civil Right which has not been yet determined, or that the Complaint is trifling or vexatious, *&c.* or where the Motion is for an Information in the Nature of a *Quo Warranto*, if he can ſhew that his Right hath been already determined on a *Mandamus*, or that it hath been acquieſced in many Years, or that it depends upon the Right of his Voters, which hath not been tried, or that it doth not concern the Public, but is wholly of a private Nature, the Court will not grant the Information without ſome particular Circumſtances, the Judgment whereof lies in Diſcretion. 2 Hawk. P. C. 262-3.

As to the Proviſions made herein by Statute, by the 4 & 5 *W. & M. cap.* 18. reciting, that divers malicious and contentious Perſons had, more of late than Times paſt, procured to be exhibited and proſecuted Informations in their Majeſties Courts of King's Bench at *Weſtminſter* againſt Perſons in all the Counties of *England*, for Treſpaſſes, Batteries, and other Miſdemeanors; and after the Parties ſo informed againſt had appeared to ſuch Informations, and pleaded to Iſſue, the Informers had very ſeldom proceeded any farther, whereby the Perſons ſo informed againſt had been put to great Charges in their Defence; and although at the Trials of ſuch Informations Verdicts had been given for them, or a *Noli proſequi* entered againſt them, they had no Remedy for obtaining Coſts againſt ſuch Informers; it is enacted, "That the Clerk of the Crown in the ſaid Court "of King's Bench for the Time being ſhall not, without expreſs Order to "be given by the ſaid Court in open Court, exhibit, receive or file any In"formation for any of the Cauſes aforeſaid, or iſſue out any Proceſs "thereupon, before he ſhall have taken or ſhall have delivered to him "a Recognizance from the Perſon or Perſons procuring ſuch Information "to be exhibited, with the Place of his, her, or their Abode, Title or "Profeſſion, to be entered, to the Perſon or Perſons againſt whom ſuch "Information or Informations is or are to be exhibited, in the Penalty of "twenty Pounds, that he, ſhe, or they will effectually proſecute ſuch In-

"forma-

" formation, and abide by and obſerve ſuch Orders as the Court ſhall " direct; which Recognizance the Clerk of the Crown, and alſo every " Juſtice of the Peace of any County, City, Franchiſe, or Town Corporate, " (where the Cauſe of any ſuch Information ſhall ariſe, are by the ſaid Sta- " tute impowered to take; and after the taking thereof by the ſaid Clerk " of the Crown, or the Receipt thereof from any Juſtice of the Peace, " the ſaid Clerk of the Crown ſhall make an Entry thereof upon Record, " and ſhall file a *Memorandum* thereof in ſome publick Place in his Office, " that all Perſons may reſort thereunto without Fee: And in caſe any " Perſon againſt whom any Information for the Cauſes aforeſaid, or any " of them, ſhall be exhibited, ſhall appear thereunto, and plead to Iſſue, " and that the Proſecutor of ſuch Information ſhall not at his and their " own proper Coſts and Charges within one whole Year next after Iſſue " joined therein procure the ſame to be tried; or if upon ſuch Trial a " Verdict paſs for the Defendant, or in caſe the ſame Informer procure a " *Noli proſequi* to be entered, then in any of the ſaid Caſes the ſaid Court " of King's Bench is authorized to award to the ſaid Defendant his " Coſts, unleſs the Judge, before whom ſuch Information ſhall be tried, " ſhall at the Trial of ſuch Information in open Court certify upon Re- " cord, that there was reaſonable Cauſe for exhibiting ſuch Information; " and in caſe the ſaid Informer ſhall not within three Months next after " the ſaid Coſts taxed, and Demand made thereof, pay to the ſaid De- *Page 171 " fendant the ſaid Coſts, then * the Defendant ſhall have the Benefit of " ſaid Recognizance.

" Provided, that nothing herein ſhall extend or be conſtrued to extend " to any other Information than ſuch as ſhall be exhibited in the Name of " their Majeſties Coroner, or Attorney in the Court of King's Bench for " the Time being, commonly called the Maſter of the Crown-Office."

In the Conſtruction hereof it hath been holden,

2 Hawk. P. C. 263. 1. That if Proceſs be iſſued on ſuch Information before ſuch Recognizance is given as the Statute directs, the ſame may be ſet aſide and diſcharged on Motion †.

†The Meaning of this Statute is, that the Clerk of the Crown ſhall not file any Information, without Leave, nor iſſue Proceſs thereupon, without Recognizance. Hardw. 247.

Carth. 503. The *King* ver. *the Town of Hertford.* Salk. 376. pl. 19. Ld. Raym. 426. S. C. adjudged. 2. That this Statute extends to all Informations except thoſe exhibited in the Name of his Majeſty's Attorney General, ſo that an Information in Nature of a *Quo Warranto*, though a proper Remedy to try a Right, in reſpect of which it may not in Strictneſs come within the Words *Treſpaſſes, &c.* yet being alſo intended to puniſh a Miſdemeanor, and as the Proceedings therein may be as vexatious as in any other, the ſame is within the Purview of the Statute, which, being a remedial Law, ſhall receive as large a Conſtruction as the Words will bear.

2 Hawk. P. C. 263. 3. That no Coſts can be had on this Statute on an Acquittal at a Trial at Bar, not only becauſe the Clauſe that gives Coſts, unleſs the Judge certify a reaſonable Cauſe, ſeems only to have a View to Trials at *Niſi prius*, but alſo becauſe a Cauſe which is of ſuch Conſequence as to be thought proper for a Trial at Bar, cannot well be thought within the Purview of the Statute, which was chiefly deſigned againſt trifling and vexatious Proſecutions.

Salk. 194. pl. 5. 4. That if there be ſeveral Defendants, and ſome of them acquitted, and others convicted, none of them can have Coſts.

2 Chan. Ca. 191. 2 Hawk. P. C. 263. 5. That wherever a Defendant's Caſe is ſuch as authorizes the Court to award him his Coſts, he has a Right to them *ex Debito Juſtitiæ*; for it ſeems a general Rule, that where Judges are impowered by Statute to do a Matter of Juſtice, they ought to do it of Courſe.

By

By the 9 *Annæ*, *cap.* 20. it is enacted, " That in caſe any Perſon or " Perſons ſhall uſurp, intrude into, or unlawfully hold and execute the " Office or Franchiſe of Mayor, Bailiff, Portreeve, or other Office within " a City, Town Corporate, Borough or Place in *England* or *Wales*, it ſhall " and may be lawful to and for the proper Officer of the Court of Queen's " Bench, the Court of Seſſions of Counties Palatine, or the Court of Grand " Seſſions in *Wales*, with the Leave of the ſaid Courts reſpectively, to ex- " hibit one or more Information or Informations in the Nature of a *Quo* " *Warranto*, at the Relation of any Perſon or Perſons deſiring to ſue or " proſecute the ſame, and who ſhall be mentioned in ſuch Information or " Informations to be the Relator or Relators againſt ſuch Perſon or Per- " ſons ſo uſurping, intruding into, or unlawfully holding and executing any " of the ſaid Offices or Franchiſes, and to proceed therein in ſuch Manner " as is uſual in Caſes of Informations in the Nature of a *Quo Warranto*; " and if it ſhall appear to the ſaid reſpective Courts, that the ſeveral " Rights of divers Perſons to the ſaid Offices or Franchiſes may properly " be determined on one Information, it ſhall and may be lawful for the " ſaid reſpective Courts to give Leave to exhibit one ſuch Information " againſt ſeveral Perſons, in order to try their reſpective Rights to ſuch Of- " fices or Franchiſes; and ſuch Perſon or Perſons, againſt which ſuch In- " formation or Informations in Nature of a *Quo Warranto* ſhall be ſued or " proſecuted, ſhall appear and plead, as of the ſame Term or Seſſions in " which the ſaid Information or Informations ſhall be filed, unleſs the " Court where ſuch Information ſhall be filed ſhall give further Time to " ſuch Perſon or Perſons, againſt whom ſuch Information ſhall be exhi- " bited, to plead; and ſuch Perſon or Perſons, who ſhall ſue or proſecute " ſuch Information, or * Informations in the Nature of a *Quo Warranto* *Page 172 " ſhall proceed thereupon with the moſt convenient Speed that may be."

And it is further enacted, " That in caſe any Perſon or Perſons againſt " whom any Information or Informations in the Nature of a *Quo Warranto*, " ſhall in any of the ſaid Caſes be exhibited in any of the ſaid Courts, ſhall " be found or adjudged guilty of an Uſurpation or Intruſion into, or un- " lawfully holding and executing of the ſaid Offices or Franchiſes, it ſhall " and may be lawful to and for the ſaid Courts reſpectively, as well to give " Judgment of *Ouſter* againſt ſuch Perſon or Perſons of and from any of " the ſaid Offices or Franchiſes, as to fine ſuch Perſon or Perſons reſpec- " tively for his or their uſurping, *&c.* and alſo to give Judgment that the " Relator or Relators in ſuch Information named ſhall recover his or their " Coſts of ſuch Proſecution; and if Judgment ſhall be given for the De- " fendant or Defendants in ſuch Information, he or they, for whom ſuch " Judgment ſhall be given, ſhall recover his or their Coſts therein ex- " pended againſt ſuch Relator or Relators; ſuch Coſts to be levied by " *Capias ad Satisfaciendem*, *Fieri facias*, or *Elegit*.

And it is further enacted, " That the Statute for the Amendment of " the Law, and all the Statutes of Jeofails, ſhall be extended to Informa- " tions in Nature of a *Quo Warranto*, and Proceedings thereon, for any " the Matters in the ſaid Act mentioned."

[For one ſingle Act in uſurping an Office, an Information lies at Common Law, for Puniſhment of the Offender, but not on this *Statute* which intitles to Coſts, and relates only to Franchiſes affecting Rights between Party and Party. 1 *Burr.* 402.

As to the Form of Proceeding, *&c.* on Informations, ſee 6 *Com. Dig.* 362. *&c.*]

INJUNCTION.

(A) The ſeveral Kinds of Injunctions, and when to be granted. 172.
(B) What ſhall be a Breach thereof, and how puniſhed. 176.
(C) How diſſolved. 177.

(A) Of the ſeveral Kinds of Injunctions, and when to be granted.

AN Injunction is a prohibitory Writ, reſtraining a Perſon from (a) committing or doing a Thing which appears to be againſt Equity and Conſcience.

(a) An Injunction to ſtay Reſtitution upon an Indictment of forcible Entry. Moor 820. pl. 1108.——Injunction to ſtay an Interloper's Trading to the *Eaſt Indies*, till the Validity of the *Eaſt-India* Company's Patent had been determined. Vern. 127. 2 Chan. Ca. 165.—An Injunction to ſtay an Action at Law for Money loſt at Gaming, though all the Circumſtances of Fraud were denied by the Anſwer. Vern. 489. 2 Vern. 71.——An Injunction denied to injoin a Perſon from over-ſtocking a Common, where he had granted Common in his Down to *J. S.* for 100 Sheep. 2 Vern. 116.

•Page 173 * Injunctions iſſue out of the Courts of Equity in ſeveral Inſtances; the moſt uſual Injunction is, to (b) ſtay Proceedings at Law; as (c) if one Man brings an Action at Law againſt another, and a Bill is brought to be relieved either againſt a Penalty, or to ſtay Proceedings at Law, on ſome equitable Circumſtances, of which the Party cannot have the Benefit at Law; in ſuch Caſe the Plaintiff in Equity may move for an Injunction, either upon an Attachment, or praying a *Dedimus*, or praying a further Time to anſwer; for it being ſuggeſted in the Bill, that the Suit is againſt Conſcience, if the Defendant be in Contempt for not anſwering, or pray Time to anſwer, it is contrary to Conſcience to proceed at Law in the mean Time; and therefore an Injunction is granted of Courſe; but this

(b) That the Court of Chancery would not grant an Injunction in a Criminal Matter under Examination in *B. R.* and that if it did, the Court of *B. R.* would break it, and protect any that would proceed in Contempt of it. 6 Mod. 16. *per Holt* C. J.—But where *A.* having obtained Judgment in Ejectment in *B. R.* againſt *B.* and had Execution awarded, but the Under Sheriff refuſed to execute it; whereupon, by Rule of that Court, he was ordered to attend, and for not attending, an Attachment was awarded againſt him; and *B.* after all this Proceeding, having, on his Bill exhibited in Chancery, obtained an Injunction, it was moved in Chancery, that this Injunction might not extend to ſtay Proceedings againſt the Under-Sheriff for his Contempt to the Court of *B. R.* for that he was proſecuted for a Contempt at the King's Suit, and it was unnatural for the King by his Injunction to ſtay his own Suit in another Court, the Offence being committed before the Bill exhibited; but the Motion was denied. Vern. 25. (c) So though the Court will not proceed againſt a Member that has Privilege of Parliament, yet if a Parliament Man ſues at Law, and a Bill is brought in Chancery to be relieved againſt that Action, the Court will make an Order to ſtay Proceedings at Law till Anſwer, or farther Order. Vern. 329.

Injunction only ſtays (c) Execution touching the Matters in queſtion, and there is always a Clauſe giving Liberty to call for a Plea to proceed to Trial, for want of it, to obtain Judgment; but Execution is ſtayed till Anſwer, or farther Order.

(c) If Declaration be delivered, but if not, all Proceedings at Law are ſtayed. 2 Kel. 17. pl. 15. in the *Exchequer* all farther Proceedings are ſtayed, be the Action in what Stage it may †.

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† Though *qu.* now, if, on Motion, the Court will not permit Plaintiff to proceed to Trial, with ſtay of Execution? Unleſs the Defendant's Anſwer is previouſly neceſſary.

Where Tenant for (d) Life is committing Waſte in cutting down young Timber, or (e) breaking up or ploughing antient Meadow or Paſture, or doing other Waſte, the Tenant in Tail ſhall have an Injunction, upon a Certificate of filing of the Bill, and ſhewing an Affidavit of Waſte committed, and this till Anſwer and farther Order; for Timber once cut down cannot be ſet up again.

Hard. 96. Vern. 23.

(d) So on a Motion to ſtay a Jointreſs Tenant in Tail, after Poſſibility, *&c.* from committing Waſte, the Court held, that ſhe being a Jointreſs within the 11 H. 7. c. 20. ought to be reſtrained, being Part of the Inheritance, which by the Statute ſhe is reſtrained from aliening. Abr. Eq. 221. *Cook* and *Winford*.—So where *A.* being Tenant for Life, Remainder to *B.* for Life, Remainder to the firſt and other Sons of *B.* in Tail Male, Remainder to *B.* in Tail, and *B.* (before the Birth of any Son) brought a Bill againſt *A.* to ſtay Waſte, on Demurrer to this Bill, becauſe the Plaintiff had no Right to the Trees, and none that had the Inheritance was Party; yet the Demurrer was over-ruled, becauſe Waſte is to the Damage of the Publick, and *B.* is to take care of the Inheritance for his Children, if he has any, and has a particular Intereſt himſelf, in caſe he comes to the Eſtate. Abr. Eq. 400. *Dayrell* and *Champneſs*.—But where a Jointreſs who had a Covenant that her Jointure ſhould be of ſuch a yearly Value which fell ſhort, though her Eſtate was not without Impeachment of Waſte, yet the Court would not prohibit her committing Waſte ſo far as to make up the Defect of her Jointure. Abr. Eq. 400. (e) But where the Plaintiff let a Farm to the Defendant at an annual Rent, and Part of it being Paſture Land, the Defendant covenanted, among other Things, not to break up or plow any Part of it, and that if he did plow any Part of it, he would pay at the Rate of 20 *s. per Ann.* for every Acre; and on Motion for an Injunction to ſtay Waſte in plowing, *per Cur.* The Parties themſelves have here agreed the Damage, and have ſet a Price for plowing, and therefore will not grant any Injunction; and declared, if the Defendant was Plaintiff againſt paying 20 *s. per* Acre for plowing, they would not relieve him. 2 Vern. 119. *Woodward* and *Gyles*.

So if a Man be Tenant for Life without Impeachment of Waſte, with Remainder to his firſt and every Son in Tail, though by virtue of that Clauſe, *without Impeachment of Waſte*, he may fell Timber, and alter any Rooms of the Houſe at his Pleaſure; yet if he ſhould pull down the Houſe or any Part of the Buildings thereunto belonging, Equity would injoin him; but not if he pull down to rebuild; for though the Clauſe, *without Impeachment of Waſte*, gives an (f) abſolute Property in the Timber, that he may do therewith what * he will, yet he is but Tenant for Life of the Lands and Houſes; and therefore if he pulls them down in order to vex a Son that has diſobliged him, he acts with an ill Conſcience, and ought to be reſtrained in Equity.

*Page 174 *Vide* Lord *Barnard*'s Caſe, 2 Vern. 339, 738. Salk. 161. pl. 14. Preced. Chan. 454. Such a Tenant not only injoined committing Waſte, but decred to put the Houſe, *&c.* in the ſame Repair it was before. (f) In Vern. 23 it is ſaid, that the Eſtate being without Impeachment of Waſte, no Prohibition or Injunction is to be granted.—But by Preced. Chan. 454. ſuch a Clauſe does not give Leave to fell and cut down the Trees which were for the Ornament or Shelter of a Houſe, much leſs to deſtroy or demoliſh the Houſe.

Alſo it is every Day's Practice to grant an Injunction for building on another Man's Ground, and ſuch Injunction ſhall go to ſtay that new Building till Anſwer and farther Order, and ſo in the Caſe of ſtopping up ancient Lights.

So Injunctions have frequently been granted to ſtay the printing and ſelling Almanacks, Bibles, and other Books, in behalf of Patentees and Owners of ſuch Books; but the Patent under Seal is ever produced in open Court. 2 Show. 258. pl. 266. Vern. 120, 275. 2 Ch. Caſ. 66, 76, 93.

There is alſo an Injunction granted to ſtay Trial at Law; this is never granted but upon Notice; as where one files his Bill, and it appears to the

Court that the Plaintiff's Equity muſt ariſe out of the Defendant's Anſwer, in this Caſe the Court will, and often does, grant an Injunction, and that the ſame may extend to ſtay Trial.

There is an Injunction called a perpetual Injunction, for quieting a Man in the Poſſeſſion of his Eſtate; this is generally either upon a plain equitable Title, or where one, two, or more Verdicts have gone againſt a Man; this Injunction is to quiet the Plaintiff and his Heirs for ever, and all claiming by, from, or under him; and this is very often granted, and in many Inſtances the Juſtice of the Court calls for it.

Preced. Chan. Lord *Bath* ver. *Sherwin.* Alſo it has been attempted in Chancery, after three or four Ejectments, by a Bill of Peace to eſtabliſh the prevailing Party's Title; but this has been conſtantly denied, where the Title was merely at Law; and my Lord *Cowper*'s Reaſons herein were, that it would be too great Arrogance in him to alter the Courſe of the Law; for that every Termor may have an Ejectment, and every new Ejectment ſuppoſes a new Demiſe, and the Coſts in Ejectment are a Recompence for the Trouble and Charges to which the Poſſeſſor is put; but where the Suit begins in Chancery, for Relief touching pretended Incumbrances on the Title of Lands, and the Court hath ordered the Plaintiff to purſue an Ejectment at Law, there after one or two Ejectments tried, and the Right ſettled to the Satisfaction of the Court, the Court hath ordered a perpetual Injunction againſt the Defendant, becauſe there the Suit is firſt attached in that Court, and never began at Law; and ſuch precedent Incumbrances appearing to be fraudulent and inequitable againſt the Poſſeſſor, it is within the Compaſs of the Court to relieve againſt it.

Vern. 156. Lady *Poines's* Caſe. A Truſtee having contracted to ſell an Eſtate to one Perſon, and the *Ceſtui que Truſt* having actually ſold it to another, who moved for an Injunction to quiet him in the Poſſeſſion, being diſturbed by the Truſtee, it was held by my Lord Keeper, that an Injunction for quieting the Poſſeſſion is only grantable where the Plaintiff has been in Poſſeſſion for the Space of three Years before the Bill exhibited, upon a Title yet undetermined, or in caſe the Cauſe hath been heard, and Judgments paſſed upon the Merits of the Cauſe by the Court.

Vern. 22, 508. Show. P. C. 17. There is an Injunction to prevent Multiplicity of Suits; as where many Suits are depending, and are likely to happen, from one and the ſame Thing the Court will here interpoſe, and grant an Injunction; they will direct a proper Iſſue to try the whole, and all the reſt ſhall be bound by the Verdict, or elſe there might be twenty Actions, and as many Verdicts, where one (*a*) proper Direction or Iſſue ends the Whole, and it is only directing one Iſſue to prevent many more.

(*a*) As where ſeveral Tenants of a Manor claim the Profits of a Fair. 1 Vern. 266.—So to ſettle the Boundaries of Lands. Preced. Chan. 261.

Vern. 269. If a Perſon is ſued at Law for irregularly ſerving the Proceſs of the Court of Chancery, it is ſaid that an Injunction will be granted to ſtay the Proceedings at Law; for the Irregularity is only puniſhable in that Court.

*Page 175 *Where two Courts have a concurrent Juriſdiction of the ſame Thing, that Court ſhall retain the Cauſe which is firſt poſſeſſed of it; as between the Exchequer and Chancery, the Counties Palatine and Chancery; but if Legacies are given to Infant Children by a Stranger, and their Father, being appointed their Guardiaan by the Spiritual Court, ſues the Executor there for Recovery of them, (*b*) Chancery will grant an Injunction againſt his proceeding in that Court; becauſe the Spiritual Court cannot order the Legacies to be put out at Intereſt for the Children's Benefit, as the Chancery may do, though they may compel the Father to give good Security with good Sureties. So where a Huſband ſues in the Spiritual Court for a Legacy given his Wife, an Injunction

(*b*) That Chancery will grant an Injunction to ſtay Proceedings in the Spiritual Court. Preced. Chan. 287.

Injunction will be awarded, becauſe that Court cannot compel him to make an adequate Settlement or Proviſion for his Wife; but if the Executor be ordered by ſuch a Time to bring in the Money, which he neglects to do, no Injunction will be granted, becauſe the Bill might have been brought only for Delay, and the Executor might at any Time he pleaſed diſmiſs his own Bill.

There are other Injunctions which are never denied; as in an Ejectment, where the Party agrees to give Judgment in Ejectment to prevent Trial, to give a Releaſe of Errors, and to conſent not to bring a Writ of Error, and to this it is ſometimes added to deliver Poſſeſſion, as the Court upon hearing ſhall direct; this forwards the Defendant at Law, and he could have no more if he were to proceed to Trial.

Where a Mortgagee brought a Bill to foreclose, and, pending the Suit, an Advowſon appendant to the mortgaged Manor became void, and the Mortgagee, being hindred from preſenting, brought his *Quare Impedit*, and (*a*) though the Mortgagor had no Bill filed, yet being ready and offering to pay the Principal, Intereſt, and Coſts, if the Mortgagee will not accept his Money, Intereſt ſhall ceaſe, and an Injunction to ſtay Proceedings in the *Quare Impedit* be granted; for the Mortgagee, till a Foreclosure, is but in nature of a Truſtee for the Mortgagor. 2 Vern. 401. *Amburſt* and *Dawling*.

(*a*) An Injunction is never to be granted before Bill filed.

4 Inſt. 92. Vern. 156. S. P. ſaid.

Where a Cauſe abated by the Death of the Lady *Gerard*, and the Defendant was her Executor, who being ſerved with a Copy of the Bill of Revivor, and my Lord Keeper's Letter, would not appear, being in Privilege; and upon Motion an Injunction was granted, though the Cauſe was not revived; and the Caſe of *Armſtrong* and *Jackſon* was cited, where before a Demurrer determined the Plaintiff had an Injunction on Motion. Abr. Eq. 285. *Duke Hamilton* verſus *Macclesfield*.

So where the Lord *Wharton* had an Injunction to quiet him in the Poſſeſſion of the Mines in queſtion, and upon hearing of the Cauſe an Iſſue was directed to try, whether the Mines in queſtion were within the Plaintiff's or Defendant's Manor; the Iſſue was tried at Bar, and found for the Plaintiff; then the Plaintiff died, and a Bill of Revivor was brought, and before the Time for anſwering was out, or the Cauſe revived, the Plaintiff moved for an Injunction to ſtay the Lord *Wharton*'s working the Mines, having Affidavit that ſince the Verdict againſt him he had trebled the Number of Workmen, and between that and *Candlemas* would work out the Mines; and an Injunction was granted, though the Cauſe was not revived. Abr. Eq. 285. *Robinſon* and Ld. *Wharton*.

Injunction extended to ſtay Proceedings againſt Bail, as well as againſt the Principal. 2 Kell. 17. pl. 15.

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* (B) What ſhall be a Breach thereof, and how puniſhed. * Page 176

IF there be a Suit in Equity concerning Title to a Cloſe, and thereupon an Order is made, that the Defendant ſhall ſuffer the Plaintiff to enjoy the Cloſe till, &c. and notwithſtanding the Defendant upon a Title of Common puts in his Cattle, this is no Breach of the Injunction; for the Common was not in queſtion by the Bill. Lane 96. *B.nt*'s Caſe.

A. obtained Judgment againſt *B.* but was hung up from taking out Execution for a Year and a Day by Injunction out of Chancery, and the Queſtion was, whether he could after take out Execution without a *Scire facias*, Salk. 322. pl. 9. *Booth* and *Booth*.

6 Mod. 288. S.C. in *B. R.* and it was held, that he could not: 1*ſt*, Becauſe the Common Law Court cannot take (*a*) Notice of Chancery Injunctions. 2*dly*, Becauſe it had been no (*b*) Breach of the Injunction to have taken out a Writ of Execution, and to have continued it by *Vicecomes non miſit Breve.*

(*a*) That a Common Law Court will not enlarge the Term in Ejectment where the Plaintiff has been hung up by an Injunction out of Chancery. Salk. 257. pl. 8. (*b*) That a Perſon may enter ſo as to intitle himſelf to an Action for Recovery of the meſne Profits, notwithſtanding an Injunction. 2 Vern. 519.

Vern. 207. *Childers* ver. *Saxby.* Where a Defendant having taken out Execution in Breach of an Injunction of the Court of Chancery, and ſome of the Bailiffs who ſerved the Execution having, as was alledged, found out a Place in a Wall in the Plaintiff's Houſe that was made up again with Bricks, wherein was hid 150 *l.* and having taken away the Money, and done great Spoil to the Plaintiff's Goods, it was ordered by the Lord Chancellor, that the Defendant ſhould make good this Money to the Plaintiff, and ſhould ſatisfy all other Damage which the Plaintiff would ſwear he had ſuſtained; and this Order was confirmed by the ſucceeding Lord Keeper; though it was objected, that the Order was unreaſonable, in making the Plaintiff Judge of his own Damage; that the Defendant came into Poſſeſſion by Courſe of Law, and the Bailiffs were legal Officers, who, if they did any Thing amiſs, the Party ought to take his Remedy at Law againſt them, and the Defendant ought not to be anſwerable for their Miſdemeanors. But the Lord Keeper held the Order to be juſt; and he thought it an idle Practice in the Court to put a Thief to his Oath to accuſe himſelf; for he that has ſtolen will not ſtick to forſwear it; and therefore *in Odium Spoliatoris* the Oath of the Party injured ſhould be a good Charge upon him that has done Wrong.

As concerning the Breach of Injunctions, it hath been of late practiſed to commit the Party on Affidavit of the Breach, and perſonal Notice given to him, but never on Notice to his Clerk; whereas by the antient Rule where a Man is guilty of the Breach of an Injunction, upon an Affidavit made thereof, the Plaintiff's Clerk in Court iſſues out an Attachment againſt him of courſe, he is arreſted thereon, gives Bail to the Sheriff, enters his Appearance with the Regiſter; ſo the Court has hold of him; the Plaintiff files Interrogatories in the Examiner's Office to examine him; the Interrogatories are *Verbatim* according to the Affidavit; and if the Party does neglect to attend and be examined, it is a Motion of courſe to examine him in four Days, or ſtand committed; if he confeſſes the Contempt, he muſt ſubmit, own his Fault, beg Pardon, and pay Coſts; but if he denies it by his Examination, the Plaintiff deſcends to prove it upon him; then the Plaintiff moves to refer it to a Maſter, to ſee whether the Party is guilty of the Contempt laid to his Charge, or not; here again he hath Liberty to be heard, and may except
*Page 177 * to the Report, and bring it on for the Judgment of the Court; and if the Court is of Opinion that he is guilty of the Contempt, he muſt ſtand committed, and pay the Coſts; but if the Court is of a contrary Opinion (as it ſometimes happens) he is acquitted with Coſts.

(C) How diſſolved.

THE Methods of diſſolving Injunctions are various; when the Anſwer comes in, and the Party hath cleared his Contempt by paying the Coſts of the Attachment, (if there is one,) he obtains an Order to diſſolve *Niſi*, and ſerves it on the Plaintiff's Clerk in Court; this Order takes notice

notice of the Defendant's having fully anſwered the Bill, and thereby denied the whole Equity thereof; and being regularly ſerved, the Plaintiff muſt ſhew Cauſe at the Day, or the Defendant's Counſel, where there is no Probability of ſhewing Cauſe, may move to make the Order abſolute, unleſs Cauſe, ſitting the Court.

The Plaintiff muſt ſhew Cauſe either on the Merits, or upon filing Exceptions; if upon the Merits, the Court may put what Terms they pleaſe on him; as bringing in the Money, or paying it to the Parties, ſubject to the Order of the Court, or giving Judgment with a Releaſe of Errors, and conſenting to bring no Writ of Error, or to give Security to abide the Order on hearing, or the like; and to this Order is generally added a Clauſe, that the Plaintiff ſhall ſpeed his Cauſe to a Hearing.

If the Plaintiff ſhews Cauſe upon Exceptions filed, he muſt procure the Report in four Days of the Inſufficiency of the Anſwer; and if the Motion is made at either of the laſt Seals after *Hilary* or *Trinity Term*, the Court ſometimes puts the Plaintiff upon opening the Exceptions, and they judge whether they are material or not; the Reaſon of this is, becauſe the Defendant, if the Anſwer ſhould be reported ſufficient, hath no Opportunity to move the Court till the Seal before the next Term, and is thereby very greatly delayed; if the Court think the Exceptions material and neceſſary, they will grant the Motion; if otherwiſe, they will deny it, as the Caſe appears; and to this is ſometimes added a Clauſe to the Order, eſpecially when the Motion is made at the laſt Seal, that the Plaintiff ſhall procure the Report in four Days, or his Injunction to ſtand diſſolved without further Motion; whereas it is not ſo in open Term, or at any of the Seals ſave the laſt; and this Clauſe being added, the Court needs not to hear the Exceptions opened, which oftentimes take up too much Time.

If the Maſter reports the Anſwer ſufficient, it is a Motion of Courſe to diſſolve the Injunction on the Anſwer's being reported ſufficient; but yet the Plaintiff may ſhew Cauſe on the Merits; for there are many Inſtances where the Plaintiff's Counſel may think the Anſwer not full, and yet may be miſtaken, and, notwithſtanding this, the Plaintiff may have good Cauſe on the Merits for Continuance of his Injunction; and it ſeems reaſonable that he have Liberty to do it; but this muſt be done on Notice given to the other Side; he cannot do it when the Defendant's Counſel come to move to diſſolve the Injunction, on the Anſwer's being reported ſufficient; becauſe, as this is a Motion of Courſe, the Party is not prepared to ſpeak to the Merits; but he may have Liberty on Notice given.

If the Plaintiff who hath an Injunction dies pending the Suit, in Strictneſs the whole Proceedings are abated, and the Injunction with them; but even in this Caſe the Party ſhall not take out Execution * without ſpecial Leave of the Court; he muſt move the Court for the Revival of the Suit within a Time limited, or the Injunction to ſtand diſſolved; and as this is never denied, ſo if the Suit is not revived, the Party takes out Execution. There are ſome Inſtances where a Plaintiff may move to revive his Injunction; but as that rarely happens, ſo it is rarely granted, eſpecially where the Injunction hath been before diſſolved. But where a Bill is diſmiſſed, the Injunction and every Thing elſe is gone, and Execution may be taken out the next Day.

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[See farther as to *Injunctions*, 6 *Com. Dig.* (*D.* 8.) *Fo.* 101. *&c.*]

Inns and Innkeepers.

(A) Inns by what Authority erected, and how far within the Statutes concerning Alehouses. 178.
(B) Who shall be said a common Innkeeper; and herein of the Privileges allowed him by Law. 179.
(C) Of the Duties injoined Innkeepers by Law. 180. And herein,

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2. Of the Offence of selling corrupt Commodities, or at exorbitant Prices. 181.
3. Of the Offence of refusing to harbour or entertain a Guest. 182.
4. In what Cases chargeable for Things stolen or lost. 182.
5. Who is such a Guest as may charge an Innkeeper. 183.
6. Of the Manner in which he is to be charged. 184.

(D) Of the Innkeeper's Remedies against his Guests. 185.

(A) Inns by what Authority erected, and how far within the Statutes concerning Alehouses.

2 Rol. Abr. 84. Palm. 367. Bulf. 109. Godb. 345. 2 Rol. Rep. 345.

IT seems to be agreed at this Day, that any Person may set up a new Inn, unless it be inconvenient to the Public, in respect of its Situation, or to its increasing the Number of Inns, not only to the Prejudice of the Public, but also to the Hindrance and Prejudice of other antient and well-governed Inns; For the keeping of an Inn is no Franchise, but a lawful Trade, open to every Subject, and there-

*Page 179 * fore there is no Need of any (a) Licence from the King for that Purpose.

2 Keb. 506. Salk. 45.

(a) It is said that in antient Times Inns were allowed in the Eyre. 2 Rol. Rep. 345.—But this is made a *Quære* in Palm. 374. and in Hutton 100. it is said, that there was no such Thing in the Eyres; but because that Strangers, who were Aliens, were abused and evilly intreated in Inns, it was, upon Complaint thereof, provided that they should be well lodged, and Inns were assigned to them by the Justices in Eyre.——In Cro. Jac. 528. there is an Instance of one outlawed on a *Quo Warranto* for keeping an Inn.

Cro. Car. 549. Dalt. Justice c. 7. *Vide* the Authorities *supra*.

But as Inns from their Number and Situation may become Nusances, they may be suppressed, and the Parties keeping them may at Common Law

Law be (*b*) indicted and fined, as being guilty of a public Nuſance; and in like manner may they be dealt with, if they uſually harbour Thieves, or Perſons of ſcandalous Reputation, or ſuffer frequent Diſorders in their Houſes.

(*b*) Four Perſons were indicted for erecting four ſeveral Inns *ad communem Nocumentum*; and it was ruled, that for ſeveral Offences of the ſame Nature ſeveral Perſons may be indicted in the ſame Indictment; but then it muſt be laid *ſeparaliter exerexerunt*, and for want of the Word *ſeparaliter* the Indictment was quaſhed. 2 Hal. Hiſt. P. C. 174.

He who has an Inn by Preſcription may lawfully enlarge it upon the ſame Land which has been uſed with it, either by erecting new Buildings thereon, or turning Stables into Chambers of Entertainment; and he ſhall have the ſame Privilege in ſuch new Part, as in any other Part of his Houſe. 2 Rol. Abr. 84.

Alſo it is agreed, that the Statute of (*c*) 5 & 6 *E.* 6. *cap.* 25. and other Statutes concerning the Licenſing of Alehouſes, &c. do not extend to Inns, unleſs an Inn degenerate into an Alehouſe by ſuffering diſorderly Tippling, &c. in which Caſe it ſhall be deemed as ſuch. Hutton 99. Salk. 45.

(*c*) For the Conſtruction hereof *vide* Mod. 34.

Sand. 249. 4 Mod. 144. Carth. 151, 263. Skin. 293. Show. 269. Comb. 405. 2 Ld. Raym. 1303. Stra. 497. And *note*, That as to the Licenſing of Alehouſes the Juſtices of Peace are the ſole Judges, and have a diſcretionary Power of granting or refuſing ſuch Licence, and will not be compelled thereto by *Mandamus*, or otherwiſe.

(B) Who ſhall be ſaid a common Innkeeper; and therein of the Privileges allowed him by Law.

A Perſon who makes it his (*d*) Buſineſs to entertain Travellers and Paſſengers, and provide Lodging and Neceſſaries for them and their Horſes and Attendants, is a common Innkeeper; and it is no way material whether he have any Sign before his Door or not. Palm. 374. 2 Rol. Rep. 345.

(*d*) If one who is not a common Hoſt be aſſigned *per Hoſpitatorem Domini Regis* to harbour a Man, he is not bound to take charge of the Goods of his Gueſt. Rol. Abr. 2. Dyer 158. in Margin.—An Infant Innkeeper not chargeable. Rol. Abr. 2. *ſecus* of a Perſon *non Compos*. Cro. Eliz. 622.

But though it be the Entertaining of Paſſengers that makes a Man an Innkeeper, yet it is ſaid, that if a Perſon having put up a Sign before his Door afterwards pull it down, he thereby diſcharges himſelf of the Burthen of an Innkeeper; but if after the taking down his Sign he uſes to harbour Men, it is as much a common Inn as if he had a Sign. Palm. 374. Godb. 346.

It hath been adjudged, that a Perſon living at *Epſom*, and lodging Strangers for drinking the Waters in the Seaſon, and ſelling them Victuals and Beer, and to no other Perſons except ſuch Lodgers, is not an Innkeeper, ſo as to have Soldiers quartered on him, purſuant to the Statute 4 & 5 *W.* 3. *cap.* 13. for he is not ſuch an *Hoſpitator* againſt whom an * Action lies for refuſing to entertain a Gueſt; alſo in this Caſe the Lodgers have ſuch an Intereſt in their Rooms, that they may maintain an Action of Treſpaſs againſt any one who ſhould enter into them againſt their Will. Carth. 417. Ld. Raym. 479. 12 Mod. 254, 255. Salk. 387. pl. 1. *Page 180 5 Mod. 427. S. C. *Parkhurſt* and *Foſter* adjudged.

A Perſon who receives Cattle to agiſt, on an Agreement to pay ſo much a Week for them, cannot retain them till Payment, as an Innkeeper Cro. Car. 271 *Chapman* ver. *Allen*.

keeper may the Horſe of his Gueſt, unleſs there be a ſpecial Agreement to that Purpoſe.

Cro. Car. 549. Jones 437. March 35. S. C. *Criſp* and *Prat.* 8 Lev. 309. & 3 Mod. 327. 3 Mod. 46, 48. 12 Mod. 159. Ld. Raym. 287. 2 Ld. Raym. 852.

An Innkeeper is diſtinguiſhed from other Traders, in that he cannot be a Bankrupt; for though he buys Proviſions to be ſpent in his Houſe, yet he does not properly ſell them, but utter them at ſuch Rates as he thinks reaſonable, and the Attendance of his Servants, Furniture of his Houſe, &c. are to be conſidered; and the Statutes of Bankruptcy only mention Merchants that uſe to buy and ſell in Groſs, or by Retail, and ſuch as get their Living by buying and ſelling, ſo that their principal Subſiſtence is by buying and ſelling; but the Contracts with Innkeepers are not for any Commodities *in Specie*, but they are Contracts for Houſe Room, Trouble, Attendance, Lodging, and Neceſſaries, and therefore cannot come within the Deſign of ſuch Words, ſince there is no Trade carried on by buying and bartering Commodities.

Stra. 514. 2 Stra. 809. Show. 268. Salk. 109. pl. 2. Skin. 292. Comb. 181. Carth 149. S. P. adjudged between *Newton* and *Trigg*.

3 Bulſ. 270. Co. Lit. 47. 2 Vern. 129.

For the Security and Protection of Travellers, Inns are allowed certain (*a*) Privileges, ſuch as that the Horſe and Goods of a Gueſt cannot be diſtrained, &c.

(*a*) In 1 Rol. Abr. 650. it is ſaid, that, by ſome Opinions, Travellers Horſes depaſtured by an Innkeeper pay no Tithes by the Common Law.——But the contrary hereof is holden in Hard. 35.

Hil. 25 & 26 Car. 2. *Southwell* and *Allom*. Raym. 231. S. C.

Alſo the Law takes care of the Reputation of an Innkeeper; and therefore where in Caſe for Words the Plaintiff declared, that he was poſſeſſed of certain Stables *in quodam loco vocat' Bell-Savage Inn*, that he had Accommodation for Travellers, and that he got his Living by the exerciſing of that Faculty; that the Defendant was poſſeſſed of another Inn, and that a Perſon not known inquiring for the *Bell-Savage Inn*, (whither he was directed, to ſet up his Horſe,) he ſaid theſe Words, *This is Bell-Savage Inn*; and at another Time he ſaid to another Perſon, *You have nothing to do there, he is broke and run away, there is no Entertainment for Man or Horſe*; by reaſon of which Words he loſt his Cuſtomers; and on Not guilty pleaded, the Jury having found for the Defendant as to the firſt Words, and as to the laſt for the Plaintiff, it was adjudged clearly for the Plaintiff; and *Hale* C. J. held farther, that if a Man keeps an Inn, and another that lives juſt by him, deſigning to get away his Cuſtomers, tells a Perſon who inquires for ſuch Inn, that no one lives there, this is actionable; alſo it was ſaid by *Hale* to have been adjudged actionable to diſſuade a Perſon from going to an Inn, by telling him the Small-Pox was there.

(C) Of the Duties injoined Innkeepers by Law. And herein,

1. To what Things their Duty extends.

9 Co. 87. Dyer 158. *Bro. Action ſur Caſe* 76, 92. *Page 181

THE Duty of Innkeepers extends chiefly to the entertaining and harbouring of Travellers, finding them Victuals and Lodgings, and ſecuring the Goods and Effects of their Gueſts; and therefore if one * who keeps a common Inn refuſe either to receive a Traveller as a Gueſt into his Houſe, or to find him Victuals or Lodging, upon his tendering him a reaſonable Price for the ſame, he is not only liable to render Damages for the

the Injury in an Action on the Caſe, at the Suit of the Party grieved, but alſo may be indicted and fined at the Suit of the King.

For he who takes upon himſelf a public Employment, muſt ſerve the Public as far as his Employment goes; therefore an Innkeeper ſhall not only anſwer for his own Neglects, but alſo for the Neglects of thoſe who act under him, though he ſhould expreſsly caution againſt it. Salk. 18.

But the Duty of an Innkeeper does not extend to the finding of his Gueſt with Cloaths or Wearing Apparel. 2 Rol. Rep. 79.

Alſo if the Gueſt be aſſaulted and beat within the Inn, he ſhall have no Action againſt his Hoſt; for the Charge of the Hoſt extends to the Moveables only, and not the Perſon of the Gueſt. 8 Co. 32. in *Calye's* Caſe.

If a Man comes to a common Inn to harbour, and deſires that his Horſe be put to Graſs, and the Hoſt put him to Graſs accordingly, and the Horſe is ſtolen, the Hoſt ſhall not be charged; becauſe by Law the Hoſt is not bound to anſwer for any Thing out of his Inn, but only for thoſe Things that are *infra Hoſpitium*. 8 Co. 32. b. *Calye's* Caſe. adjudged. 4 Leon. 96. S. P. adjudged. 2 Brownl. 255. S. P. *per Cur*.

But if the Owner does not require the Hoſt to put his Horſe to Graſs, but the Hoſt does it of his own Head, if the Horſe be ſtolen, he ſhall anſwer for it. 8 Co. 32. b. 4 Leon. 96. 2 Brown. 255. S. P. *per Cur*.

Alſo if the Hoſt upon the Command of the Gueſt puts the Horſe to Graſs, and by the voluntary and wilful Negligence of the Hoſt the Horſe is ſtolen, as if the Hoſt voluntarily leaves open the Gates of the Cloſe, by which Means the Horſe ſtrays out, and ſo is ſtolen or loſt, an Action (*a*) on the Caſe lies againſt the Hoſt. Rol. Abr. 4. *Moſley* and *Foſſet*.

(*a*) This, it ſeems, muſt be intended a ſpecial Action on the Caſe, and not on the Cuſtom of the Realm; for which *vide* Rob. Ent. 23, 24. Hern's Plead. 250.

2. Of the Offence of ſelling corrupt Commodities, or at exorbitant Prices.

Innholders are reſtrained from ſelling at exorbitant Prices, and may be indicted if they extort any greater or larger Sums than thoſe Rates and Prices that are (*b*) impoſed on their Commodities. Carth. 150. Skin. 291. pl. 2. An Innkeeper was made in Court for the County of *Middleſex* for the Rates and Prices of Hoſtlers, *viz.* Hay for a Night and a Day for one Horſe 9*d.* with Litter, Hay for one Day 4*d.* for one Horſe, without Hay 2*d.* Oats 8*d.* by the Peck, and not more. Raym. 162.

(*b*) Proclamation

And to this Purpoſe it is enacted by 21 *Jac.* 1. *cap.* 21. "That all "Hoſtlers or Innholders ſhall ſell their Horſe-bread, and their Hay, Oats, "Beans, Peas, Provender, and all kind of Victual, both for Man and Beaſt, "for reaſonable Gain, having reſpect to the Gain for which they ſhall be "ſold in the Markets adjoining, without taking any Thing for Litter. "And it is further enacted by the ſaid Statute, That every Hoſtler, "and Innkeeper dwelling in any Town or Village being a Thorough-"fare, and no City, Town Corporate, or Market Town, wherein any "common Baker, having been an Apprentice to the Trade for ſeven "Years, is dwelling, may make within his Houſe Horſe-bread, ſuffi-"cient, lawful, and of due Aſſiſe according to the Price of Grain and "Corn. And it is further enacted, That if the Horſe-bread which "any of the ſaid Hoſtlers or Innholders ſhall make be not ſufficient, "lawful, and of due Aſſiſe according to the Price of Grain and Corn, as "above- *Et Vide* 23. E. 3. c. 6. and Hawk. P. C. 235.

*Page 182 " * aboveſaid, or that if any of them ſhall offend in any Thing contrary " to this Act, the Juſtices of Aſſiſe, Juſtices of Oyer and Terminer, Juſtices " of Peace in every Shire, Liberty or Franchiſe within this Realm, Sheriffs " in their Turns, and Stewards in their Leets, may inquire, hear, and de- " termine the ſaid Offences of the ſaid Hoſtlers and Innholders, who ſhall " be fined for the firſt Offence according to the Quantity of the Offence, and " for the ſecond Offence ſhall be impriſoned for one Month, and for the " third Offence ſhall ſtand upon the Pilory."

9 H. 6. 53. Rol. Abr. 95. If an Innkeeper ſell corrupt Wine or Victuals, an Action lies againſt him; alſo if his Servant ſell ſuch corrupt Wine or Victuals, an Action on the Caſe lies againſt the Maſter, though he did not order the Servant to ſell it to any particular Perſon.

3. Of the Offence of refuſing to harbour or entertain a Gueſt.

Dyer 158. pl. 33. 2 Brownl. 254. 2 Rol. Rep. 345. Keilw. 50. Palm. 367. Godb. 346. Salk. 388. Carth. 150. S. P. admitted. It has been already obſerved, that if one who keeps a common Inn (*a*) refuſe either to receive a Traveller as a Gueſt into his Houſe, or to find him Victuals or Lodging, upon his (*b*) tendering him a reaſonable Price for the ſame, he is not only liable to render Damages for the Injury in an Action on the Caſe, at the Suit of the Party grieved, but may alſo be indicted and fined at the Suit of the King.

(*a*) Without a reaſonable Excuſe; and therefore if he refuſe under Pretence that his Houſe is already full of Gueſts, if this be falſe, an Action on the Caſe lies. Dyer 158. Rol. Abr. 3. (*b*) That he is not bound to let him have Meat unleſs paid before-hand; for the Hoſt is not bound to truſt. *Bro. Action ſur Caſe* 76. Bro. Contract 43. 9 Co. 87. b.

5 E. 4. 2. b. Dalt. c. 7. Show. 268. Moor 867. pl. 1229. In 2 Brownl. 254. *it is ſaid by Coke* C. J. that an Innkeeper is not bound to receive a Horſe, unleſs the Maſter be lodged there.—And herewith in 1 Salk. 388. my Lord C. J. *Holt* agrees; but the other three Judges differ from him, becauſe by the keeping of the Horſe the Innkeeper has Gain, though it would be otherwiſe of a Trunk, or other dead Thing.

Alſo it is ſaid, that an Innkeeper may be compelled by the Conſtable of the Town to receive and entertain a Perſon as his Gueſt.

Alſo an Innkeeper, or a Perſon keeping a Livery Stable, is obliged to receive a Horſe, though the Owner does not lodge in his Houſe; for by taking upon him a public Employment, he is obliged to ſerve the Public as far as his Employment extends.

4. In what Caſes chargeable for Things ſtolen or loſt.

Dyer 266. 8 Co. 32. a. Poph. 178. Noy 79. Latch 179. Innkeepers are clearly chargeable for the Goods of Gueſts ſtolen or loſt out of their Inns, and this without any Contract or Agreement for that Purpoſe; for the Law makes them liable in Reſpect of the Reward, as alſo in reſpect of their being Places appointed and allowed of by Law, for the Benefit and Security of Traders and Travellers.

Fitz. Hoſtler 5. *Bro. Action ſur le Caſe* 42. (*c*) Therefore And this Duty and Burthen enjoined Innkeepers by Law, they cannot diſcharge themſelves of, under Pretence of (*c*) Sickneſs, Want of Underſtanding, (*d*) Abſence from their Houſes, &c.

if an Innkeer be ſo diſtempered that he is not of a ſound Memory, and a Gueſt knowing thereof Inns there, where his Goods are ſtolen, an Action on the Caſe lies againſt the Innkeeper; for he cannot diſable himſelf by ſaying he was not then of a ſound Memory. Cro. Eliz. 622. *Craſs* and *Andrews*, adjudged. Rol. Abr. 2. S. C.—But an Infant Innkeeper ſhall not be charged, for his Privilege ſhall be preferred and take place of the Cuſtom. Rol. Abr. 2. *Vide* Head of *Infancy and Age*. (*d*) If the Innkeeper goes abroad, he muſt anſwer for the Goods of his Gueſt; for he ought to have a Servant to take care of them in his Abſence. 11 H. 4, 45. Rol. Abr. 4. ——But if an Inn is broke open, and the Goods of Gueſts taken away by the King's Enemies, the Innkeeper is not anſwerable. Plow. 9. b.

But

* But if a Perſon comes to an Innkeeper, and deſires to be entertained by him, which the Innkeeper refuſes, becauſe his Houſe is already full, whereupon the Party ſays, he will ſhift among the reſt of the Gueſts, and there he is robbed, the Hoſt ſhall not be charged. *Page 83 Bendl. 60. pl 101. Dyer 158. And. 29. adjudged.

It is ſaid in *Dyer*, that if the Hoſt require his Gueſt to put his Goods in ſuch a Chamber, under Lock and Key, and that then he will warrant their Safety, or elſe not, and notwithſtanding the Gueſt ſuffers them to lie in an outer Court, where they are ſtolen, no Action lies againſt the Hoſt; for they were not loſt through the Neglect of the Hoſt, but of the Gueſt. Dyer 268. *Spencer's* Caſe. ——But in Moor 78. pl. 207, 158. pl. 299. the S. P. ſeems to be holden otherwiſe, and that the Hoſt cannot diſcharge himſelf of this Branch of his Duty by ſuch a Declaration as this.

If the Hoſt delivers the Key of the Chamber where the Goods are to the Gueſt, and he leaves the Door open, and the Goods are ſtolen, yet an Action lies againſt the Hoſt; for at his Peril he ought to keep ſafely the Goods of his Gueſts. 8 Co. 33. a. in *Calye's* Caſe.

If the Gueſt is robbed by his Servant, or by one who comes with him, or by one who deſires to be lodged with him, he ſhall have no Action againſt the Hoſt; for it was the Folly of the Gueſt to keep ſuch a Servant or Company; and there is no Default of good Cuſtody in the Hoſt. 8 Co. 33. a. in *Calye's* Caſe. Cro. Eliz. 285. Fitz. Hoſtler. 1, 2. S. P.

It ſeems the Hoſt is anſwerable, though the Gueſt does not acquaint him what Goods, &c. he has. 8 Co. 33. a. But it is ſaid, that if an Hoſt demands of his Gueſt what Money or Goods he has, and he tells him none, or leſs in Truth than he has, if afterwards they are loſt, the Hoſt is not anſwerable. Moor 158. pl. 299. *per Anderſon.* But *Windham Periam* cont.

5. Who is ſuch a Gueſt as may charge an Innkeeper.

If an Hoſt invites one to Supper, and, the Night being far ſpent, invites him to ſtay all Night, if he is after robbed, yet ſhall not the Hoſt be charged, for this Gueſt was no (*a*) Traveller. 2 Brownl. 214. 8 Co. 32. b. Rol. Abr. 3. S. P. Skin. 276. S. P. (*a*) By the ancient Law the firſt Day he was called a *Traveller*, the ſecond Day a *Hogenhind*, and the third Day a menial Servant, whom the Hoſt ſhould anſwer in the Leet for, as his Servant, *per* Latch 88. See Forteſc. Rep.

If a Man comes to an Inn with a Hamper, in which he hath ſeveral Goods, and goes away, leaving this with the Hoſt, and (*b*) two Days after comes again, but in the Time of his Abſence this is ſtolen, he ſhall have no Action againſt the Hoſt; for at the Time of the Stealing he was not his Gueſt, and by the keeping the Hamper the Hoſt had no Benefit, and therefore ſhall not be charged with the Loſs of it in his Abſence. Rol. Abr. 3, 338. Cro. Jac. 188. Noy. 126. S. C. adjudged between *Jelly* and *Clerk*.

(*b*) Otherwiſe if he had returned the ſame Night. Moor 877. Poph. 179.

But if *A.* comes with Goods to an Inn in *London*, and ſtays there for a Week, Month, or longer, and is there robbed of them, he ſhall have an Action againſt his Hoſt; though perhaps, being at the End of his Journey, he cannot then be ſaid *tranſeuns*, according to the Writ in the Regiſter. Latch 127. Poph. 179. Dyer 158. b. in Margin.

But if an Attorney hires a Chamber in an Inn for the whole Term, he is *quaſi* a Leſſee, and if robbed, the Hoſt is not anſwerable. Moor 877.

So if a Man upon a ſpecial Agreement boards or ſojourns in an Inn, and is robbed, the Hoſt ſhall not anſwer for it, Latch 127. Hetley 49.

So

*Page 184 * So if the Gueſt (*a*) deliver the Goods to the Hoſt upon another Account, he ſhall not be charged if loſt or ſtolen.

Rol. Abr. 3.

(*a*) But how far a Man ſhall be charged with the ſafe Cuſtody of Goods by a general Acceptance, *vide* Co. Lit. 89. Rol. Abr. 338. and Tit. *Bailment*.

Rol. Abr. 3. Moor 877. Noy 126. Salk. 388. pl. 2.

If a Man comes to an Inn with a Horſe which he rides, and leaves it with the Hoſt, and goes away from the Inn for ſeveral Days, and in his Abſence the Horſe is ſtolen, yet ſhall the Hoſt be charged for it, becauſe he had Benefit by the Continuance of the Horſe with him, inaſmuch as he is to be paid for it, and ſo the Owner is a ſufficient Gueſt to maintain an Action†.

† *Vide ante* 182. Div. 3.

Cro. Jac. 224. Yelv. 162. Dyer 158. in Margin.

If a Man's (*b*) Servant, travelling on his Maſter's Buſineſs, comes to an Inn with his Maſter's Horſe, which is there ſtolen, the Maſter may have an Action againſt the Hoſt, becauſe the (*c*) abſolute Property is in him.

Noy 79. Rol. Abr. 3. (*b*) But if a Perſon takes another's Horſe and rides him to an Inn, where he is ſtolen, the Owner ſhall not have an Action againſt the Hoſt, but muſt purſue his Remedy againſt the Taker. Rol. Abr. 3. (*c*) It is ſaid, that if a common Carrier is robbed in his Inn, the Owner, and not the Carrier, ſhall have the Action. Dalſ. 8. But this, it ſeems, is not Law, being founded on Suppoſition that the Carrier is not anſwerable to the Owner.

Yelv. 162.

So if *A.* ſends Money by his Friend, and he is robbed in his Inn, *A.* ſhall have the Action.

Latch 127. Poph. 179.

If one Joint-tenant of Goods is robbed, both may have the Action.

6. Of the Manner in which he is to be charged.

8 Co. 32. b. (*d*) For this *vide* Reg. 104. a. 105. a. F.N.B. 94. b. (*e*) This is the Courſe, for it is not a Cuſtom confined to a particular Place, but it is ſuch as is extenſive to all the King's People. 3 Mod. 227. Fitz. Hoſtler 2. *Bro. Action ſur Caſe* 41. (*f*) He need not name them, becauſe by Preſumption of Law he hath no Knowledge of them. Plow. 129. a. (*g*) *Per Hetley* 49. it ought to be ſhewn that the Gueſt *tranſeuns hoſpitavit*; yet *quære*; for perhaps he was at the End of his Journey. Latch 127. Poph. 179. and all the Entries are otherwiſe. (*h*) The Writ was, 100 *l.* of the Plaintiff *in Hoſpitio* of the Defendant *Hoſpitati ceperunt*, &c. and tho' objected *in Hoſpitio* referred to the Perſon, and not to the Money, and that he might harbour in the Houſe of the Defendant, and his Money be ſtolen elſewhere, and that it ſhould have been *ibidem invent' ceperunt*, yet the Writ was adjudged good. Fitz. Hoſtler 2. *Bro. Action ſur le Caſe* 58. (*i*) And this is well enough, though not ſhewn by what Authority or Licence held. 2 Rol. Rep. 346. Palm. 374. Godb. 346.

The (*d*) Form of the Writ is thus, *Cum ſecundum Legem & (e) Conſuetudinem Regni Noſtri* Angliæ *Hoſpitatores, qui Hoſpitia communia tenent ad hoſpitand' Homines, &c. tranſeuntes, & in eiſdem Hoſpitantes, eorum Bona, &c. abſque Subſtractione ſeu Amiſſione cuſtodire tenentur, (f) quidam Malefactores quendam Equum (g) ipſius* A. *&c. (h) infra (i) Hoſpitium ejuſdem* B. *&c. invent' pro Defectu ipſius* B. *ceperunt, &c.*

8 Co. 32. a. (*l*) In the Writ he may be named Yeoman, but in the Declaration it muſt be ſhewn that he is a common Hoſtler. *Bro. General Brief* 16. *Bro. Action ſur Caſe* 58. Fitz. Hoſtler 2. (*l*) *Vide* Dyer 266. pl. 9. Hob. 245. 2 Leon. 162.

The *Writ* need not mention that the Defendant (*k*) keeps *commune Hoſpitium*, for it muſt be ſo intended; for the Recital of the Writ is, *Hoſpitatores qui communia Hoſpitia tenent, &c.* and the latter Words depend upon the former; (*l*) but the Plaintiff ought to *count* that he kept *commune Hoſpitium.*

Cro. Jac. 224. *Beedle* and *Morris*, adjudged. Yelv. 162. S.C. (*m*) In this Caſe there is no direct Writ in the Regiſter; but by the Statute of *Weſtm.* 2. the Clerks ſhall agree to make a ſpecial Writ. Dalſ. 8, 9.

If in ſuch Action brought (*m*) by the Maſter for Goods ſtolen from his Servant, the Plaintiff lays the Cuſtom that Innkeepers ought ſafely to keep the Goods of their Gueſts, and all other Goods brought into their Inns, the Cuſtom is ſufficiently alledged to maintain the Action, notwith-

notwithſtanding it was objected, (*a*) that there was no ſuch Cuſtom to keep the Goods of others ſafely. *Page 185

(*a*) That the Miſrecital thereof is immaterial, for it is the Common Law. Latch 127. *per Jones* and *Dod.* Hob. 18. 3 Mod. 227. 1 Sid. 245.

If in his Declaration the Plaintiff lays the Cuſtom for common Inns, and then lays that he was *Hoſpitatus in Hoſpitio, &c.* this is well enough, for it muſt be intended that it was *commune*, elſe, it is *Domus, & non Hoſpitium.* Hob. 245. & *vide* Raſt. Ent. 405. Rob. Ent. 22.

The Declaration againſt an Innkeeper was thus, *Præd' D. com' Hoſpitat' adtunc & ibidem exiſten' in Stabulum deliberavit* a certain Gelding, to be by him ſafely kept at a reaſonable Rate, and to be by him ſafely re-delivered to the Plaintiff; and after Verdict for the Plaintiff, it was objected, that for aught appears the Horſe was put into the Defendant's Stable without his Privity, in which Caſe he is not bound to take any Care of it; for the Words being *præd' D. com'. Hoſpitat' exiſten'*, may as well be taken in an Ablative as Dative Caſe: But the Court held, that the Words being indifferent to an Ablative or Dative Caſe, they ought to be taken in that Caſe which makes the Declaration good, and therefore gave Judgment for the Plaintiff. 6 Mod. 223. *Stanyon* and *Davis.* Salk. 404. pl. 1. S. C. but not S. P.

(D) Of the Innkeeper's Remedies againſt his Gueſts.

INNKEEPERS may detain the (*b*) Perſon of the Gueſt who eats, or the Horſe which eats, till Payment, and this he may do without any Agreement for that Purpoſe; for Men, that get their Livelihood by Entertainment of others, cannot annex ſuch diſobliging Conditions that they ſhall retain the Party's Property in Caſe of Non-payment, nor make ſo diſadvantageous and impudent a Suppoſition, that they ſhall not be paid; and therefore the Law annexes ſuch a Condition without the expreſs Agreement of the Parties. 39 H. 6. 18. 5 H. 7. 15. 2 Rol. Abr. 85. Cro. Car. 271. Carth. 150. Salk. 388. pl. 2.

(*b*) May detain the Perſon of his Gueſt. Show. 269. For it would be hard to oblige him to ſue for every little Debt, and a greater Hardſhip that he might not be able to find him who was his Gueſt.——But if a Perſon goes into an Inn or Tavern, and calls for Wine, and goes away without paying for it, no Action of Treſpaſs lies againſt him; for the going into the Inn or Tavern was lawful, and therefore the Vintner muſt purſue his Remedy by Action of Debt. 8 Co. 147. or on the Caſe.

If *A.* injuriouſly take away the Horſe of *B.* and put him into an Inn to be kept, *B.* comes and demands him, he ſhall not have him until he hath ſatisfied the Innkeeper for his Meat; for when an Innkeeper takes a Horſe into his Keeping he is not bound to inquire who is the Owner of the Horſe which he is obliged to keep, let him belong to whom it will, and therefore no Reaſon that the Innkeeper ſhould be obliged to deliver him till he is ſatisfied. Yelv. 67. 3 Bulſ. 269, 270. 2 Rol. Abr. 85. Poph. 128, 179.

If *A.* deliver a Horſe to an Innkeeper, and *B.* promiſes, that in conſideration that the Innkeeper will deliver over the Horſe to *A.* that he, *viz. B.* will ſatisfy him for his Meat; this is a good Promiſe, for here is a good Conſideration, inaſmuch as the Innkeeper loſes the Detainer, which is a Damage, and *A.* regains his Horſe, that is to his Advantage. Hutton 101.

An Innkeeper that detains a Horſe for his Meat cannot uſe him, becauſe he detains him as in the Cuſtody of the Law, and by conſequence the Detention muſt be in the Nature of a Diſtreſs, which cannot be uſed by the Diſtrainer. Moor 877. 2 Rol. Rep. 438.

But

*Page 186 † Stra. 556. Moor 876. 3 Bulf. 271 Yelv. 67. Rol. Rep. 449. (a) Vent. 71. S. P.

* But by the Cuſtom of *London* and *Exeter*, if a Man commit an Horſe to an Hoſtler, and he eat out the Price of his Head, the Hoſtler may take him as his own, upon the reaſonable Appraiſement of four of his Neighbour; which was, it ſeems, a Cuſtom ariſing from the Abundance of Traffic with Strangers, that could not be known, to charge them with the Action; (a) but the Innkeeper hath no Power to ſell the Horſe, by the general Cuſtom of the whole Kingdom.

2 Rol. Abr. 85.

But if *A.* commit the Horſe of *B.* to an Hoſtler in *London*, and he eat out his Head, yet cannot the Hoſtler ſell him: For all Cuſtoms being derogatory to the Common Law, are to be taken ſtrictly; and there is no Cuſtom of *London* that hath gone ſo far as this Caſe, to authorize one Man to ſell and convey the Property of another.

2 Rol. Abr. 85.

If a Man commit his Horſe to an Innkeeper, and he put him to Paſture, he may detain the Horſe until he be ſatisfied for the Meat; for the Paſture of ſuch Perſons ſet up by the Law for Entertainment, hath the ſame Privilege with the Stables.

2 Rol. Rep. 438. & *vide* 2 Rol. Abr. 85.

If a Horſe be committed to an Innkeeper, it may be detained for the Meat of the Horſe, but not for Meat of the Gueſt; for the Chattels are only in the Cuſtody of the Law for the Debt that ariſes from the Thing itſelf, and not from any other Debt due from the ſame Party; for the Law is open for all ſuch Debts, and doth not admit private Perſons to take Repriſals.

2 Rol. Rep. 438.

If an Horſe be committed to an Innkeeper, and be detained by him for his Meat, and the Owner take him away, the Innkeeper muſt make freſh Purſuit after him, and retake him; otherwiſe the Cuſtody of him is loſt; for he cannot retake him at any other Time; for if a Diſtreſs be reſcued, and the Party upon freſh Purſuit do not retake it, the Diſtreſs is loſt; for no Man that has only a naked Cuſtody can make a Repriſal, when the Thing is out of his Cuſtody; for it is in the Power of an Owner and Proprietor, and of him only, to retake ſuch his Property, wherever he finds it.

2 Rol. Rep. 438.

But if an Horſe be committed to an Hoſtler, and he detain him for his Meat, and after the Owner comes to an Agreement that the Hoſtler ſhall retain him till he is ſatisfied, here he hath not only the Cuſtody of him as a Diſtreſs, but alſo the Property in him as a Pledge; and if the Owner take it from him, he ſhall not only retake it upon freſh Purſuit, but wherever he meets it, becauſe he had a Property by ſuch Contract, and a Man that hath a Property may retake his own where he meets with it.

Skin. 648. pl. 6. *Gilber* verſus *Berkley*.

Upon Evidence the Caſe was, a Man had a Horſe in an Inn, and came thither and directed that the Innkeeper ſhould not give him any more Food, for he would not be reſponſible for it; and the Queſtion was, whether for the Food after this Direction given by the Innkeeper to the Horſe, he who brought the Horſe thither ſhall be charged, or not; and *Holt* C. J. at firſt inclined that this is a Diſcharge, and that the Horſe (though he might be retained by the Innkeeper) yet is but in the Nature of a Diſtreſs, and it being in the Cuſtody of the Innkeeper in his Inn, this is a Pound Covert, and the Horſe afterwards ought to be found and maintained at the Peril of the Innkeeper; but after, *mutata Opinione*, he directed, that this was not a Diſcharge; for then any Innkeeper might be deceived, and it is the leſſening of the Security of an Innkeeper, who may detain, and, by the Cuſtom of *London*, ſell the Horſe for his Keeping.

[If the Horſe is once out, the Innkeeper cannot detain him for what was due before, on his coming in again. *Stra.* 556.]

Joint-

* Joint-tenants and Tenants in common. *Page 187

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(A) Of the Nature of their Eſtates; and herein of the Difference between Joint-tenants and Tenants in common.

Lit. ſ. 277. (*a*) Or may be created by other Conveyances, ſuch as Fine, Recovery, Bargain, and Sale, Releaſe, Confirmation, &c.

WHERE (*a*) a Feoffment is made to two or more, and their Heirs, or a Leaſe is made to them for Term of their (*b*) Lives, they are Joint-tenants; for being jointly infeoffed, &c. they ſhall jointly hold *per mie & per tout*, and ſhall jointly implead and be impleaded, which Property is common between them and Coparceners; but Joint-tenants have a ſole Quality of Survivorſhip which neither Coparceners nor Tenants in common have.

Co. Lit. 180. b. (*b*) Or by other Limitations, as if a Rent-charge of 10 *l.* be granted to *A.* and *B.* to have and to hold to them two, *viz.* to *A.* until he be married, and unto *B.* till he be advanced to a Benefice, they are Joint-tenants in the mean Time, notwithſtanding the ſeveral Limitations, and if *A.* die before Marriage, the Rent ſhall ſurvive; but if *A.* had married, the Rent ſhould have ceaſed for a Moiety; & *ſic e converſo* on the other Side. Co. Lit. 180. b.

Lit. ſ. 292. Co. Lit. 189. a. Tenants in common are thoſe that come to the Land by ſeveral Titles, or by one Title and ſeveral Rights; as if there be three Joint-tenants, and one alien his Part, the other two are Joint-tenants of their Parts that remain, and hold them in common with the Alienee; ſo if Joint-tenants make ſeveral Feoffments or Gifts in Tail, or Leaſes for Life, the Feoffees, Donees or Leſſees are Tenants in common.

Co. Lit. 189. a. And as the eſſential Difference between Joint-tenants and Tenants in common is, that Joint-tenants have the Lands by one joint Title, and in one Right, and Tenants in common by ſeveral Titles, or by one Title and by ſeveral Rights; this is the Reaſon, ſays my Lord *Coke*, that Joint-tenants have one joint Freehold, and Tenants in common have ſeveral Freeholds, though this Property is common to them both, *viz.* that their Occupation is undivided, and neither of them knoweth his Part in ſeveral.

3 Co. 27. Co. Lit. 30. a. 31. b. 37. b. Bro. Tit. *Dower* 4, 84. Hence it appears, that the Wife of a Joint-tenant cannot be endowed; as if Lands are given to two Men and their Heirs, or the Heirs of their two Bodies, and one of them dies, his Wife ſhall not be endowed, but it ſhall

ſhall go to the Survivor, who then is in from the firſt Feoffor or Donor, and may plead it as an original Feoffment or Gift to himſelf, and ſo is paramount her Title of Dower, which is not complete till her Huſband's Death; and one Book ſays, it was the antient Courſe in Mortgages to make the Eſtate to two, in order to prevent the Mortgagee's Wife of Dower. Cro. Eliz. 503. Perk. f. 334.

* But the Wife of a Tenant in common ſhall be endowed; for there no Survivorſhip takes place, but each Moiety *(a)* deſcends to the reſpective Heirs of the reſpective Tenant in common, and in ſuch Caſe the Dower ſhall be aſſigned in *(b)* common too; for ſhe cannot have it otherwiſe than her Huſband had. *Page 189 Lit. f. 44, 45. Co. Lit. 34. b. 37. b.

(*a*) And it hath been adjudged that a Writ of Dower will lie againſt the Heir of the Tenant in common before Partition made. 3 Lev. 84. *Sutton* and *Rolf*. (*b*) And not by Metes and Bounds; for which *vide* Brownl. 127. Rol. Abr. 682. Perk. f. 413.

Alſo if there be two *Joint-tenants*, and one *releaſeth* to the other, this paſſeth a Fee without the Word *Heirs*, becauſe it refers to the whole Fee, which they jointly took, and are poſſeſſed of by force of the firſt Conveyance; but *Tenants in common* cannot *releaſe* to each other; for a Releaſe ſuppoſeth the Party to have the Thing in Demand; but *Tenants in common* have ſeveral diſtinct Freeholds, which they cannot transfer otherwiſe than as Perſons who are ſole ſeiſed. Co. Lit. 9. 200. *b*.

If Lands be given to *A.* and *B.* and the Heirs of *A. B.* who is only Joint-tenant for Life, cannot ſurrender his Eſtate to *A.* for he is ſeiſed with him *per mie & per tout*. 22 H. 6. 51. 2 Rol. Abr. 86.

If Land be given jointly to two, upon Condition that they ſhall not alien, and one of them releaſe to the other, it is no Breach of the Condition. Winch 3. Raym. 413.

If there be two Joint-tenants of Land holden by Heriot Service, and one dies, the other ſhall not pay Heriot Service; for there is no Change of the Tenant, the Survivor continuing Tenant of the whole Land. Owen. 152. *Butler* and *Archer*.

And although Tenants in common have ſeveral Freeholds, yet one Tenant in common cannot diſſeiſe the other, otherwiſe than by an actual Diſſeiſin, as turning him out, and hindering him to enter; but a bare Perception of the Profit is not enough. Salk. 392. pl. 4. *Reading*'s Caſe.

(B) What Perſons may be Joint-tenants or Tenants in common.

AN Alien and Subject may be Joint-tenants, & *nullum tempus occurrit Regi*; therefore if an Alien and Subject born purchaſe Lands to them and their Heirs, the Survivorſhip ſhall take place till Office found; but the Office found intitles the King, and ſevers the Joint-tenancy. Co. Lit. 180. b.

If a Villein and another Perſon purchaſe Lands to them and their Heirs, the Lord of the Villein may enter into a Moiety. Co. Lit. 186. a.

Bodies Politic or Corporate cannot be Joint-tenants with each other, neither can a Corporation, whether ſole or aggregate, be Joint-tenant with a natural Perſon; and therefore if Land be given to two Biſhops, or Abbots, or Parſons, and their Succeſſors, they are Tenants in common at firſt, and have no joint Eſtate for Life; for they take in their politick Capacities in Right of their Churches or Houſes; ſo if Land be given to the King and a Subject, and their Heirs, or if the Crown deſcend to a Joint-tenant, or if Lands be given to a Layman and a Parſon, and to the Co. Lit. 189. b. 190. a. Moor 202. 2 Sand. 319.

Heirs of one, and Succeſſors of the other, they are Tenants in common, for the Fee veſts in them, in ſeveral Capacities.

Co. Lit. 190. a. But if a Leaſe for Years or other perſonal Thing be given to a Layman and Biſhop, &c. they are not Tenants in common, but Joint-tenants; for as no Chattel perſonal can go in Succeſſion, they muſt both take in their natural Capacities.

*Page 190 21 E. 3. 50 b. 1 Rol. Abr. 87. * Diſſeiſors may be Joint-tenants, and upon the Death of one of them the Survivor ſhall have the Whole; for the Right, ſuch as it was, continued jointly in them.

21 E. 3. 50. b. 2 Rol. Abr. 87. Infants may be Joint-tenants, and if there be two Infants Joint-tenants, who alien in Fee, and one of them dies, the Survivor ſhall have the Whole; for notwithſtanding the Alienation the Joint-tenancy is not ſevered, by reaſon of the Poſſibility of defeating it by Writ *Dum fuit infra Ætatem.*

Lit. ſ. 291. Baron and Feme may be Joint-tenants; but herein it is to be obſerved, that Huſband and Wife being conſidered but as one Perſon in Law, if an Eſtate be made to Huſband and Wife, and a third Perſon, and their Heirs, the Huſband and Wife take but one (*a*) Moiety, the third Perſon the other.

(*a*) *A.* purchaſed a Copyhold Eſtate, and took Surrender thereof in the Names of himſelf, his Wife, and Daughter, and their Heirs, which he afterwards, as viſible Owner thereof, mortgaged to *J. S.* On a Bill brought by the Mortgagee againſt the Mother and Daughter, to diſcover their Title and to ſet aſide their Eſtates as fraudulent againſt the Mortgagee, who was a Purchaſer; it was held by the Court not to be fraudulent, and that the Huſband and Wife took one Moiety by Intireties, which the Huſband could not alien, nor diſpoſe of ſo as to bind the Wife, and that the other Moiety was well veſted in the Daughter. 2 Vern. 120. *Buck* verſus *Andrews.*

Co. Lit. 187. a. Alſo Baron and Feme being one Perſon in Law, there can be no Moieties between them of an Eſtate given to them jointly during Coverture; and therefore if Lands be given to Huſband and Wife, and their Heirs, the Huſband cannot during the Wife's Life diſpoſe of any Part of it, but the Whole muſt go to the Survivor of them.

Co. Lit. 187. b. But if an Eſtate be made to a Man and a Woman, and their Heirs, before Marriage, and after they marry, the Huſband and Wife have Moieties between them.

Co. Lit. 187. And as there can be no Moities between Huſband and Wife of an Eſtate given to them during Marriage, it hath been holden, that if the Huſband be attainted and executed, the Wife ſhall by her Petition regain all ſuch Lands conveyed jointly to her and her Huſband.

Co. Lit. 187. So if the Lord enter on the Huſband being his Villein, and having made ſuch Purchaſe, the Wife ſurviving ſhall recover the Whole.

Co. Lit. 187. It is ſaid, that if a Deed of Feoffment or Grant of a Reverſion be made to them whilſt ſole, and then they intermarry before Livery or Attornment, that they take no Moieties; but if they had been ſeiſed of an Uſe by Moieties before 27 *H.* 8. *cap.* 10. and ſuch Uſe had been executed, by the Statute, they ſhould have had the Eſtate of the Land by Moieties; for they ſhould have the Eſtate in ſuch Plight as they had the Uſe.

Co. Lit. 187. If Huſband and Wife vouch and recover by Force of a Warranty made to them when ſole, yet they ſhall have no Moieties in the Eſtate recovered.

Co. Lit. 188. Co. 101. Dyer 340. If *A.* make a Feoffment to the Uſe of himſelf and ſuch Wife as he ſhall marry, and afterwards take a Wife, he and his Wife are Joint-tenants, though he were ſeiſed of a qualified Fee before the Marriage, and the Wife had nothing; for by the Marriage the contingent Eſtate veſted in them both at the ſame Time by the ſaid Limitation.

If

If *A.* purchaſe a *Walk in a Chaſe*, and take the Patent thus, To himſelf and his Wife, and one *J. S.* for their Lives, and the Life of the longeſt Liver of them, and afterwards *A.* dies indebted, this Purchaſe is not Aſſets; for it ſhall be preſumed to be intended an (*b*) Advancement and Proviſion for the Wife; for ſhe cannot be a Truſtee for her Huſband, and therefore ſhe ſhall enjoy the Benefit of it during her Life; but after her Deceaſe in caſe *J. S.* ſhould ſurvive her, then to be a Truſt for the Executor of the Huſband, and applied towards the Payment of his Debts. 2 Vern. 67. decreed between *Kingdom* and *Bridges*. *Page 191

(*b*) If Father and Son join in Purchaſe of Lands on a valuable Conſideration, and the Father afterwards deviſes thoſe Lands, the Court of Chancery will not ſuppoſe the Concurrence of the Son was only in Truſt for the Father, but that he was made Joint-tenant for his own Advantage; and this, it is ſaid, was the antient Way of Purchaſing to avoid Wardſhips. Chan. Ca. 28. *Scroope* verſus *Scroope*.

A Leaſe is made to *A.* and to Huſband and Wife, *viz.* to *A.* for Life, Huſband in Tail, Wife for Years; in this Caſe each of the three has a ſeveral Eſtate. Co. Lit. 187 b.

If an Eſtate be limited to Huſband and Wife and the Heirs of the Body of the Huſband, they are Joint-tenants for Life, and the Inheritance is ſo executed in him, that if he makes a Feoffment, this will be a Diſcontinuance to his Iſſue; but if he ſuffers a common Recovery with ſingle Voucher, this will bind neither the Iſſue nor any Remainders, becauſe his Wife was ſeiſed of the Whole jointly with him, and not of Part, and there are no Moieties between them, and therefore it cannot be good for any Part; but the Feoffment deals with the Poſſeſſion, and gives it away by ſolemn Livery; and therefore to preſerve the Warranty, this amounts to a Diſcontinuance, and the Iſſue ſhall be put to his *Formedon in Deſcender*, and thoſe in Remainder to their *Formedon in Remainder*; and if the Huſband levies a Fine, this will bind the Iſſue, by the Statutes 4 *H.* 7. *cap.* 24. and 32 *H.* 8. *cap.* 36. 2 Co. 61. Cro. Eliz. 470, 481. Poph. 52. Dyer 9. pl. 22. Cro. Car. 320. 3 Co. 5. Moor 210. Yelv. 131. Lev. 37. Sid. 83.

And as the Huſband, being jointly ſeiſed with his Wife of the Lands, cannot alien them; ſo neither can he charge ſuch Lands; and therefore where the Huſband in ſuch Caſe acknowledged a Recognizance, and died, it was held, that the Wife ſhould hold the Lands diſcharged. Rol. Abr. 346.

Huſband and Wife may be Joint-tenants of a Leaſe for Years, or other Chattel (*c*) real, as well as of a Freehold or Eſtate of Inheritance. 43 E. 3. 10. Rol. Abr. 349.

(*c*) But if Goods are given to a Huſband and Wife, the Wife ſhall not have them by Survivorſhip, but the Executor of the Huſband. 43 E. 3. 10. Rol. Abr. 349.

So if (*d*) a Statute be acknowledged to Baron and Feme, they are Joint-tenants of this, and the Feme ſhall have all by Survivorſhip. 48 E. 3. 12. b. Bro. Baron and Feme 24. Rol. Abr. 342, 889. S. C.

(*d*) So if an Obligation be made to Baron and Feme. Rol. Abr. 342.

Alſo it hath been ruled in Chancery, that where the Huſband lends out Money in the Names of himſelf and his Wife, upon Mortgages and Bonds, and dies, that the Wife is intitled to the Money by Survivorſhip, if there are Aſſets ſufficient to pay the Huſband's Debts. 2 Vern. 683.

But where the Huſband is jointly poſſeſſed of a Leaſehold Intereſt, or other perſonal Thing, he may diſpoſe of it in his Life-time without the Conſent or Concurrence of his Wife. Rol. Abr. 343.

But if a Leaſe be made to Baron and Feme for Years, the Baron cannot deviſe the Term; for the Feme is in by Survivorſhip before the Deviſe takes effect. Co. Lit. 351. Rol. Abr. 344.

Alſo if a Leaſe be made to Baron and Feme for their Lives, Remainder to the Survivor, or to the Executors of the Survivor of them, and the Baron grants the Term, and dies, this will not bar the Wife ſurviving; becauſe the Wife had but a Poſſibility, and no Intereſt. 10 Co. 51. Godb. 139. 4 Leon. 185. Hutton 17. 2 Rol. Abr. 48. pl. 3.

Poph. 5. Cro. Eliz. 841. Co. Lit. 46. b. Rol. Abr. 344.

8 Co. Lit. 171. But in 1 Rol. Abr. 34. this is made a *Quære.* Rol. Abr. 350.

If the Baron be indebted to the King, and purchaſes Lands for Years, to him and his Wife, and dies, this Land ſhall be put in execution for the ſaid Debt, becauſe the Baron hath Power to diſpoſe of the ſaid Term.

If a (*c*) Rent-charge be granted to a Man and a Woman for Years who afterwards intermarry, and after Arrearages incur, and after the Baron dies, the Feme ſhall have the Reſidue of the Rent, and alſo the * Arrearages in a Writ of Annuity, becauſe they participate of the Nature of the Principal.

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(*c*) So if Baron and Feme are ſeiſed of a Rent-Service for their Lives, the Rent incurs, and after the Baron dies, the Feme ſhall have the Arrearages incurred during the Coverture. 29 E. 3. 140. Moor 887. pl. 1248. Hob. 208. Cro. Eliz. 791.

Rol. Abr. 727. Co. Lit. 55. b. Noy 149. S. C. and the Court divided thereupon. Dyer 316. S.C. cited in Margin to have been adjudged accordingly. Cro. Eliz. 61. cited to have been adjudged; & *vide* Owen 102. and 2 Vern. 322. where *J. S.* on his Marriage ſettled Lands to the Uſe of himſelf and his Wife for their Lives, and of the Survivor of them, Remainder to the Heirs of their two Bodies; and the Huſband dying and leaving the Ground ſown with Corn, the Queſtion was, whether the Emblements on the Land ſettled as aforeſaid ſhould go to the Wife, or to the Executors of the Huſband, and the Court of Chancery propoſed to each to take a Moiety, which was agreed to. 2 Vern. 322-3.

If there be a Baron and Feme Joint-tenants for Life, and the Baron ſows the Land, and dies before Severance, his Executor ſhall have the Emblements, and not the Feme; and it is ſaid, there is no Diverſity between this and where the Baron is ſeiſed in Right of the Feme.

(C) Of what Things there may be a Joint-tenancy or Tenancy in common.

Co. Lit. 181. b. 2 Rol. Abr. 87.

THERE may be a Joint-tenancy not only of Lands and Tenements but alſo of Chattels perſonal, as well as real, ſuch as Leaſes for Years, a Horſe, &c. for where two come to theſe by a joint Gift or Purchaſe they ſhall ſurvive, and not go to the Executors of the Party.

Co. Lit. 182. a.

But an Exception is to be made of two Joint-Merchants; for the Wares, Merchandizes, Debts, or Duties that they have as Joint-Merchants or Parceners ſhall not ſurvive, but ſhall go to the Executors of the Deceaſed, and this *per Legem Mercatoriam*, which is Part of the Laws of this Realm, for the Advancement and Continuance of Trade and Commerce; which being *pro bono Publico*, the Rule is, that *Jus accreſcendi inter Mercatores pro Beneficio Commercii Locum non habet.*

Carth. 170-1. *Kemp* and *Andrews.* Show. 188. Comb. 474. 3 Lev. 290. S. C.

But though there is no Survivorſhip between Merchants; yet if there are two Joint-Merchants, or two who are jointly poſſeſſed of Goods in the Way of Trade, who caſually loſe them, and afterwards one of them dies, the Survivor alone may, it ſeems, bring Trover for them; for the Action muſt neceſſarily ſurvive, though the Intereſt doth not, otherwiſe there would be a Failure of Juſtice; becauſe the Survivor and the Executor of him who is dead cannot join in the Action, for that their Rights are of ſeveral Natures, and there muſt be ſeveral Judgments; but it being held clearly, that if this was any Plea, it muſt have been in Abatement, for this Reaſon the Books ſay the principal Point was not determined.

Lit. ſ. 320. Co. Lit. 199. a.

Alſo there may be Tenants in common of Chattels real or perſonal, intire or ſeveral, as Leaſes for Years, Wards, Horſes, &c. as when any of thoſe who were Joint-tenants of them grant over their Intereſt to a Stranger, the Grantee and the other are Tenants in common.

Co. Lit. 199. a.

Alſo if there be two Tenants in common of a Seignory, and a Ward fall, they are Tenants in common of the Wardſhip as well of the Body as Land; and ſo it is if the Land eſcheat to them, they ſhall be Tenants in common thereof.

If

If a Corody be granted to two Men and their Heirs, in this Caſe, because the Corody is uncertain, and cannot be ſevered, it ſhall amount to a ſeveral Grant, to each of them one Corody; for the Perſons be ſeveral, and the Corody is perſonal. Co. Lit. 190. a.

If two take a Leaſe jointly of a Farm, the Leaſe ſhall ſurvive; but the Stock on the Farm, though occupied jointly, ſhall not ſurvive; neither * ſhall a Stock uſed in a joint Undertaking in the way of Trade ſurvive; and therefore it is ſaid not to be neceſſary in Articles of Copartnerſhip to provide againſt it. Vern. 217. *Page 193

(D) How a Joint-tenancy is created.

A Joint-tenancy may be created by (*a*) Fine, Recovery, Bargain and Sale, Releaſe, Confirmation, &c. Co. Lit. 180. b.

(*a*) But it is ſaid, that a Fine *ſur Conuzance de Droit come ceo*, &c. cannot be levied to two, and their Heirs; for the End of Fines being not only to ſettle the Poſſeſſion for the preſent, but for ever, the Admittance of ſuch Fine would not anſwer that End; for beſides the Uncertainty which of the Conuzees ſhould ſurvive and enjoy the Land, the Fine itſelf cannot operate according to the Limitation; for the Survivor, by the Privilege of Joint-tenancy, ſhall enjoy the Whole, and for ever exclude the Heirs of the other Conuſee; beſides, the Fine, being equivalent to a Judgment, ought to decide and ſettle the Right of the Fee. 2 Rol. Abr. 19. Co. *Reading on Fines*, 5, 9.

Alſo a Joint-tenancy may be created by (*b*) a Diſſeiſin; as if two or more diſſeiſe another of Lands, &c. to their own Uſe, they are Joint-tenants, but if to the Uſe of one of them, he to whoſe Uſe is ſole Tenant, and the others Coadjutors. Lit. f. 278. Co. Lit. 180. b.

(*b*) And as there may be Joint-tenants by Diſſeiſin, ſo there may be Joint-tenants by Abatement, Intruſion, or Uſurpation. Co. Lit. 181. a. & *vide* Vaugh. 189.

If a Diſſeiſin be made to the Uſe of two, and one agrees at one Time, and another at another Time, yet they are Joint-tenants; for every ſubſequent Aſſent is equal to a Command precedent, and if both had commanded the Diſſeiſin, the firſt Act had been the Act of both, and therefore from that Act done they are now eſteemed as Joint-Diſſeiſors. Co. Lit. 188. a. Co. 56. 2 Leon. 223.

Yet it is laid down as a general Rule, that Joint-Eſtates muſt veſt at once, and that therefore if a Leaſe for Life be made to *A.* Remainder to the Heirs of *J. S.* and *J. N.* then living, the Heirs cannot be Joint-tenants; but it ſeems that in this Caſe they are Tenants in common; for when *J. S.* dies, his Heir hath either a ſole Property of the Fee, or hath it with others, becauſe there is none in Being to take it with him, and if he had a ſole Property of the Fee, it cannot alter without ſome Act of his own; but he cannot have a ſole Property in the whole Remainder, for that were expreſly contrary to the Conveyance; he muſt therefore have a ſole Property of the Fee in a Moiety, which is a Tenancy in common. Co. Lit. 188. a.

But in caſe of an Uſe, Perſons may be Joint-tenants that do not take at the ſame Time; as if a Man enfeoffs ſuch a one to the Uſe of himſelf for Life, and of ſuch a Wife as he ſhall afterwards take, they are Joint-tenants; for here the Huſband has no Property in the Land, neither *Jus in Re* nor *ad Rem*, but the Feoffee has the whole Property, at firſt to the Huſband only, and upon the Contingency of the Marriage, to them both intirely; and this is the only Rule in Equity to ſupport the Truſt in the ſame Manner the Parties have limited it; and now by the Statute of Uſes it is executed in the ſame Form it was governed in Equity. Co. Lit. 188. a. 13 Co. 56. Dyer 340. Co. 104.

If

Rol. Abr. 791. 13 Co. 55. Hutton 112. If a Man enfeoffs or levies a Fine to *A.* in Fee, to the Uſe of himſelf and *B.* and their Heirs, they are at Common Law Joint-tenants of the Uſe; for the Eſtate in a Uſe veſts according to the Intent of the Parties, which was to place the intire Uſe in them, and the Poſſeſſion only in *A.* and ſince the Statute executes the Poſſeſſion in the ſame Manner as the Uſe was, they are ot Tenants in common, as one in by the Common
*Page 194 * Law, and the other by the Statute, but Joint-tenants by the Words of the Statute.

2 Rol. Abr. 791. If a Man infeoffs *A.* to the Uſe of *A.* and *B.* they are Joint-tenants, though *B.* gave no Conſideration, becauſe the Uſe is diſpoſed of expreſsly to him.

13 Co. 54. Poph. 126. If a Charter of Feoffment be made between *A.* of the one Part, and *B.* and *C.* of the other Part, and *A.* gives Lands to *B. Habendum* to *B.* and *C.* and their Heirs, *C.* takes nothing by the *Habendum*, becauſe all the Lands were given to *B.* and conſequently *C.* cannot hold thoſe Lands which are given before to another; but in this Caſe if the *Habendum* had been to *B.* and *C.* and their Heirs, to the Uſe of *B.* and *C.* this had been a good Limitation of the Uſe, and conſequently the Statute would carry the Poſſeſſion to the Uſe, and *B.* and *C.* thereby become Joint-tenants.

2 Rol. Abr. 416. 6 Co. 17. If Lands are given to a Woman and the Heirs of the Body of her Huſband who is then dead, it is ſaid that the Wife and the Iſſue of the Huſband are Joint-tenants for Life, with Remainder to the Iſſue in Tail; for ſince they are named to take in Poſſeſſion with the Wife, if they ſhould only take an Eſtate for Life, the Donor would have the Land again, tho' there were ſtill Heirs of the Body of the Huſband; and whoever anſwers that Deſcription is compriſed within the Words of the Gift, therefore they ſhall alſo have a Remainder in Tail.

Cro. Eliz. 431. 2 Sid. 53. 3 Lev. 127. If a Man has Iſſue only two Daughters, and deviſes his Lands to them and their Heirs, this, though it be a Deviſe to the Heir at Law, (for ſo are the Daughters,) makes them Joint-tenants, in which Survivorſhip ſhall take place; for by the Will the Quality of the Eſtate is altered.

Co. Lit. 188. a. If Lands be deviſed to two, to have and to hold to one for Life, and the other for Years, they are not Joint-tenants; for an Eſtate of Freehold cannot ſtand in Jointure with a Term for Years; nor can a Reverſion upon a Freehold, ſtand in Jointure with a Freehold and Inheritance in Poſſeſſion.

(E) How a Tenancy in common is created.

Co. Lit. 189. a. TENANTS in common, as hath been ſaid, are thoſe that come to the Land by ſeveral (*a*) Titles, or by one Title and ſeveral Rights, and they have the Poſſeſſion in common, though ſeveral Rights, and it may be by Purchaſe, Deſcent or Preſcription.

(*a*) As if the one and his Anceſtors, or they whoſe Eſtate he hath in one Moiety, have holden in common the ſame Moiety with the other Tenant, which hath the other Moiety, and with his Anceſtors, or with thoſe whoſe Eſtate he hath, undivided, Time out of Mind. Lit. ſ. 310. Co. Lit. 195.

Co. Lit. 189. If there be three Joint-tenants, and one alien his Part, the other two are Joint-tenants of their Parts that remain, and hold them in common with the Alienee.

Lit. ſ. 309. So if there be two Coparceners, and one of them alien her Part, the Alienee and other Coparcener are Tenants in common.

Co. Lit. 189. b. Alſo if Joint-tenants make ſeveral Feoffments or Gifts in Tail, or Leaſes for Life, the Feoffees, Donees, or Leſſees are Tenants in common.

If

If Land be given to two, *Habend'* the one Moiety to one and his Heirs, and the other Moiety to the other and his Heirs, they are Tenants in common. Co. Lit. 190. a.

* So if a Man ſeiſed in Fee infeoff another of a Moiety, or third or fourth Part, without any Aſſignment of it in Severalty, the Feoffee and Feoffor are Tenants in common. * Page 195 Co. Lit. 190. b.

If there be two Joint-Leſſees for Life, and one grant all that belongs to him to another, the Grantee and the other Leſſee are Tenants in common as long as both Leſſees are alive, and the Leſſor ſhall enter into a Moiety by the Death of either of them; becauſe by ſuch Grant the Jointure was ſevered, and it makes no Difference in this Caſe, if the Joint-Leaſe was made by theſe Words, *Habend'* to them two for their Lives, and to the Survivor; for *Expreſſio eorum quæ tacite inſunt nihil operatur.* Co. Lit. 191.

If there are three Joint-tenants, and one of them releaſe to one of the other two all his Right, as to this third Part, he to whom the Releaſe was made and the other Joint-tenant are Tenants in common; but as to the other two Thirds they continue Joint-tenans as before. Lit. f. 304. Co. Lit. 193. a.

(F) What Words create a Joint-tenancy, and not a Tenancy in common, & e converſo.

AS to the Words which create a Joint-tenancy, and not a Tenancy in common, we muſt diſtinguiſh between the Operations Words have in a Conveyance, and in a laſt Will or Teſtament, in which the Intention of the Teſtator is chiefly to govern; if therefore an Eſtate be given to two equally divided, or equally (*a*) to be divided, theſe Words in (*b*) a Conveyance do not make them Tenants in common, or ſever the Joint-tenancy, which was at firſt jointly conveyed to them. 2 Rol. Abr. 90. 3 Co. 39. 2 Vern. 323.

(*a*) That there is no Difference where it is to two equally divided, and where to two equally to be divided. 2 Vent. 365, 366. Show. Par. Caſes 210.

(*b*) Copyhold Lands were ſurrendered to the Uſe of *A. B.* and *C.* and their Heirs, equally to be divided between them and their Heirs reſpectively; and *Gould* and *Turton*, Juſtices, held it a Tenancy in common, by reaſon of the apparent Intent of the Parties; but *Holt* Ch. Juſtice held it a Joint-tenancy, and that the Word *equally* imported no more than to have alike, and as to the Word *divided* he held, that did not import a Tenancy in common, for their Poſſeſſion muſt be intire & *pro indiviſo*, to divide would be to deſtroy it; and it is ſtrange to create an Eſtate from a Word which implies only what would deſtroy it. Salk. 391. pl. 3. Ld. Raym. 622. Comyn. Rep. 88. pl. 58. 3 Salk. 206. pl. 13. See 12 Mod. 296. But this Caſe being cited Mich. 1730. in *Can.* in the Caſe of *Stringer* and *Phillips*, was ſaid to have been reverſed, according to Lord *Holt's* Opinion.

Therefore it hath been holden, that in caſe of a Conveyance there are but two Ways of making a Tenancy in common: 1*ſt*, Either by limiting the Eſtate to them to take expreſly as Tenants in common: Or 2*dly*, By limiting a Moiety, or a Third, or other undivided Part to one, and the other Moiety or a Third to another, &c. and that the Words *equally divided* or *equally to be divided*, would not create a Tenancy in common in a Deed; but they ſhould be Joint-tenants where the Chance of Survivorſhip is equal, and that Chance is the Meaning of the Words *equally to be divided*, or an equal Perception of the Profits. *Stringer* ver. *Phillips*, 1730. at the Rolls.

Alſo if a Man make a Feoffment in Fee of 20 Acres to *A.* and *B.* *Habendum* one Moiety to *A.* and the other Moiety to *B.* this *Habendum* makes them Tenants in common; for tho' the Premiſſes be joint, and therefore of themſelves would operate to give a joint Eſtate and Poſſeſſion, yet the *Habendum* explaining the Manner of Poſſeſſing, is not inconſiſtent or repugnant, becauſe it makes no Diviſion of that undivided Poſſeſſion which was given in the Premiſſes. Co. Lit. 138. b. 190. b. Hob. 172.

But

2 Vern. 323. *Clark* verſus *Clerk.* *Page 196

But if a Man conveys his Houſe and four Farms to Truſtees, upon Truſt that his two Siſters might cohabit in the capital Houſe, and equally divide the Rents and Profits of the four Farms betwixt them * and the Whole to the Survivor of them, this ſhall be a Joint-tenancy; for although the Words *equally to be divided betwixt them* do ſometimes in a Will make a Tenancy in common, yet it is only by way of Conſtruction, and in compliance with the Intent of the Teſtator.

Moor 558. pl. 759. *Lewin* and *Cox*, adjudged in the Exchequer-Chamber by five Judges againſt two; & *vide* Dyer 25. a. in Margin, and 2 Rol. Abr. 89. ſeveral Caſes to this Purpoſe.

As a Deviſe to two equally, and their Heirs, this was held to make them Tenants in common; for in a Will the Intention of the Teſtator is to govern, and no Words which have a Meaning and tend to illuſtrate his Intention can be rejected, and therefore the Word *equally* muſt be conſtrued to have been inſerted to make them Tenants in common, elſe it can have no Meaning at all; and in this Caſe it was ſaid by one of the Judges, that if the Word *equally* had come after the Deviſe to the two and their Heirs, it had been more ſtrong to make them Joint-tenants than Tenants in common.

Lit. Rep. 46. *Jaques* and *Thorough-good* ver. *Collins.*

So a Deviſe of ſeveral Houſes to Five, their Heirs and Aſſigns, all of them to have Part and Part alike, the one of them to have as much as the other, was held a Tenancy in common.

Cro. Car. 75. S. C. adjudged.

Cro. Jac. 448 *King* verſus *Rumbal.* Rol. Abr. 833. S. C. 2 Rol. Abr. 89. S. C. 3 Co. 39. S. P. reſolved.

So where a Man deviſe to his Wife for Life, and after her Deceaſe to his three Daughters, equally to be divided, and if any of them die before the other, then the Survivors to be her Heirs, equally to be divided; and if they all die without Iſſue, then to others, &c. and it was held, that the Daughters were not Joint-tenants, but that they had ſeveral Inheritances in Tail.

3 Mod. 210. S. C. cited, and like Point reſolved.

3 Lev. 373. *Bliſſet* and *Cranwell.*

So if a Man deviſe Lands to his two Sons and their Heirs for ever, and the longer Liver of them, to be equally divided between them after his Wife's Death, this ſhall be a Tenancy in common in the Sons; adjudged by three Judges againſt one, and that the latter Words being in a Will ſhall controul the former.

Hill. 15. & 16 Car. 2. in *B. R.* *Ride* verſus *Atwick.* Keb. 692, 754, 773. S. C.

A Man having three Sons, *William*, *John*, and *Daniel*, and Lands in *D. S.* and *E.* deviſed his Lands in *D.* to his Son *John*, and his Heirs, and his Lands in *S.* to his Son *Daniel* and his Heirs, and deviſed that his Wife ſhould have all his Freehold Lands for five Years, paying 10 *l.* a Year to *John*, and 6 *l.* a Year to *Daniel*; and if either of his three Sons died before the five Years expired, then to be divided equally by them that ſhall be living: *William* and *John* both died during the five Years; and it was held, that *William's* Part, who died firſt, ſhould be divided betwixt *John* and *Daniel*, and they to be Tenants in common thereof; but it was likewiſe held, that when *William* was dead, and his Part divided, that that Clauſe was executed, ſo that upon the Death of the ſecond the Will would not carry his Part to the third.

Trin. 6 *Annæ* in *B. R.* *Tuckerman* and *Jefferies* 11 Mod. 108. S. C. Holt, 370. S. C.

In Treſpaſs for breaking and entering the Plaintiff's Cloſe, it was found by ſpecial Verdict, that *A.* was ſeiſed in Fee of ſuch a Place, whereof the Cloſe in queſtion was Parcel, and being ſo ſeiſed, made his Will in Writing, wherein, *inter alia*, he gave to *Jane* the Wife of *B.* and to *Elizabeth* the Wife of *C.* all his Eſtate, &c. to be equally divided between them, during their natural Lives, and after the Deceaſes of the ſaid *Jane* and *Elizabeth* to the right Heirs of *Jane* for ever; and found further, that the ſaid *Jane* and *Elizabeth* were Heirs at Law to the ſaid *A.* and that after the Death of *A.* their Huſbands entered in their Rights; that *Jane* died before the Treſpaſs,

one

one of the Defendants being her Iſſue and Heir, and that *C.* entered into the whole in Right of *Elizabeth* his Wife, and let to the Plaintiff, and thereupon the Defendant entered; and the only Queſtion was, whether this Deviſe made *Jane* and *Elizabeth* Joint-tenants for Life, ſo as upon the Death of *Jane* the * Whole ſurvived to *Elizabeth* for Life, or whether upon the Words *equally to be divided between them*, they were Tenants in common, ſo as a Croſs-Remainder of the Moiety was not to go to the Heirs of *Jane* till after the Death of *Elizabeth*; and it was argued for the Plaintiff, that though the Words *equally to be divided* do often in a Will make a Tenancy in common, yet it is not ſo much the Words themſelves, as the Intention of the Teſtator, that makes ſuch an Eſtate; for they have no Force of themſelves to make ſuch an Eſtate, but according to the Intent of the Teſtator; for a Joint-Eſtate is equally liable to be divided with an Eſtate in common, 1 *Inſt* 186. and one Joint-tenant has no more than a Moiety to grant, to charge or to diſpoſe of; and therefore the Words *equally to be divided* are no more than what the Law implies; and the only Difference between Joint-tenants and Tenants in common is the Conveyance by which they claim. *Lit. ſect.* 292, 298. And in this Caſe being in a Will, if it had gone no farther than to be equally divided between them, it was agreed it would have been a Tenancy in common. *Styl.* 211. 2 *Roll. Abr.* 89, 90. But here was a manifeſt Intent that it ſhould go to the Survivor; for it is limited after the Deceaſes of the ſaid *Jane* and *Elizabeth* to the right Heirs of *Jane*; which is as if he had ſaid, to them and the Survivor of them, for their Lives; for the right Heirs of *Jane* are to take nothing till *Jane* and *Elizabeth*'s Death, and they are to take the whole Eſtate at the ſame Time, and not one Moiety at one Time, and another at another; and if his Intent had been ſo, he would have ſaid ſo, *viz.* And after the Deceaſe of them, or either of them; for in ſuch Caſe if the Deviſees ſhould take as Tenants in common, the Remainder in the one Moiety muſt be contingent; ſo that if the Tenant in common in Fee ſhould ſurvive the other Tenant in common for Life, the Remainder to the right Heirs of *Jane* will be void as to the other Moiety, and there is no other way to make the whole Deviſe good, but by making them Joint-tenants for Life; and admitting they were Tenants in common, yet the Defendant has no Title but to the Moiety till after both their Deaths, which has not happened, *Elizabeth* being ſtill living; and to this Purpoſe were cited *Moor* 7. 4 *Leon.* 14. 2 *Jones* 172. *Raym.* 452. *Holmes* and *Meynel.* *Page 197

On the other Side it was argued, that they were Tenants in common, and that in a Will the Words *equally to be divided between them* have been always conſtrued to make a Tenancy in common, becauſe of the Intent of the Teſtator, which in a Will is chiefly to be regarded; as if one deviſe Lands to one and his Aſſigns for ever, this paſſes a good Eſtate in Fee; beſides, in this Caſe there was no Intent to make them Joint-tenants; For, 1*ſt*, There are no Words of Survivorſhip; for the Words *after the Deceaſes of the ſaid* Jane *and* Elizabeth, are no more than what the Law would have implied, for it could not take effect otherwiſe for the Whole, as it will do when it is limited to a Stranger, and his Heirs, and if he die without Iſſue, then to *B.* and theſe Words in the principal Caſe do not carry a neceſſary Implication that they ſhould be Joint-tenants; for in the mean Time it may deſcend to the Heir at Law, as to a Moiety; and the Reaſon why *equally to be divided* makes a Tenancy in common in a Will is becauſe otherwiſe thoſe Words would be idle, for they import a Diviſion in the Intereſt. 3 *Lev.* 373. *Styl.* 434. *Bendl.* and *Daliſ.* 77.

Holt C. J. pronounced the Opinion of the Court, that they were Joint-tenants, notwithſtanding the Words *equally to be divided between them*, and the Lands ought to ſurvive to *Elizabeth*: 1*ſt*, For though upon ſuch Words generally they are Tenants in common, yet if it ſhould be ſo in this Caſe it would

would be expreſly againſt the Intent of the Teſtator, and would defeat the Heirs of *Jane* of Part; for they are to take all together, and not by Moieties, one at a Time, and one at another, but all at once; and if they ſhould be Tenants in common, they muſt take by Moieties at ſeveral Times.

*Page 198 2*dly*, It is expreſs that the Heirs of *Jane* are not to take till after * both their Deceaſes. 3*dly*, If they ſhould be Tenants in common, then the Heirs of *Jane* would be in danger to loſe a Moiety; for as to that one Moiety, it muſt be a contingent Remainder; ſo that if *Elizabeth* ſhould die during the Life of *Jane*, the Contingency for that Moiety not happening, it muſt deſcend to the Heirs at Law of the Teſtator, who are *Elizabeth* and the Iſſue of *Jane*, as Coparceners. 4*thly*, *Jane* and *Elizabeth* are Heirs at Law to the Teſtator, and as ſuch the Whole would have deſcended to them in Coparcenary, if no Will had been made; but here by this Will it is plain the Teſtator intended to prefer the Heirs of *Jane* to the Whole; and it was adjudged for the Plaintiff †.

† If *A.* ſeiſed in Fee, conveys to Truſtees to Uſes, to the Uſe of his Children and their Heirs, *equally to be divided amongſt them*, it is a Tenancy in common, as well as in a Will. 1 Wilſ. 341.

2 Vern. 430. *Phillips* and *Phillips*. Preced. Chan. 167. S. C. (*a*) *Vide* 2 Vern. 556. where it is held, that Survivorſhip muſt take place as well in Equity as at Law. *Vide poſt* 199.

A. deviſed Lands to Truſtees, and their Heirs in Truſt that the Profits ſhould be equally divided between his Wife and Daughter during the Wife's Life, and after her Death he deviſed the ſame to the Uſe of his Daughter in Tail, with Remainders over; the Daughter died during the Mother's Life; and it was held in (*a*) Chancery, that this was a Tenancy in common, and ſhould go to the Adminiſtrator of the Daughter during the Mother's Life, and ſhould not be a reſulting Truſt for the Benefit of the Heir.

Vern. 353. *Kew* and *Rouſe*.

J. S. deviſed a Term for Years, and all her Intereſt therein to her two Daughters, they paying yearly to her Son 25 *l.* by Quarterly Payments, *viz.* each of them 12 *l.* 10 *s.* yearly out of the Rents of the Premiſſes during his Life, if the Term ſo long continued; and my Lord Chancellor held it clearly a Tenancy in common, the 25 *l.* being to be paid by the two Daughters equally in Moieties.

Abr. Eq. 292 *Edwards* and *Faſhion*. Preced. Chan. 332. S. C.

A Man having a Mortgage for Years makes his Will, and thereby deviſes all his perſonal Eſtate, of what Nature ſoever, to his Executors, in Truſt for the Payment of his Debts, and afterwards deviſes the Reſidue and Overplus of his perſonal Eſtate to his two Daughters, equally to be divided between them, and dies; the Debts being ſatisfied, the Daughters contract with the Mortgagor for the Purchaſe of the Equity of Redemption to them and their Heirs; one of the Daughters deviſes her Share and Intereſt to the Plaintiff, and dies; and it was held, that this Purchaſe of the Equity of Redemption and Inheritance was a Tenancy in common, the Mortgage deviſed to the Daughters being ſo, and this Purchaſe being founded on the ſaid Mortgage.

Abr. Eq. 292 *Warner* ver. *Hone*.

J. S. deviſed his Leaſehold Houſe to his Wife for Life, and after her Death he deviſed it to *A.* and her three Sons equally amongſt them; and it was decreed, that they took it as Tenants in common, though there was no Mention of any Diviſion to be made.

Preced. Chan. 163. *Hamel* ver. *Hunt*.

A Man aſſigns a Term to Truſtees, in Truſt to permit himſelf to receive the Profits thereof during his Life, and after his Death in Truſt to permit his two Daughters *B.* and *C.* their Executors and Adminiſtrators to receive the Profits during the Reſidue of the Term, equally to be divided between them, they paying ſo much within two Years to his two other Daughters; and it was held, that this being a Truſt of a perſonal Thing, they were Tenants in common, the Father's Intention appearing to be to make ſeveral and diſtinct Proviſions for his two Daughters and the paying the Sums appointed to the Siſters makes them Purchaſers.

On:

One deviſes 200*l.* to be laid out in the Purchaſe of Lands, and ſettled by Truſtees to the Uſe of her Daughter, and the Heirs of her Body, and if ſhe died without Iſſue, then to the Uſe of the Children of *A.* (who then had Iſſue *B.* and *C.*) the Daughter died without Iſſue before the Money was laid out, after whoſe Death the Truſtees laid out the Money in a Purchaſe of Lands, and ſettled the ſame on *B.* and *C.* jointly in Fee according to the Will, who accordingly enjoyed the ſame for ſome Time; and one of them dying, it was held, that this was a Joint-tenancy, which went to the * Survivor: But it is ſaid to have been holden by the Court, that if the Money had not been actually laid out in a Purchaſe, the Survivor would have been intitled but to a Moiety only. Carth. 15: *in Can.* *Page 199 *Vide* Head of *Truſts*.

Alſo it is ſaid, that if 500*l.* a-piece is deviſed to two Legatees, who take a Mortgage jointly to them both, for ſecuring the Payment of their Legacies with Intereſt, and one of them dies, the other ſhall have nothing by Survivorſhip, becauſe in this Caſe the Mortgagees were Truſtees for each other, and the Mortgage, which is only as a Security, makes no Alteration in the Caſe. Carth. 16.

One deviſed 100*l.* to five, equally to be divided between them and the Survivors and Survivor of them, and if *A.* (one of the five) died before Marriage, her Share to go over to another Perſon; and it was decreed, that they took this 100*l.* as Tenants in common, and that the Words *and the Survivors or Survivor of them* to make them Joint-tenants would be a Contradiction to the firſt Words, whereby they were made Tenants in common, and that they ſhould be conſtrued to extend only to ſuch as were Survivors at the Death of the Teſtator, and thereby inſerted to prevent a Lapſe; and this is the ſtronger by the Limitation over of *A.*'s Share upon a Contingency, by which it is plain the Teſtator did not intend her to be a Joint-tenant with the reſt, and as the Deviſe was to all five, they muſt all take alike, and not *A.* be Tenant in common, and the other four Joint-tenants. Abr. Eq. 292-3. *Stringer* and *Phillips*, at the Rolls.

It ſeems to be the Doctrine of the Courts of Equity, that where two or more purchaſe Lands, and advance the Money in equal Proportions, and take a Conveyance to them and their Heirs, that this is a Joint-tenancy, that is, a Purchaſe by them jointly of the Chance of Survivorſhip, which may happen to the one of them as well as to the other; but where the Proportions of the Money are not equal, and this appears in the Deed itſelf, this makes them in the Nature of Partners, and however the legal Eſtate may ſurvive, yet the Survivor ſhall be conſidered but as a Truſtee for the others in proportion to the Sums advanced by each of them: ſo if two or more make a Joint-purchaſe, and afterwards one of them lays out a conſiderable Sum of Money in Repairs or Improvements, and dies, this ſhall be a Lien upon the Land, and a Truſt for the Repreſentative of him that advanced it, and that in all other Caſes of a Joint Undertaking or Partnerſhip, either in Trade, or any other Dealing, they were to be conſidered as Tenants in common, and the Survivors as Truſtees for thoſe who were dead. *Vide* Vern. 33, 217, 361.

As where the Commiſſioners of Sewers had ſold and conveyed Lands to five Perſons, and their Heirs, who afterwards, in order to improve and cultivate thoſe Lands, entered into Articles, whereby they agreed to be equally concerned as to Profit and Loſs, and to advance each of them ſuch a Sum to be laid out in the Manurance and Improvement of the Land; and it was held, that they were Tenants in common, and not Joint-tenants, as to the beneficial Intereſt or Right in thoſe Lands, and that the Survivor ſhould not go away with the Whole; for then it might happen that ſome might have paid or laid out their Share of the Money, and others, who had laid out nothing, go away with the whole Eſtate. Abr. Eq. 290-1. *Lake* and *Gibſon*.

[If a Joint-eſtate is aſſigned in Truſt, and one of the *Ceſtui que Truſts* dies, the Truſt ſurvives for the Benefit of the ſurviving *Ceſtui que Truſt*, againſt the Creditors of the Deceaſed, in Equity as well as Law. *Bunb.* 342.]

*Page 200 (G) **Of the Duration and Continuance of the Eſtate, whether given jointly or in common; and therein where the Inheritance ſhall be ſaid to be joint or ſeveral.**

5 Co. 9. Sid. 247. Raym. 126. IF an Eſtate is limited to Huſband and Wife during their *joint* Lives, this is no abſolute Eſtate for their Lives, ſo as to go to the Survivor; but the Death of either of them determines that Eſtate.

2 Co. 23, 24. *Baldwin's* Caſe. And. 223. Owen 48. If a Man covenants, grants, demiſes and to Farm lets Land to *A.* and *B.* and the Heirs of *B. habendum* to *A.* and *B.* for 300 Years, this is but a Term for Years in *A.* and *B.* though there be Words of Inheritance; for it was plainly the Intention of the Leſſor to create a Term only by his uſing the common Words of Demiſe; beſides, the Leſſees by the Premiſſes could have but an Eſtate at Will, becauſe the Words of Inheritance in the Premiſſes of the Deed were not ſufficient to carry the Freehold without Livery which was not made in this Caſe.

2 Rol. Abr. 150. If a Leaſe be made to *A.* and *B.* for their Lives, and the Life of the longeſt Liver of them, and they make Partition, and then *A.* dies, the Leſſor ſhall enter into his Part, and there can be no Occupancy, for *B.* has no Title to it, becauſe the Right of Survivorſhip was loſt by the Partition, which deſtroyed the Joint-tenancy; nor will the Words *to the longeſt Liver* be of any Uſe to *B.* becauſe they were void at firſt, being no more than the Law implied in the Joint-Eſtate; nor can there be any Occupancy, becauſe after the Partition each of the Leſſees hath but an Eſtate for his own Life in his reſpective Moiety, and conſequently the Reverſion, which is to commence when the particular Eſtate determines, muſt neceſſarily take place.

Lit. ſ. 285. If a Leaſe be made to two, and to the Heirs of one of them, they are Joint-tenants for Life, and one has a Freehold, and the other a Fee; and if he that has the Fee die, the Survivor ſhall hold the Whole during his Life.

Lit. ſ. 283. If Lands be given to two Men and the Heirs of their Bodies begotten, they have but a Joint-Eſtate for Life, and ſeveral Inheritances; for though the Gift be limited to the Deſcendants of their Bodies, yet it being impoſſible there ſhould be one Deſcendant of both their Bodies, they cannot have a Joint Eſtate-tail.

So if Lands be given to one Man and two Women, and the Heirs of their Body begotten, they have a Joint-Eſtate for Life, and ſeveral Inheritances, becauſe there can be no one Iſſue of both the Womens Bodies; and if the Man ſhould marry one of them, yet it is not limited in the Donation which of them, in caſe of ſuch Intermarriage, ſhould firſt take.

Plow. 35. a. Co. Lit. 183. So if Land be given to two Men and their Wives, and the Heirs of their Bodies begotten, they have a Joint-Eſtate for Life, and ſeveral Inheritances, but no Joint-Eſtate in Tail; becauſe though the Huſband and the Wife of the other may die, and the Survivors may marry, yet the Gift being made to them all, and the Heirs of their Bodies, it is impoſſible that there ſhould be one Heir or Deſcendant of all their Bodies, and therefore it can be no Joint-Eſtate in them all, but they all four take jointly for Life, and each Huſband and his Wife have a ſeveral Inheritance in a Moiety.

Co. Lit. 25. b. Bro. Eſtate 22. Tail 16. But if Land be given to a Man and a Woman unmarried, and the Heirs of their Bodies, this is a Tail ſpecial, for the Poſſibility that they may marry, and then the Deſcendants of that Marriage only can inherit: So if the Gift be made to a Man that hath a Wife, and to a Woman that

* that hath an Husband, and the Heirs of their Bodies, this is a Tail special presently in them, for the Possibility that they may marry, and the Descendants of such Marriage may inherit according to the Limitation of the Gift. *Page 201

If an Estate be limited to Husband and Wife, and the Heirs of their Bodies, and they are divorced *a Vinculo Matrimonii*, they are only Tenants for Life, because they shall not be (*a*) presumed to intermarry after they are once legally divorced by Church Censures. 3 H. 6. 48. 7 H. 7. 16.

(*a*) So if Lands be given to a Man and his Mother and the Heirs of their Bodies begotten, they have but a Joint-Estate for Life; but in this Case, the Mother and Son have several Inheritances. Co. Lit. 184. a.

And in all the Cases above-mentioned where the Inheritances are several, the Reversion depending thereon is several also; and if any of the Donees die without Issue, the Donor shall after the Death of all the Donees enter into a Moiety, or a third Part, *&c.* Co. Lit. 183. b.

If Lands be given to two Men, and the Heirs of their Bodies begotten, Remainder to them two and their Heirs, they are Joint-tenants for Life, Tenants in common of the Estate-Tail, and Joint-tenants of the Fee. Co. Lit. 183. 4.

(H) Of the joint and distinct Interests of Joint-tenants and Tenants in common, as to Acts done by or to them: And herein,

1. In what Acts they must all join.

IF a Feoffment be made to two or more jointly, they shall all do Homage and Fealty; but if a Feoffment be made by them, Homage and Fealty done to any one of them is sufficient. Co. Lit. 67. b.

Joint-tenants or Tenants in common of an Advowson are regularly to join in Presentation; and therefore if one Joint-tenant or Tenant in common present, or if they present severally, the Ordinary may either admit or refuse to admit such a Presentee, unless they join in Presentation, and after the six Months he may in that Case present by Lapse. Co. Lit. 186. b.

Where Joint-tenants of an Advowson made Partition by Deed of Covenant to present by Turns, and held good. Carth. 505. Ld. Raym. 535. 12 Mod. 321. Salk. 43. pl. 1.

If one Tenant in common of an Advowson doth present alone, this doth not put the other out of Possession, for at the next Avoidance they may join in Presentment. 2 Rol. Abr. 372. And. 63.

Or if there be two Joint-tenants seised of an Advowson, and the one doth present without the other, this is no (*b*) Usurpation upon his Companion, but he may alledge this Presentment in a *Quare Impedit* as a Title for himself to the next Avoidance, and this by reason of the Privity there is betwixt them. 27 H. 8. 11. b. Co. Lit. 186. b.

(*b*) So if there be two Joint-tenants, and the one doth present the other, this doth not gain any Possession; for that it is not strictly and properly a Presentation, but rather a Prayer to be admitted. 14. H. 8. 2. b.

Joint-tenants and Tenants in common may, according to the Interests they have, join or sever in making Leases, and such Leases shall bind whether made to commence *in præsenti* or *futuro*. Co. Lit 168. Bro. Tit. Grants 154. Rol. Abr. 848.

But

*Page 202 * But if there be two Joint-tenants, and they make a Leaſe by Parol or Deed Poll, reſerving Rent to one only, yet it ſhall enure to both; but if the Leaſe had been by Deed indented, the Reſervation ſhould have been good to him only to whom it was made, and the other ſhould have taken nothing. The Reaſon of the Difference is this: Where the Leaſe is by Deed Poll or Parol, the Rent ſhall follow the Reverſion, which is jointly in both Leſſors, and the rather, becauſe the Rent being ſomething in Retribution for the Land given, the Joint-tenant to whom it is reſerved ought to be ſeiſed of it in the ſame Manner he was of the Land demiſed, which was equally for the Benefit of his Companion as himſelf; but where the Leaſe is by Deed indented, they are eſtopped to claim the Rent in any other Manner than is reſerved by the Deed, becauſe the Indenture is the Deed of each Party, and no Man ſhall be allowed to recede from or vary his own ſolemn Act.

2 Rol. Abr. 447. Co. Lit. 47. Vent. 161. 162-3.

Rol. Abr. 877. If two Tenants in common of Lands join in a Leaſe for Years by Indenture of their ſeveral Lands, this ſhall be the Leaſe of each for their reſpective Parts, and the Croſs Confirmation of each for the Part of the other, and no Eſtoppel on either Part, becauſe an actual Intereſt paſſes from each reſpectively, and that excludes the Neceſſity of an Eſtoppel, which is never admitted if by any Conſtruction it can be avoided, as being one of thoſe Things which the Law looks upon as odious, becauſe it chokes and diſguiſes the Truth.

2. Where the Acts of one will be equally advantageous as if done by both.

Co. Lit 70. b. 2 Inſt. 34. If there be two Joint-tenants who hold by Knight's Service, and one of them performs the Service by going with the King to War, &c. this ſhall ſuffice for both; for though they be two Tenants, yet they hold only by one Tenure.

Owen 152. *Butler* verſus *Archer*. If there be two Joint-tenants of Land holden by Heriot-Service, and one dies, the other ſhall not pay Heriot-Service; for there is no Change of Tenant, the Survivor continuing Tenant of the whole Land.

Salk. 285. pl. 17. 6 Mod. 44. Ld. Raym. 741, 840. It hath been holden, that the Poſſeſſion of one Joint-tenant is the Poſſeſſion of the other, ſo far as to (*a*) prevent the Statute of Limitations.

12 Mod. 657. (*a*) So if two Joint-tenants be diſſeiſed, and one enters, this is in Law the Entry of both, and ſo it ſhall be pleaded. Bridgm. 129.

Co. Lit. 186. b. Alſo, if two Joint-tenants be of an Advowſon, and the one preſenteth to the Church, and his Clerk is admitted and inſtituted, this in reſpect of the Privity ſhall not put the other out of Poſſeſſion; but that if that Joint-tenant who preſenteth dieth, it ſhall ſerve for a Title in a *Quare impedit* brought by the Survivor.

Lit. f. 306. Co. Lit. 194. a. If there be two Joint-tenants by Diſſeiſin, Abatement, or Intruſion, and the Diſſeiſee or Owner of the Land releaſe to one of them, this ſhall enure only for the Benefit of him to whom the Releaſe was made, who being ſeiſed *per mie et per tout* is capable of ſuch a Releaſe, and by the Delivery of the Releaſe the whole Freehold and Inheritance by Operation of Law veſting in him, the Intereſt of his Companion being by Wrong is immediately deveſted and vaniſhed.

Co. Lit. 194. But if two Men uſurp by a wrongful Preſentation to a Church, and their Clerk is admitted, inſtituted and inducted, and the rightful Patron releaſeth to one of them, this ſhall enure to them both, for that the Uſurpers come not in merely by Wrong, but their Clerk is in by Admiſſion and Inſtitution, which are judicial Acts.

So

So if a Man be diſſeiſed, and the Diſſeiſor makes a Feoffment to two Men in Fee, if the Diſſeiſee releaſe by his Deed to one of the Feoffees, this Releaſe ſhall enure to both the Feoffees, becauſe they come in by Title and Purchaſe, and not by Wrong, and are preſumed to have a Warranty annexed to their Eſtate, which is greatly favoured in Law. Lit. ſ. 207. Co. Lit. 194. b. *Page 203

If a Feoffment be made to *A.* and *B.* by Deed, and Livery is made to *A.* in the Abſence of *B.* in the Name of both, the Livery is good to paſs the Eſtate to both; but if the Feoffment had been without Deed, and the Livery given to one in the Name of both, it ſhould operate to him only; becauſe the Parties are united in a Deed, they all take as one; therefore Livery to one in the Name of the reſt, is an actual Delivery to them all; but without Deed they are not ſo united; and therefore the Delivery to one in the Name of ſeveral, is no actual Delivery to the reſt, but the whole Eſtate muſt reſide in him to whom it is delivered, and a ſubſequent Aſſent cannot take it out of him, ſuch Aſſent being not ſo ſolemn as the Feoffment; beſides, in the Caſe of the Feoffment by Deed *A.* may be looked upon as the Attorney of *B.* to receive Livery, and therefore the Eſtate ſhall immediately veſt in *B.* becauſe every Man is preſumed to aſſent to a Grant for his Advantage; but the Feoffment without Deed will admit of no ſuch Conſtruction, becauſe no Man can receive Livery as Attorney to another without an Appointment by Deed. Co. Lit. 49. b. 359. 2 Vent. 202, 205. 5 Co. 95. a. 2 Rol. Abr. 9. 2 Leon. 23. *Mutton's* Caſe.

So if a Feoffment be made to *A.* and *B.* and the Feoffor gives a Letter of Attorney to deliver Seiſin, and the Attorney give Livery to *A.* in the Abſence of *B.* in the Name of both, this is a good Livery; for though the intire Poſſeſſion be delivered to one only, yet they being Joint-tenants by the Deed of Feoffment, ſuch Livery to one makes no Alteration or Change of the Poſſeſſion, becauſe if the Livery had been made to both, each had been placed in the Poſſeſſion. Co. Lit. 49. 2 Rol. Abr. 8.

So if a Leaſe for Years to *A.* and *B.* the Remainder to *C.* in Fee, and Livery is made to *A.* in the Abſence of *B.* whether the Conveyance be by Deed or without, the Livery is good, and veſts the Remainder in *C.* becauſe by the bare Demiſe *A.* and *B.* have an Intereſt, each being equally intitled to the whole Poſſeſſion, either may inveſt himſelf in the whole Poſſeſſion by Entry, or receive the Poſſeſſion from the Leſſor by the Solemnity of Livery; and therefore when the whole Poſſeſſion is delivered by the Leſſor, and Livery is made to *A.* in the Abſence of *B.* in the Name of both, this Livery is ſufficient to veſt the Remainder in *C.* becauſe *A.* had as much Power to receive the Poſſeſſion of the Whole, as if the Leaſe for Years had been made to him only, he and *B.* being Joint-tenants by the Demiſe, and thereby ſeiſed *per mie & per tout.* Co. Lit. 49. 5 Co. 94. 2 Rol. Abr. 8.

If a Surrender be made of a Copyhold Eſtate to *A.* and *B.* and their Heirs and *A.* comes in within the Time of the Proclamations, but *B.* does not, whether *A.* ſhall have the Whole, or a Moiety ſhall be forfeited, *dubitatur.* Yelv. 1. & *vide* Tit. *Copyhold.*

3. Where the Acts of one will bind the other, whether to his Advantage or Prejudice.

Herein we muſt obſerve, that regularly every Act done by one Joint-tenant for the Benefit of him and his Companion ſhall bind the other; but no injurious Act of one Joint-tenant alone ſhall prejudice his Companion. Bridgm. 129. 2 Co. 67.

Therefore if there be two Joint-tenants of a Seignory, and one diſſeiſes the Tenant, this ſhall ſuſpend but a Moiety of the Seignory; for his Companion ſhall not be prejudiced by his injurious Act, to which he was no Party, Co. Lit. 148. b. 9 Co. 135. b.

Party, and therefore after ſuch Diſſeiſin the Diſſeiſor is liable to the Diſtreſs of his Companion for his Moiety of the Seignory.

*Page 204 2 Inſt. 516. * If there be two Joint-tenants, and one of them levies a Fine, this does not bar his Companion, unleſs he omits to make his Claim within five Years after his Title accrued.

Co. Lit. 197. b. If there be two Tenants in common of an Advowſon, and they bring a *Quare Impedit*, and the one doth releaſe, yet the other ſhall ſue for and recover the whole Preſentment.

Dalſ. 44. pl. 33. If two Joint-tenants make a Feoffment on Condition that if they pay ſuch a Sum before a certain Day they may re-enter, and before the Day one of them releaſes this Condition to the Feoffee, this ſhall not bind his Companion.

Co. Lit. 197. b. If two Tenants in Common be of the Wardſhip of the Body, and a Stranger doth raviſh the Ward, and the one Tenant in common releaſes to the Raviſher, this ſhall go in Benefit of the other Tenant in common, and he ſhall recover the Whole, and this Releaſe ſhall not be any Bar to him.

Co. Lit. 80. b. Bridgm. 129. But if two Joint-tenants be of a Ward, and the one diſparageth the Heir, both ſhall loſe the Wardſhip; for thoſe Words of the Statutes are, *& omne commodum, &c.*

2 Inſt. 302. Two Joint-tenants for Years, or for Life, one of them doth Waſte, this is the Waſte of them both as to the Place waſted; yet the Words of the Statute of *Glouceſter* are, *Home que tient*; but treble Damages ſhall be recovered againſt him who did the Waſte only.

Co. Lit. 35. a. 2 Co. 67. Perk. 397. If there be two or more Joint tenants of Land whereof a Woman is dowable, and one of them aſſign her Dower thereout, this is good, and ſhall bind the others, becauſe they were compellable to aſſign it in ſuch Manner; but if one of them had aſſigned her a Rent thereout, in lieu of Dower, this ſhall not bind the reſt, becauſe they could not have been compelled to it by Suit.

(I) Of Severance and Survivorſhip: And herein,

1. Of the Right of Survivorſhip, and what Things will ſurvive.

Co. Lit. 181. THE *Jus accreſcendi*, or Right of Survivorſhip, takes place only between Joint-tenants; as where Lands are given to two Men and their Heirs, the Survivor ſhall have the Whole; for being limited to them and their Heirs, the Feoffor or Donor hath thereby transferred the abſolute Property to them; but how the Word *Heirs* came to ſignify the Heirs of one of them, ſo as to exclude the Heirs of him who died firſt, is not eaſy to be determined, and can be accounted for no otherwiſe than that both Joint-tenants being intitled to the Whole during their reſpective Lives, the Survivor having continued longeſt in Poſſeſſion was therefore preſumed to have done moſt Service to the Feud, and upon that Account was allowed to tranſmit it to his Heirs; alſo, ſays my Salk. 392. Lord Chief Juſtice *Holt*, the Common Law does not love to multiply Tenures.

Co. Lit. 181. b. So if Land be given to two Men for Life or Years, they are Joint-tenants, and the Survivor ſhall hold the Whole for his Life, or according to the Number of Years limited in the Conveyance.

But

But if a Man letteth Lands to *A.* and *B.* during the Life of *A.* if *B.* die, *A.* ſhall have all by Survivorſhip; but if *A.* die, *B.* ſhall have nothing. Co. Lit. 181. b.

* A naked Truſt or Authority cannot ſurvive; but a Truſt coupled with an Intereſt ſhall ſurvive together with it. *Page 205 Co. Lit. 181. b.

But for this *vide* Head of *Truſts*.

If a Leaſe be made to *A.* and *B.* for their Lives, and the Life of the longeſt Liver of them, and they make Partition, and then *A.* dies, the Leſſor ſhall enter into his Part; for *B.* has no Title to it, becauſe the Right of Survivorſhip was loſt by the Partition, which deſtroyed the Joint-tenancy; nor will the Words *to the longeſt Liver* be of any Uſe to *B.* becauſe they were void at firſt, being no more than the Law implied in the Joint-Eſtate. Co. Lit. 191. a. 2 Rol. Abr. 150.

Two Joint-tenants of a Rent-Charge or Rent-Service, and one of them dies, the Survivor ſhall recover all the Arrearages which incurred and became due in the Life-time of his Companion. 33 H. 6. 20. b. 15. E. 3. *Aſſiſe* 18. 2 Rol. Abr. 86.

Two Joint-tenants ſow their Land with Corn, and one of them dies, the Corn ſown ſhall go to the Survivor, and the Moiety ſhall not be to the Executors of the Perſon deceaſed; for they are ſuppoſed to carry on the Cultivation of the Soil by (*a*) Joint-Stock. Rol. Abr. 727.

(*a*) So if two Joint-tenants ſow their Land, and one of them lets his Moiety for Years, and he who did not let dies, the other ſhall have the Corn as Survivor. Owen 102.

But if Huſband and Wife are Joint-tenants, and the Huſband ſows the Land with Corn, and dies, the Crop ſhall go to the Executors of the Huſband, as it ſeems; for this Land is not cultivated by a Joint-Stock, but is totally the Corn of the Huſband, and the Property of it ſeems not to be loſt by committing it to the Joint-Poſſeſſion, no more than if it had been ſown in the Land of the Wife only. Rol. Abr. 727. & *vide ſupra* Letter (B), and the Authorities there cited.

So if there be two Tenants in common, and one of them ſow the Land, and die, his Executors ſhall have the Corn; becauſe they have different Intereſts, and are ſuppoſed to cultivate by different Stocks, and not by a joint one. Perk. ſ. 523.

2. At what Time the Right of Survivorſhip is to take Place.

This Right is to take place immediately upon the Death of the Joint-tenant, whether it be a natural or civil Death; as if there be two Joint-tenants, and one of them enters into Religion, the Survivor ſhall have the Whole. Co. Lit. 181. b.

Alſo it is laid down as a Rule, that there ſhall be no Right of Survivorſhip, unleſs the Thing be in Jointure at the Inſtant of the Death of him who firſt dieth; *Nihil de re accreſcit ei qui nihil in re quando Jus accreſceret habet.* Co. Lit. 188. b.

Therefore if there be two Joint-tenants of a Rent, and one of them diſſeiſe the Tenant of the Land, this is a Severance of the Jointure for a Time; for the Moiety of the Rent is ſuſpended by Unity of Poſſeſſion, and therefore cannot ſtand a Jointure with the other Moiety in Poſſeſſion, ſo that if during ſuch Suſpenſion one Joint-tenant dies, there can be no Survivorſhip. Co. Lit. 188. b.

Two Femes Joint-tenants of a Leaſe for Years, one of them taketh Huſband, and dieth, yet the Term ſhall ſurvive, for though all Chattels real are given to the Huſband, if he ſurvive, yet the Survivor between the Joint-tenants is the elder Title, and after the Marriage the Feme continued ſole poſſeſſed; for if the Huſband dieth, the Feme ſhall have it, and not the Executors of the Huſband; but otherwiſe it is of perſonal Goods. Co. Lit. 185. b.

Page 206 3. What Diſpoſition will work a Severance, and defeat the Right of Survivorſhip: And herein,

1. *What Diſpoſition with a Stranger will work a Severance.*

Co. Lit. 186. a. Although Joint-tenants are ſeiſed *per mie & per tout*, yet to divers Purpoſes each of them hath but a Right to a Moiety; as to infeoff, give or demiſe, or to forfeit or loſe by Default in a *Præcipe*; and therefore where there are two or more Joint-tenants, and they all join in a Feoffment, each of them in Judgment of Law gives but his Part.

Co. Lit. 186. a. So if there be two Joint-tenants, and they both make a Feoffment in Fee, a Gift in Tail, or Leaſe for Life, *&c.* upon Condition, and that for Breach thereof one of them ſhall enter into the Whole, yet he ſhall enter but into (*a*) a Moiety, becauſe no more in Judgment of Law paſſed from him.

(*a*) But every Joint-tenant may warrant the Whole, becauſe a Man may warrant more than paſſeth from him. Co. Lit. 186. a.

Co. Lit. 136. a. If one Joint-tenant bargains and ſells his Moiety, and dies before the Deed is inrolled, yet the Deed being afterwards inrolled ſhall work a Severance *ab initio*, and ſupport by Relation the Intereſt of the Bargainee.

Cro. Jac. 53. Co. Lit. 186. Bulſ. 3. But if one Joint-tenant bargains and ſells all the Lands, and before Inrolment the other dies, his Part ſhall ſurvive; for the Freehold not being out of him, the Jointure remains, and though afterwards the Deed is inrolled, yet only a Moiety ſhall paſs; for the Inrollment by relation cannot make the Grant of any better Effect than it would have been if it had taken Effect immediately.

Co. Lit. 185. If a Recovery be had againſt one Joint-tenant, who dies before Execution, the Survivor ſhall not avoid this Recovery, becauſe that the Right of the Moiety is bound by it.

2 Vern. 63. That ſuch an Agreement does not bind at Law. Co. Lit. 184. b. 185. a. If one Joint-tenant agree to alien, and does it not, but dies, this will not ſever the Joint-tenancy, nor bind the Survivor.

Preced. Chan. 124. *Moyſe* and *Giles*. 2 Vern. 385. S. C. Two Joint-tenants of a Church Leaſe, one whereof being taken ſick in a Journey, to ſever the Jointure and provide for his Wife ſends for the Schoolmaſter of the Town, (who was the only Perſon he could get to come at him) and acquainted him with his Intentions, and deſired him to prepare an Inſtrument for that Purpoſe; the Schoolmaſter drew a kind of Deed of Gift of the Leaſe from the ſick Man to the Wife, which he executed, and died; and this being to the Wife, and void in Law, ſhe would have made it good in Equity, but was diſmiſſed, being voluntary and without Conſideration.

2. *What Diſpoſition or Conveyance by one Joint-tenant or Tenant in common, with his Companion, will work a Severance.*

Page 207 22 H. 6. 42. b. Perk. ſ. 193, 197. Co. Lit. 193. b. 200. b. The proper Conveyance by one Joint-tenant to another, and what will moſt effectually ever the Joint-tenancy, is a Releaſe; but one Joint-tenant cannot enfeoff his Companion, becauſe they are both already * ſeiſed (*b*) *per mie & per tout*; and this Manner of Conveyance paſſing by

(*b*) And therefore if there be two Joint-tenants, and one releaſe to the other, this paſſeth a Fee without the Word *Heirs*, becauſe it refers to the whole Fee, which they jointly took, and are poſſeſſed of by Force of the firſt Conveyance. Co. Lit. 9, 200.

Livery

Livery, cannot operate ſo as to give him what he already hath; but Tenants in common cannot releaſe to each other, for a Releaſe ſuppoſeth the Party to have the Thing in Demand, but Tenants in common have ſeveral diſtinct Freeholds, which one cannot transfer to the other without the Solemnity of Livery.

But though a Releaſe be the proper Conveyance from one Joint-tenant to another, yet if the Jury find that the one Joint-tenant did grant or convey to another, this amounts to a Releaſe; for they having found the ſubſtantial Part, the Court is to apply the Words according to the Operation they have in Law; but every ſuch Conveyance muſt be pleaded as a *Releaſe*.

Vent. 78. Sid. 452. 2 Sand. 96. 2 Keb 641. Raym. 187. S.C. *Cheſter* ver. *Wilkins*. 4 Mod. 151. S. P. 8 Mod. 240. Fitzgib. 275.

So if there be two Joint-tenants for Life, and one is a Feme Covert, and the Baron and Feme levy a Fine to the other Joint-tenant, and thereby grant *totum & quicquid* in the Land for the Life of the Wife, upon the Death of the other Joint-tenant the Leſſor may enter, for the Fine enured by Way of Releaſe, and then the other Joint-tenant muſt have claimed the Whole from the firſt Feoffment, ſo could have had the Whole but for his own Life.

2 Rol. Abr. 86, 403. Cro. Jac. 698. *Euſtace* ver. *Scawen*; & *vide* 6 Co. 78. b. S. P.

An Agreement between Joint-tenants of an Advowſon, that they ſhould be Tenants in common, and that each of them ſhould preſent, amounts to a Severance and Releaſe.

Carth. 505. Salk. 43. S. C. Ld. Raym. 535. 12 Mod. 321.

If there be two Joint-tenants of a Rent, the one may releaſe to the other; but if the Rent be behind, the one cannot releaſe his Intereſt in the Arrearages † to another.

Leon. 167. † It's a *Choſe in Action*.

One Joint-tenant or Tenant in common may let his Part for (*b*) Years or at Will to his Companion; for this only gives him a Right of taking the whole Profits, when before he had but a Right to the Moiety thereof, and he may contract with his Companion for that Purpoſe, as well as he may with any Stranger.

Co. Lit. 186. a. Owen 102. Cro. Jac. 83, 611. Moor pl. 194.

(*b*) If Father and Son be Joint-tenants for 100 Years, and the Son takes a Leaſe from the Father of Lands for 15 Years to begin, &c. the ſame ſhall conclude the Son to claim the whole Term or Parcel of it by Survivorſhip. 2 Leon. 159. ſaid by *Plowden*, and agreed to by the Court.

A Partition or Severance between Joint-tenants of a (*c*) Freehold muſt be by Deed, becauſe by the Notoriety of Inveſtiture they take it jointly; and to alter that a Matter of Solemnity is required, which is a Deed; but Tenants in common may make a Partition without Deed; becauſe that is only a ſetting out by Metes and Bounds, according to the firſt Inveſtiture, which gave each of them diſtinct Moieties.

2 Rol. Abr. 255. Co. Lit. 169. a. (*c*) But Joint-tenants for Years might make Partition without Deed before the Statute 29 Car. 2. c. 3. of Frauds and Perjuries. Co. Lit. 187. a.

3. *At what Time ſuch Diſpoſition muſt be made to take Effect.*

Regularly every Diſpoſition by one Joint-tenant to bind his Companion muſt be (*d*) an immediate Diſpoſition; for the ſurviving Joint-

Co. Lit. 168. Rol. Abr. 848.

(*d*) That if one Joint-tenant covenants to ſtand ſeiſed to the Uſe, &c. of the Moiety of his Companion after his Death, no Uſe ſhall ariſe, becauſe but a bare Poſſibility. Noy 14. And though he ſurvive his Companion. Moor 776.——If two Joint-tenants be of a Term, and the one of them grant to *J. S.* that if he pay to him 10*l.* before *Michaelmas*, that then he ſhall have his Term; the Grantor dieth before the Day, *J. S.* pays the Sum to his Executors at the Day, yet he ſhall not have the Term, but the Survivor ſhall hold place; for it was in Nature of a Communication. Co. Lit. 184-5.——That an Agreement by one Joint-tenant to alien will not be decreed in Equity. 2 Vern. 63.

Page208 tenant claiming the Whole by the original Inveſtiture, the Whole muſt deſcend to him, unleſs his Companion hath diſpoſed of it from him in his Life-time.

Co. Lit. 185. a. Bro. Tit. *Grants* 154. But if two Joint-tenants are in Fee, and one lets his Moiety to *J. S.* for Years, to begin after his Death, this is good, and ſhall bind the other, if he ſurvives, becauſe this is a preſent Diſpoſition, and binds the Land from the Time of the Leaſe made, ſo that he cannot after avoid it.

Lit. f. 289. 2 Rol. Abr. 848. But a Deviſe for Years in ſuch Manner by one Joint-tenant will not bind the other ſurviving, becauſe that is no preſent Diſpoſition, nor binding on the Deviſor himſelf, inaſmuch as he may revoke or cancel his Will, and ſo deſtroy that Deviſe.

Lit. f. 287. Perk. f. 500. Cro. Jac. 106. Moor 776. pl. 1074. Alſo if there be two Joint-tenants of Lands, and one of them deviſees away that which belongs to him, and dies, this is a void Deviſe, and the Deviſee takes nothing, becauſe the Deviſe does not take Effect till after the Death of the Deviſor, and then the ſurviving Joint-tenant takes the Whole by a prior Title, *viz.* from the firſt Feoffment; but in this Caſe if the Deviſor ſurvives the other Joint-tenant, then the Deviſe is good for the Whole, becauſe he being the ſurviving Joint-tenant, has the Whole by Survivorſhip, and then the Words of the Will are ſufficient to carry the Whole Eſtate; beſides, at the Time of making the Will though he was not ſole Tenant, yet he was ſeiſed *per mie & per tout*, and it is impoſſible to fix upon any particular Part which he meant to deviſe, becauſe he could not then call one Part of the Land more his own than another, and the moſt genuine Conſtruction ſeems to give the whole Land, ſince he was ſeiſed *per tout* of it at the Time of the Deviſe.

Co Lit. 59. b. Rol. Abr. 501. Alſo, if there are two Joint-Tenants, and one of them ſurrenders his Moiety to the Uſe of his laſt Will, and dies before the Surrender is preſented, having made his Will, this is a Severance of the Jointure; for being preſented it relates to the Time of the firſt Surrender.

Poph. 96. Moor pl. 514. 3 Bulſ. 273. Rol. Rep. 401. Dyer 187. a. Plow. 263. Cro. Jac. 91. Co. Lit. 184 b. 185. a. 186. a. 3 Bulſ. 131. 2 And. 16. 2 Vern. 323. If two Joint-tenants for Life are, and one of them makes a Leaſe for Years of his Moiety, either to begin preſently, or after his Death, and dies, this Leaſe is good, and binding againſt the Survivor; the Reaſon whereof is, that notwithſtanding the Leaſe for Years, the Joint-tenancy in the Freehold ſtill continues, and in that they have a mutual Intereſt in each other's Life, ſo that the Eſtate in the Whole, or in any Part, is not to determine or revert to the Leſſor till both are dead; for the Life of the one, as well as of the other, was at firſt made the Meaſure of the Eſtate granted out by the Leſſor, and therefore ſo long as either of them lives, if the Joint-tenancy continues, he is not to come into Poſſeſſion; now theſe Joint-tenants having a reciprocal Intereſt in each other's Life, when one of them makes a Leaſe for Years of his Moiety, this does not depend for its Continuance on his Life only, but on his Life and the Life of the other Joint-tenant, whichſoever of them ſhall live longeſt, according to the Nature and Continuance of the Eſtate whereout it was derived; and then ſo long as that continues, ſo long the Leaſe holds good, and by conſequence ſuch Leſſee ſhall hold out the ſurviving Joint-tenant and the Reverſioner till the Eſtate whereout his Leaſe was derived be fully determined.

Co. 96. Moor 139. Co Lit. 185. a. 318. But if a Rent were reſerved on ſuch Leaſe, this is determined and gone by the Death of the Leſſor; for the Survivor cannot have it, becauſe he comes in by Title paramount the Leaſe, and the Heirs of the Leſſor have no Title to it, becauſe they have no (*a*) Reverſion or Intereſt in the Land.

(*a*) But *quære* if the Executors or Adminiſtrators cannot maintain an Action of Debt or Covenant, either upon the Covenant in Law, or expreſs Covenant, for Payment of the Rent, if there be any.

A and

* *A.* and *B.* Joint-tenants for their Lives, *A.* by Indenture leaſes the Moiety which he holds in Jointure with *B.* to *C.* for ſixty Years from the Death of *B.* if he the ſaid *A.* ſhall ſo long live, and demiſes the other Moiety to *C.* for ſixty Years from his own Death, if *B.* ſhall ſo long live; then *A.* dies, and *B.* ſurvives; and it was adjudged that this Leaſe was void for both Moieties; for by the firſt Words it was a good Leaſe from *A.* of his Part upon the Contingency of his ſurviving *B.* but that never happened, and as to *B.*'s Part, *A.* had not Power to leaſe or contract for it during the Life of *B.* though he had happened after to ſurvive him, for that was but a bare Poſſibility, which could not be leaſed or contracted for, and therefore the Leaſe was void in the Whole. *Page 209 Cro Jac. 91. Moor pl. 1074. *Whitlock* ver. *Horton.*

A. and *B.* Joint-tenants for their Lives, *A.* leaſes his Part for ſixty Years, if he and *B.* ſo long live, then *B.* ſurrenders his Part, and takes back a new Eſtate; then *A.* dies, living *B.* and it was adjudged, that this Leaſe made by *A.* was determined by his Death; for the Joint-tenancy, which would have given them or their Leſſees an Intereſt in each other's Life, is by the Surrender of *B.* determined and gone, and then the Leaſe of *A.* ſtood ſingle upon his own Life, and conſequently by his Death is determined. So it would be if after ſuch Leaſe for Years by one Joint-tenant they had made Partition of the Joint-Eſtate, and then the Leſſor had died, his Leaſe would be at an End, becauſe the Joint-tenancy, which ſhould have ſupported it after his Death, is by the Partition defeated and gone. Cro. Jac. 337. Rol. Rep. 309. 3 Bulſ. 130. 2 Rol Abr. 131. *Daniel* and *Waddington.*

4. What ſhall be a total Severance, or but for a limited Time.

It hath been holden in Equity, that if three Perſons are jointly intereſted in the Truſt of a Term for Years, and one of them mortgages his third Part, that hereby the Joint-tenancy is wholly ſevered, and that it was not like the Caſe where a Perſon makes his Will, and afterwards mortgages his Eſtate, in which it was agreed to be no total Revocation; for my Lord *Cowper* held, that a Joint-tenancy was odious in Equity, and not like the Caſe of a Will, which might have been for the Benefit of the Mortgagor, and not have been revoked; but that it was to the Diſadvantage of the Mortgagor that the Joint-tenancy ſhould continue; for thereby, if he happen to die firſt, all his Eſtate and Intereſt goes from his Repreſentatives to the Survivor. Salk. 158. *York* verſus *Stone.*

If there be two Joint-tenants of a Rent, and one of them diſſeiſe the Tenant of the Land, this ſevers the Joint-tenancy for a Time, the Moiety of the Rent being ſuſpended by Unity of Poſſeſſion, and therefore cannot ſtand in Jointure with the other Moiety in Poſſeſſion. Co. Lit. 188. a.

If two Joint-tenants be of a Term, and the one grants Parcel of the Term to a Stranger, by this the Jointure of all is ſevered. Cro Eliz. 33. *Syms*'s Caſe.

5. How far the Charges or Incumbrances of one Joint-tenant ſhall affect the Survivor.

Regularly all Grants or Charges by one Joint-tenant out of the Land fall off with his Life, and cannot affect the Survivor, becauſe there being no immediate Diſpoſition of the Land itſelf, that comes whole and intire to the Survivor under the firſt Title, and by conſequence over-reaches all intermediate Charges or Grants thereout by the other Joint-tenant who is dead. Lit. ſ. 286. Co. Lit. 184. b. Bridgm. 43.

* Therefore if one Joint-tenant acknowledge a Recognizance, or a Statute, or ſuffereth Judgment in an Action of Debt, &c. and dieth before Execution *Page 210 Co. Lit. 184. b.

tion had, it ſhall not be executed (*a*) afterwards; but if Execution be ſued in the Life-time of the Conuſor, it ſhall bind the Survivor; alſo in all theſe Caſes, if he that charges ſurvive, it ſhall bind for ever.

(*a*) So if one Joint-tenant in Fee-ſimple be indebted to the King, and dieth, after his Deceaſe no Extent ſhall be made upon the Land in the Hands of the Survivor. Co. Lit. 185. a.

Co. Lit. 186. b. But if one Joint-tenant grant *Veſturam*, or *Herbagium terræ*, for Years, and dies, this ſhall bind the Survivor. So if two Joint-tenants are of a Water, and one grants a ſeparate Piſcary for Years, and dies, this ſhall bind the Survivor; becauſe in theſe Caſes, the Grant of the one Joint-tenant gives an immediate Intereſt in the Thing itſelf whereof they are Joint-tenants.

Co. Lit. 184. b. 2 Rol. Abr. 88. 6 Co. 79. Lord *Abergaveny*'s Caſe. Alſo, tho' a Statute or Recognizance acknowledged by one Joint-tenant ſhall not bind his Companion, unleſs Execution was taken out in the Life-time of him who acknowledged it; yet if after ſuch Acknowledgment, the Joint-tenant who acknowledged it had releaſed to his Companion, the Land would be chargeable with the Statute, tho' he who acknowledged it had died before Execution, becauſe his Acceptance of the Releaſe prevents his claiming by Survivorſhip.

2 Sand. 28. So if one Joint-tenant in Fee acknowledges a Recognizance, and afterwards both Joint-tenants bargain and ſell the Lands to a Stranger, who reconveys it to them, and then he who acknowledged the Recognizance dies, the Moiety of the Land ſhall be charged with the Recognizance notwithſtanding the Survivorſhip.

6. Of Severance by Operation of Law.

2 And. 202. If a Man hath Iſſue three Sons, and he deviſes to his two youngeſt Sons Lands to them jointly for their Lives, and the eldeſt Son, who hath the Reverſion in Fee, dies, by which it deſcends to the ſecond Son, this by Operation of Law is a Severance of the Joint-tenancy.

2 Co. 60. b. *Wiſcot*'s Caſe. Co. Lit. 132. b. So if there be three Joint-tenants for Life, and the Reverſion is granted to one of them, the Jointure is ſevered as to the third Part of him to whom the Reverſion is ſo granted.

S. P. Cro. Eliz. 481, 570. S. P. 2 Sand. 386. S. C. cited. 2 Co. 58.

2 Co. 58. If two Joint-tenants levy a Fine and declare no Uſes, they are ſeized as before.

If Land be given to two jointly with Warranty, and one of them makes a Feoffment of his Part, the Warranty is loſt as to him, but the other may vouch for his Moiety; but if they make Partition, the Warranty is loſt as to both by the (*b*) Common Law.

Hob. 25.

(*b*) But if they make Partition purſuant to the Statute 31 H. 8. c. 1. & 32 H. 8. c. 32. the Warranty remains, becauſe they do it by Compulſion. Co. Lit. 187. 6 Co. 12. b.

Co. Lit. 185. a. If one Joint-tenant in Fee take a Leaſe for Years of a Stranger, by Deed indented, and dieth, the Surveyor ſhall not be bound by the Concluſion, becauſe he claims above it, and not under it.

*Page 211 * 7. Of Severance by Compulſion of Law; and therein of the Writ *de Partitione facienda*.

Lit. ſ. 290. Co. Lit. 187. At Common Law Joint-tenants and Tenants in common were not compellable to make Partition, except by the Cuſtom of ſome Cities and Boroughs.

But

But now by the 31 *H.* 8. *cap.* 1. reciting the Inconveniencies which Joint-tenants and Tenants in common lay under, from one Joint-tenant's or Tenants in common occupying the whole Land, or receiving the whole Profits, it is enacted, *Sect.* 2. "That all Joint-tenants and Tenants in "common that now be, or hereafter ſhall be of any Eſtate or Eſtates of "(*a*) Inheritance in their own Rights, or in Right of their Wives, of any "Manors, Lands, Tenements or Hereditaments within the Realm of "*England*, *Wales*, or the Marches of the ſame, ſhall and may be coacted "and compelled by virtue of this preſent Act, to make Partitions between "them of all ſuch Manors, Lands, Tenements and Hereditaments, as they "now hold, or hereafter ſhall hold as Joint-tenants or Tenants in common "by Writ *de Partitione faciendâ*, in that Caſe, to be deviſed in the King "our Sovereign Lord's Court of Chancery, in like Manner and Form as "Coparceners by the common Laws of this Realm have been and are "compelled to do, and the ſame Writ to be purſued at the common Law.

(*a*) The Statute 32 H. 8. c. 32. gives the like Remedy to Joint-tenants and Tenants in common for Life or Years.

"Provided that every of the ſaid Joint-tenants or Tenants in common, "and their Heirs, after ſuch Partition made, ſhall and may have Aid of the "other, or of their Heirs, to the Intent to dereign the Warranty Paramount, "and to recover for the Rate as is uſed between Coparceners after Partition "made by the Order of the Common Law."

Before theſe Statutes the Writ of Partition was confined to Coparceners; alſo it lay againſt the Alienee of a Coparcener, for a Coparcener cannot by her Alienation deveſt the Right of her Siſter to divide the Eſtate, nor can ſhe deſtroy her Writ of Partition; but the Alienee had no ſuch Writ of Partition, becauſe ſuch Alienee took an undivided Moiety; nor was the Alienee under the Reaſons on which the Law had founded ſuch Right of Diviſion, which was, that the Inheritance might be ſeparated after Marriage into diſtinct Families; and for the ſame Reaſons the Tenant by the Curteſy, tho' he came in by the Act of Law, could not have this Writ, tho' it lay againſt him by the ſurviving Coparceners.

Co. Lit. 175. a. 167. a. Dyer 98. b.

But now by Force of theſe Statutes, the Alienee of one Parcener may have a Writ of Partition againſt the other Parcener, becauſe they are Tenants in common.

Co. Lit. 175. a.

So Tenant by Curteſy ſhall have a Writ of Partition upon the Statute 32 *H.* 8. *cap.* 32. for though he is neither Joint-tenant nor Tenant in common, yet being in equal Miſchief with thoſe to whom the Statute gives this Remedy, he is within the Equity thereof.

Co. Lit. 175. b.

But if three Coparceners are, and a Stranger purchaſe the Part of one of them, he cannot join with either of the two Coparceners in a Writ of Partition, either at common Law or by Force of the Statute; for the Words of the Preamble of the Statute are, *And none of them by the Law doth or may know their ſeveral Parts*, &c. *and cannot by the Laws of this Realm make Partition without their mutual Aſſents:* Now in this Caſe one of them, *viz.* the Parcener may have a Writ of Partition at common Law, and therefore cannot come within the Preamble and Intent of the Act, and ſo cannot join with the Purchaſer in a Writ of Partition brought upon it.

And. 30. pl. 72. Co. Lit. 175. b. Keilw. 208. Dyer 128. Bendl. 42. pl. 76.

* It hath been holden, that a general Writ by Joint-tenants or Tenants in common grounded on this Statute, and concluding *contra formam Statut.* is ſufficient, without reciting the Caſe particularly, ſo as to bring it within the Statute; for the framing of the Writ is left to the Clerks in Chancery, and muſt be according to the Form which they have deviſed.

*Page 212 Cro. Eliz. 742, 743. & *vide* Cro. Eliz. 759. 2 Lutw. 1018. 3 Leon. 231.

In this Writ Partition may be demanded of the View of Frank-pledge, together with the Manor; for though it be not ſeverable of itſelf, nor partible, yet the Profits thereof may be divided, or it may be divided thus. that the one ſhall have it at one Time, and the other at another; alſo being demanded with

Cro. Eliz. 759. Sir *George Moor* and *Brown* ver. *Onſlow.*

with the Manor, it may well be entirely allotted to one, and the Land in Recompence to another.

Booth 245. Lit. f. 248. Co. Lit. 167. In this Action there are two Judgments; the firſt is *Quod Partitio fiat inter partes prædictas de tenementis prædict' cum pertinen.* and upon this there goes out a judicial Writ to the Sheriff to make Partition, which recites firſt the Writ of Partition and Judgment, and then commands the Sheriff, together with twelve Men of the Vicinage, *&c.* to go in (*a*) Perſon to the Tenements to be divided, and there in the Preſence of the Parties, (if they appear on Summons to be made) by the Oaths of thoſe twelve Men, to make an equal and fair Partition, and allot to each Party their full and juſt Share, and then return the Inquiſition of the Partition annexed to the Writ, under the Seals of the Sheriff, and the Jurors, whoſe Names are likewiſe to be returned.

(*a*) The Sheriff muſt go in Perſon, otherwiſe upon Information thereof the Court will ſtay the filing of the Return, and award a new Writ, for the Writ being his Commiſſion, he cannot deviate from it; but if the Sheriff returns that he was there in Perſon, and this Return is received and filed, then any Information to the contrary comes too late; becauſe by the filing it is become Matter of Record, againſt which no Averment *in Pais* lies; neither can the Party have Error upon the Return. Cro. Eliz. 9, 10. *Clay*'s Caſe.

Co. Lit. 169. When the Inquiſition is thus returned, upon Motion made to the Court, the ſecond Judgment is given in this Manner: *Ideo conſiderat' eſt per Cur' quod Partitio firma & ſtabilis in perpetuum teneatur.*

Rol. Abr. 750. Lord *Berkley* and *Counteſs of Warwick.* Cro. Eliz. 635. Moor 643. Noy 71. S. C. adjuded. Cro. Jac. 324. In a Writ of Partition, if the Judgment be given *quod Partitio fiat*, and thereupon a Writ is directed to the Sheriff to make Partition, no Writ of Error lies hereupon, for the Judgment is not compleat till the Sheriff's Return, and the ſecond Judgment which the Law requires hereupon, *viz. quod Partitio, &c.* for before that the Plaintiff may be nonſuit, or he may, upon the Return of the Sheriff, ſuggeſt to the Court that the Partition is not equal, and ſo have a new Partition, and may alſo releaſe before the laſt Judgment.

2 Bulſ. 104 like Caſe adjudged, & *vide* 2 Rol. Rep. 125. 2 Bulſ. 119.

Cro. Eliz. 65. If the Writ be brought by one Joint-tenant againſt ſeveral, and there happens to be Error in the Execution of it, and one of the Defendants releaſes all Errors to the Plaintiff, this ſhall not bar the others; for each having a diſtinct Intereſt ſhall not be prejudiced by the Releaſe of his Companion.

Dyer 265. pl. 5. *Dalton's Sheriff* 265. *A.* and *B.* Tenants in common of a Manor, *A.* purchaſes ſeveral Freeholds that lay ſo mixed with the Demeſne Lands of the Manor that they could hardly be diſtinguiſhed from them; *B.* brings a Writ of Partition of the Manor only; and it was adjudged that Partition ſhould be made, and a Writ awarded accordingly; upon the Execution of which Writ *A.* comes to the Sheriff and Inqueſt, and informs them with the Purchaſe of the Freeholds, that are not Parcel of the Manor, and bids them take care how they make Partition of all the Lands within ſuch a Compaſs, leſt they offer Violence to their Conſciences; but does not ſhew them the Freeholds diſtinctly, nor the Limits of the Manor, which obliged the Sheriff to adjourn to a certain Day, on which one of the Inqueſt made Default; and thereupon the Sheriff returns a Fine

*Page 213 * of 40 *s.* with an Account of the Difficulties they met with, & *ulterius propter Brevitatem temporis Breve illud exequi non potuit*, it was held, that *A.* ought to ſhew the Bounds of the ſeveral Freeholds that he purchaſed, or the Number of the Acres; but if no Light or Evidence is given by either Party to the Inqueſt, and they make Partition *de tanto quantum reſumitur & dignoſcitur per Præſumptiones*, it is good; for they are under an Obligation to execute the Commands of the Court at their Peril.

If

If after the Awarding of the judicial Writ, and before the Return of it, the Defendant dies, yet the Partition is good, and the Writ ſhall not abate, becauſe before the Death of the Defendant Judgment was given that Partition ſhould be made; and though upon the Return of the judicial Writ there is another Judgment given, yet that is given in Confirmation of the firſt Judgment; it ſeems likewiſe, that upon the Return of the judicial Writ no Exception can be taken to it; therefore it is not material whether the Defendant be dead or alive, ſince he can have no Advantage by any Plea on the Return of the Writ. Daliſon 59.

The Proceſs in this Writ is Summons, Attachment, and Diſtreſs infinite. F. N. B. 62. Booth 245.

A. and *B.* were Joint-tenants for Years, *B.* ſuffers *C.* to occupy his Moiety with him, and *A.* brings a Writ of Partition againſt *B.* and *C.* ſuppoſing that *B.* had granted a Moiety of his Part to *C.* *C.* ſhews that he was but Tenant at Will to *B.* whereupon the Writ abated; whether *A.* might have another Writ of Partition againſt *B.* by Journeys Accounts, was the Queſtion; and reſolved, that he might; for the Poſſeſſion of *C.* was good Colour for bringing the Writ of Partition, and *A.* could not take notice what Eſtate *C.* had. Cro. Jac. 218. *Beedle* verſus *Clerk.*

By the (*a*) 8 & 9 *W.* 3. *cap.* 31. intitled an Act for the eaſier obtaining Partitions of Lands in Coparcenary, Joint-tenancy and Tenancy in common, reciting, That whereas the Proceedings upon Writs of Partition between Coparceners by the common Law or Cuſtom, Joint-tenants and Tenants in common are found by Experience to be tedious, chargeable, and oftentimes ineffectual, by Reaſon of the Difficulty of diſcovering the Perſons and Eſtates of the Tenants of the Manors, Meſſuages, Lands Tenements, and Hereditaments to be divided, and the defective or dilatory executing and returning of the Proceſs of Summons, Attachment and Diſtreſs, and other Impediments in making and eſtabliſhing of Partitions, by reaſon of which divers Perſons having undivided Parts or Purparts, are greatly oppreſſed and prejudiced, and the Premiſſes are frequently waſted and deſtroyed, and lie uncultivated and unmanured, ſo that the Profits of the ſame are totally or in a great Meaſure loſt; for Remedy whereof it is enacted, " That after Proceſs " of *Pone*, or Attachment returned upon a Writ of Partition, Affidavit " being made by any credible Perſon of due Notice given of the ſaid " Writ of Partition to the Tenant or Tenants to the Action, and a Copy " thereof left with the Occupier, or Tenant or Tenants, or, if they can- " not be found, to the Wife, Son, or Daughter, (being of the Age of " twenty-one Years, or upwards,) of the Tenant or Tenants, or to the " Tenant in actual Poſſeſſion by Virtue of any Eſtate of Freehold or for " Term for Years, or uncertain Intereſt, or at Will, of the Manors, " Lands, Tenements or Hereditaments whereof the Partition is de- " manded, (unleſs the ſaid Tenant in actual Poſſeſſion be Demandant in " the Action,) at leaſt forty Days before the Day of Return of the ſaid " *Pone* or Attachment, if the Tenant or Tenants of ſuch Writ, or any " of them, or the true Tenant to the Meſſuages, Lands, Tenements, " and Hereditaments as aforeſaid, ſhall not in ſuch Caſe within fifteen " Days after Return of ſuch Writ of *Pone* or Attachment cauſe an Ap- " pearance to be entred in ſuch Court where ſuch Writ of *Pone* or " Attachment ſhall be returnable, then in Default of ſuch Appearance, " the Demandant having entered his Declaration, the Court may pro- " *ceed to examine the Demandant's Title, and Quantity of his Part and *Page 214
" Purpart, and accordingly as they ſhall find his Right, Part and Pur- " part to be, they ſhall for ſo much give Judgment by Default, and " award a Writ to make Partition, whereby ſuch Proportion, Part and " Purpart may be ſet out ſeverally; which Writ being executed, after

" eight

(*a*) And made perpetual by the 3 & 4 *Annæ*, c. 18. ſ. 2.

" eight Days Notice given to the Occupier, or Tenant or Tenants of the " Premiſſes, and returned, and thereupon final Judgment entered, the " ſame ſhall be good, and conclude all Perſons whatſoever, after Notice " as aforeſaid, whatever Right or Title they have, or may at any Time " claim to have, in any of the Manors, Meſſuages, Lands, Tenements, " and Hereditaments mentioned in the ſaid Judgment and Writ of Parti- " tion, although all Perſons concerned are not named in any of the Pro- " ceedings, nor the Title of the Tenants truly ſet forth.

" Provided always, That if ſuch Tenant or Perſon concerned, or " either of them, againſt whom or their Right or Title ſuch Judgment " by Default is given, ſhall within the Space of one Year after the firſt " Judgment entered, or in caſe of Infancy, Coverture, *non ſanæ Me-* " *moriæ*, or Abſence out of the Kingdom, within one Year after his, her, " or their Return, or the Determination of ſuch Inability, apply them- " ſelves to the Court by Motion where ſuch Judgment is entered, and " ſhew a good and probable Matter in Bar of ſuch Partition, or that the " Demandant hath not Title to ſo much as he hath recovered, then in " ſuch Caſe the Court may ſuſpend or ſet aſide ſuch Judgment, and ad- " mit the Tenant and Tenants to appear and plead, and the Cauſe " ſhall proceed according to due Courſe of Law, as if no ſuch Judgment " had been given; and if the Court upon hearing thereof ſhall adjudge " for the firſt Demandant, then the ſaid firſt Judgment ſhall ſtand con- " firmed and be good againſt all Perſons whatſoever, except ſuch other " Perſons as ſhall be abſent or diſabled as aforeſaid; and the Perſon or " Perſons ſo appealing ſhall be awarded thereupon to pay Coſts; or if " within ſuch Time or Times aforeſaid the Tenants or Perſons concerned, " admitting the Demandant's Title, Parts and Purparts, ſhall ſhew to " the Court any Inequality in the Partition the Court may award a new " Partition to be made in Preſence of all Parties concerned, (if they " will appear,) notwithſtanding the Return and filing upon Record the " former, which ſaid ſecond Partition returned and filed ſhall be good " and firm for ever againſt all Perſons whatſoever, except as before ex- " cepted.

" And it is further enacted, That no Plea in Abatement ſhall be ad- " mitted or received in any Suit for Partition, nor ſhall the ſame be abated " by reaſon of the Death of any Tenant.

" And it is further enacted, That when the High Sheriff by reaſon " of Diſtance, Infirmity, or any other Hindrance, cannot conveniently " be preſent at the Execution of any Judgment in Partition, in ſuch Caſe " the Under Sheriff, in Preſence of two Juſtices of the Peace of the " County where the Lands, Tenements, or Hereditaments to be divided " do lie, ſhall and may proceed to Execution of any Writ of Partition " by Inquiſition in due Form of Law, as if the High Sheriff were then " perſonally preſent; and the High Sheriff thereupon ſhall, and is hereby " enabled and required to make the ſame Return as if he were perſonally " preſent at ſuch Execution; and in caſe ſuch Partition be made, re- " turned and filed, he or they, that were Tenant or Tenants of any of " the ſaid Meſſuages, Lands, Tenements, and Hereditaments, or any " Part or Purpart thereof, before they were divided, ſhall be Tenant or " Tenants for ſuch Part ſet out ſeverally to the reſpective Landlords or " Owners thereof, by and under the ſame Conditions, Rents, Covenants, " and Reſervations where they are or ſhall be ſo divided: and the Land- " lords and Owners of the ſeveral Parts and Purparts ſo divided and " alloted, as aforeſaid, ſhall warrant and make good unto their reſpective

*Page215 " * Tenants the ſaid ſeveral Parts ſeverally after ſuch Partition, as they " are or were bound to do by any Copy, Leaſes, or Grants of their re- " ſpective Parts before any Partition made; and in caſe any Demandant " be Tenant in actual Poſſeſſion to the Tenant to the Action for his Part " and Proportion, or any Part thereof, in the Meſſuages, Lands, Tene-

" ments,

" ments, and Hereditaments to be divided by Virtue of a Writ of Partition " as aforeſaid, for any Term of Life, Lives or Years, or uncertain Intereſt, " the ſaid Tenant ſhall ſtand and be poſſeſſed of the ſaid Purparts and Pro- " portions for the like Term, and under the ſame Conditions and Cove- " nants, when it is ſet out ſeverally in purſuance of this, or any other Act, " Statute or Law, for that Purpoſe.

" And it is further enacted, That the reſpective Sheriffs, their Under- " Sheriffs and Deputies, and, in caſe of Sickneſs or Diſability in the " High Sheriff, all Juſtices of the Peace, within their reſpective Divi- " ſions, ſhall give due Attendance to the executing ſuch Writ of Parti- " tion, unleſs reaſonable Cauſe be ſhewn to the Court upon Oath, and " there allowed of, or otherwiſe be liable every of them to pay unto the " Demandant ſuch Coſts and Damages as ſhall be awarded by the Court, " not exceeding five Pounds, for which the Demandant or Plaintiff may " bring his Action in any of his Majeſty's Courts of Record at *Weſtmin-* " *ſter*, wherein no Eſſoign, Protection, Privilege, or Wager of Law ſhall " be allowed, nor any more than one Imparlance; and in caſe the De- " mandant doth not agree to pay to the Sheriffs or Under-Sheriffs, Juſtices, " and Jurors ſuch Fees as they ſhall reſpectively demand for their Pains " and Attendance in the Execution of the ſame, and returning thereof, " then the Court ſhall award what each Perſon ſhall receive, having reſpect " to the Diſtance of the Place from their reſpective Habitations, and the " Time they muſt neceſſarily ſpend about the ſame, for which they may " ſeverally bring their Actions."

By the 7 *Annæ*, *cap.* 18. it is enacted, " That if Coparceners, or Joint- " tenants or Tenants in common be ſeiſed of any Eſtate of Inheritance in " the Advowſon of any Church or Vicarage, or other Eccleſiaſtical Pro- " motion, and a Partition is or ſhall be made between them to preſent " by Turns, that thereupon every one ſhall be taken and adjudged to be " ſeiſed of his or her ſeparate Part of the Advowſon to preſent in his or " her Turn; as if there be two, and they make ſuch Partition, each ſhall " be ſaid to be ſeiſed, the one of the one Moiety to preſent in the firſt " Turn, the other of the other Moiety to preſent in the ſecond Turn; " in like Manner if there be three, four or more, every one ſhall be ſaid to " be ſeiſed of his or her Part, and to preſent in his or her Turn." 7 *Annæ*, c. 18.

(K) Joint-tenants and Tenants in common how to ſue and be ſued; and herein of Summons and Severance.

JOINT-TENANTS being ſeiſed *per mie & per tout*, and deriving by one and the ſame Title, muſt jointly implead and be jointly impleaded with others. Co. Lit. 180. b.

So though one Joint-tenant may diſtrain for Rent, yet he cannot bring an Action of Debt, nor (*a*) avow for Rent-Arrear without making himſelf Bailiff to his Companions, that they may be privy to the Suit, and be intitled to their Shares upon his Recovery thereof in their Right. Carth. 328. *Pullen* and *Palmer*. 5 Mod. 72. 150. S. C.

(*a*) That Joint-Feaſants muſt join in Avowry for Damage-Feaſant. Thompſ. Ent. 264. 5 Mod. 151.

* If *A.* and *B.* Joint-tenants and to the Heirs of *B.* join in a Leaſe for Life, *A.* has a Reverſion, and ſhall join in Action of Waſte; but the Writ muſt be *ad Exhæreditationem* of *B.* becauſe he only hath the Inheritance. *Page 216 Co. Lit. 42. a.

But

Noy 1. *Farmer* and *Downs*, adjudged.

But if two Joint-tenants acknowledge a Statute, and their ſeveral Lands are taken in Execution, and after, upon the Invalidity of the Statute, they jointly bring an *Audita Querela*, the Writ ſhall abate; for they ought to have ſeveral Writs; for the Wrong done to one by the Execution of his Land is no Tort to the other.

Show. Rep. 342. 2 Vent. 214. Comb. 190. Carth. 224. Mod. 102. Co. Lit. 200. 12 Mod. 96, 301, 657. Ld. Raym. 312, 341. 2 Stra. 820. S. P. in *Heaſman* v. *Moon*. B. R. Mich. 15 Geo. 2.

And although regularly Joint-tenants are to join and be joined in an Action, yet it is otherwiſe with Tenants in common; and therefore if in Ejectment the Plaintiff declares on a Leaſe made by *A.* and *B.* and on the Trial it appears that they are Tenants in common, the Plaintiff cannot recover; but if *A.* and *B.* had been Joint-tenants, a Joint-leaſe to the Plaintiff had been good, and he might have declared *quod demiſerunt*; and the Reaſon of the Difference is, that Tenants in common are of ſeveral Titles, and therefore the Freehold is ſeveral; and if they are diſſeiſed, they ſhall be put to their ſeveral Actions; as therefore the Lands of Tenants in common are to be conſidered as different Eſtates depending on different Titles, the Plaintiff ſhall not recover, becauſe that were to allow the Plaintiff to try two ſeveral and different Titles in one Iſſue at the ſame Time, and therefore the Plaintiff to make out his Title muſt ſhew and prove that each demiſed the Whole to him, or elſe he doth not prove the Declaration; whereas the Diſcovery of the Tenancy in common proves the contrary; and as they have different Titles to a Moiety only, ſo they could not each of them demiſe the Whole; but Joint-tenants are ſeiſed *per mie & per tout*, and they derive by one and the ſame Title, and therefore each may be ſaid to demiſe the Whole; and as they muſt join in an Action for any Violation of their Poſſeſſion, ſo for the ſame (*a*) Reaſon too their Leſſee on their joint Demiſe †.

(*a*) But *note*, That to avoid any Difficulty in thoſe Caſes, the beſt Way ſeems to be for them to join in a Leaſe to a third Perſon, and that Leſſee to make a Leaſe to try the Title. Noy 134.

† Tenants in common cannot make a Joint-leaſe. 2 Wilſ. 232.

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‡ The Plaintiff may declare on a Demiſe of one undivided Moiety by one Tenant in common, and in his ſecond Count, of a Demiſe of the other undivided Moiety, by the other Tenant in common, &c.

Lit. ſ. 314. Co. Lit. 197. a.

But though Tenants in common having (*b*) ſeveral and diſtinct Rights cannot join in an Action, yet where the Thing is (*c*) intire, as a Horſe, Hawk, they muſt join, theſe being in their Nature not ſeverable, and therefore from the Neceſſity of the Caſe the Law admits them to join.

(*b*) Cannot join, though they come in by one Feoffment. Mod. 11. (*c*) And therefore Tenants in common ſhall join in a *Quare impedit*, becauſe the Preſentation to the Advowſon is intire. Co. Lit. 197. b——And for this Reaſon Tenants in common of a Seignory ſhall join in a Writ of Right of Ward, and Raviſhment of Ward for the Body. Co. Lit. 197. b.——Alſo Tenants in common ſhall join in Detinue of Charters, and if the one be nonſuit, the other ſhall recover. Co. Lit. 197. b.——And ſhall join in a *Warrantia Chartæ*, but ſever in Voucher. Co. Lit. 197. b.

Co. Lit. 197. b. Moor 202.

So if there be two Tenants in common, and they make a Leaſe for Life, rendering Rent, this Reſervation, though made by joint Words, ſhall follow the Nature of the Reverſion, which is ſeveral in the Leſſors; therefore they ſhall be put to their ſeveral Aſſiſes if they be diſſeiſed, as if there had been diſtinct Reſervations ‖.

‖ Or may bring Ejectment, declaring as mentioned in the Note above.

Lit. ſ. 315. Co. Lit. 198. a.

Alſo Tenants in common ſhall join in Actions perſonal, as Treſpaſs in breaking into their Houſe, breaking their Incloſure or Fences, feeding, waſting, or deſouling their Graſs, cutting down their Timber, fiſhing in their Piſcary, &c. and ſhall recover jointly their Damages; becauſe in

thoſe

thoſe Actions though their Eſtates are ſeveral, yet the Damages ſurvive to all; and it would be unreaſonable to bring ſeveral Actions for one ſingle Treſpaſs.

So if there be two Tenants in common of a Manor, and they make a Bailiff thereof, and one of them die, the Survivor ſhall have an Action * of Account, for the Action given unto them for the Arrearages upon the Account was joint. Co. Lit. 198. a. *Page 217

So if two Tenants in common ſow their Land, and a Stranger eateth the Corn with his Cattle, though they have the Corn in common, yet the Action given to them for the Treſpaſs is joint, and ſhall ſurvive. Co. Lit. 198. a.

Tenants in common may join or ſever in (*a*) Debt or Covenant for Rent; but if they ſever, the Demand muſt be *de una Medietate* of the whole Rent, and not of a certain Sum, which amounts to a Moiety. Carth. 289. *Midgley* and *Gilbert* ver. Lord *Lovelace*.

(*a*) But in an Avowry they ought to ſever. Co. Lit. 188. b.

And as in Treſpaſs Tenants in common ſhall join, ſo they ſhall for a Nuſance done to their Land, for it is Perſonal, and concerns the Profits of the Land; but for Forging of falſe Deeds they ſhall ſever, for that concerns the Inheritance of the Land; as to Nuſance if it be continued after the Death of one of the Tenants in common, his Deviſee ſhall join in Action with the Survivor, for the Continuance thereof is as the new erecting of ſuch a Nuſance. Cro. Jac. 231. *Some* and *Barwiſe*.

A. makes a Leaſe, in which the Leſſee covenants with the Leſſor, *&c.* to repair; Leſſor grants his Reverſion by ſeveral Moieties to ſeveral Perſons, and Leſſee aſſigns to *J. S.* In an Action of Covenant by the Grantees of the Reverſion for not repairing, the Queſtion was, If two Tenants in common of a Reverſion could join in bringing an Action of Covenant againſt the Aſſignee? And it was held, that they could and ought to join in this Caſe, being a mere Perſonal Action, according to *Littleton*'s Rule, which was held to be general, without Relation to any Privity of Contract; and that the Covenant being indiviſible, the Wrong and Damages could not be diſtributed becauſe uncertain. Mich. 15 Car. 2. *Kitchen* and *Knight* ver. *Buckley*. Sid. 157. Lev. 109. Keb. 565, 572. Raym. 80. S. C. & *vide* to this Purpoſe Keilw. 14. 18 H. 6. 6, 7. 28 E. 3, 90. Moor 40. Godb. 90, 283. Bro. *Joinder in Action* 104. Bendl. 89.

Joint-tenants and Tenants in common are to join in a *Quare impedit*; the firſt, becauſe they are jointly ſeiſed, and claim by a joint Title; the (*b*) latter out of Neceſſity, becauſe the Thing is intire. Co. Lit. 197. b. 2 And. 23, 63.

Comp. Incumb. 253. & *vide ſup.* 7 Ann. c. 18. (*b*) If two Tenants in common be of an Advowſon, and they bring a *Quare impedit*, and the one doth releaſe, yet the other ſhall ſue for and recover the whole Preſentment. Co. Lit. 197 b.

If Joint-tenants or Tenants in common refuſe to ſet out their Tithes, the Action muſt be brought againſt them both; but if one of them only occupy the Land, the Action is to be brought againſt him; or if one Joint-tenant or Tenant in common ſets out the Tithes, and the other takes them away, the Action muſt be brought againſt the Wrong-doer. Hut. 121. Cro. Jac. 86, 362.

If a Leaſe for Years be made to *B.* and *C.* rendring Rent, and *C.* aſſigns his Moiety to *D.* and after the Rent is in Arrear, the Leſſor may bring an Action of Debt for the Rent againſt *B.* and *D.* for the Reverſion remains intire. Palm. 283.

If two Joint-tenants bring Treſpaſs, pending the Action one of them dies, the Writ ſhall abate; *ſecus* if brought againſt them, for in the latter Caſe, the Action is both joint and ſeveral †. Cro. Jac. 19. 4 Mod. 249. S. P.

† By 8 & 9 *W.* 3. c. 11. ſ. 7. the Death of one Plaintiff, or Defendant, where there is another ſurviving, not to abate the Suit.

Alſo

Cro. Jac. 19. Alſo where a *Quare impedit* is brought by two Joint-tenants, and pending the Action one of them dies, the Writ ſhall not abate; and this out of Neceſſity, leſt the ſix Months ſhould elapſe, and thereby the Action be loſt.

Co. Lit. 188. If one Joint-tenant refuſes to join in Action, he may be ſummoned and ſevered; but herein it is to be obſerved, that if the Perſon ſevered dies, the Writ abates, becauſe the Survivor then goes for the Whole, which he cannot do on that Writ, where on the Summons and Severance he went only for a Moiety before, for the Writ cannot have a double Ef-
*Page 218 fect, to wit, for a Moiety in caſe of Summons and Severance, and for * the Whole in caſe of Survivorſhip; and the Law is the ſame if ſuch Joint-tenants proceed without Summons and Severance, for ſince both by the Writ might by Poſſibility recover their Moieties, they ſhall not go on for the Whole in caſe of Survivorſhip, becauſe the Words and Effect of the Writ at the Time of its firſt Purchaſing was that each might recover his
† See the preceding Note, *ante* 217. Moiety, and therefore a new Writ muſt be purchaſed to enable one to proceed for the Whole †.

Co. Lit. 197. But in perſonal and mixed Actions where there is Summons and Severance, and yet after ſuch Summons and Severance the Plaintiff goes on for the Whole, there if one of them dies, yet the Writ ſhall not abate, becauſe they go on for the Whole after Summons and Severance; and if they were to have a new Writ, it would only give the Court Authority to go on for the Whole.

Co. Lit. 197. So if two Joint-tenants bring a Writ of Ward, and they are ſummoned and ſevered, and the ſevered Perſon dies, the Writ ſhall not abate, becauſe after ſuch Severance he went on for the Whole; and ſo he does in this Caſe, after the Death of his Companion.

Co. Lit. 197. b. Dyer 279. So in a *Quare impedit* by two Joint-tenants, and one is ſummoned and ſevered, and the ſevered Perſon dies, the Writ ſhall not abate, becauſe the Advowſon is an entire Thing; and he proceeded for the Whole after the Severance, and ſo he may after the Death, *&c.*

11 H. 4. 17. Rol. Abr. 571. If two Joint-tenants bring an Aſſiſe, and the one is ſevered, if it be found that the other had Goods taken upon the Land, he ſhall recover ſole Damage for them.

Moor 466. Cro. Eliz. 554. Skin. 12. pl. 12. Salk. 4. pl. 10, 32. Mod. 102. 12 Mod. 96, 301, 657. Ld. Raym. 312, 341. Wherever Tenants in common ought to join in an Action, and one alone brings the Action, the Defendant ought to plead the Tenancy in common in Abatement, which is a Defence the Law allows him, that he may not be twice charged; but if he plead in chief, and it be found againſt him, the Plaintiff ſhall have Judgment, becauſe he loſes the Opportunity of pleading in Abatement by pleading to the Right of the Action.

2 Stra. 820. S. P. in *Heaſman* ver. *Moon*, *K. B.* Mich. 15 Geo. 2. 2 Lev. 113. Carth. 63.

2 Inſt. 523, 524. If Joint-tenancy be pleaded by Fine or Deed in Abatement of the Demandant's Action, he cannot take a general Averment that the Tenant is ſole ſeiſed, for that were directly to contradict them, and ſet them aſide by a Matter of leſs Force and Solemnity than they are; but he may confeſs the Joint-tenancy which the Tenant pleads after the Fine levied, but that the Joint-tenant not named releaſed to the Tenant before the Writ brought, or that both the Conuzees infeoffed one who infeoffed the Tenant; but at this Day, if the Tenant had been infeoffed by Deed, and had pleaded Joint-tenancy, to abate the Demandant's Writ, the Demandant might have averred generally, that the Tenant is ſole ſeiſed, for the Statute of 34 *E.* 1. *de Conjunctim Feoffeatis* extends to Joint-tenancy by Deed tho' not by Fine, but by the common Law the Demandant was not allowed

that

that Plea, where the Tenant claimed under a Deed, no more than when he claimed under a Fine; but if the Tenant claims by Feoffment in *Pais*, and plead that in Abatement of the Demandant's Action, the Demandant may aver ſole Tenancy, becauſe the Feoffment is to be proved *viva voce per Pares*, whoſe Credit is not more regarded by the Court than the Demandant's.

(L) Of the Remedies which Joint-tenants and Tenants in common have againſt each other.

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BY the Common Law Joint-tenants and Tenants in common had no Remedy againſt each other, where one alone received the whole Profits of the Eſtate, for he could not be charged as Bailiff or Receiver to his Companion, unleſs he actually made him ſo; but now by the 4 & 5 *Ann. cap.* 16. it is provided, that they and their Executors and Adminiſtrators may have an Account againſt the others as Bailiffs, for receiving more than their Proportion, and againſt their Executors and Adminiſtrators.

Co. Lit. 172. a. 186. a. 200. b. 3 Leon. 228. So if two had a Ward in common, and one took all the Profits. F. N. B. 118.

But if one Joint-tenant or Tenant in common had ejected or (*a*) withheld the Poſſeſſion from his Companion, ſuch Joint-tenant or Tenant in common ſo ejected might have maintained an *Ejectione firmæ* againſt ſuch Ejector, &c. †.

Co. Lit. 199. b.

(*a*) But tho' one Tenant in common may diſſeiſe the other, yet it muſt be by actual Diſſeiſin, as turning him out, hindering him to enter, &c. but a bare Perception of Profits is not enough. Salk. 392 pl. 4. 7 Mod. 39. See Ld. Raym. 404, 737, 750, 830. 8 Mod. 109. Comyns 113. pl. 74. Ld. Raym. 716. Stra. 531. 2 Stra. 960, 1180.—† Confeſſion of Leaſe, Entry, and Ouſter, is ſufficient on an Ejectment, in the Caſe of a Tenant in common, without Proof of actual Ouſter. P. 6 Geo. 3. 3 Bur. 1895.

Alſo one Joint-tenant or Tenant in common may offend againſt the Statutes againſt forcible Entries, either by forcibly ejecting, or forcibly holding out his Companions; for though the Entry of ſuch a Tenant be lawful *per mie & per tout*, ſo that he cannot in any Caſe be puniſhed in an Action of Treſpaſs at the Common Law; yet the Lawfulneſs of his Entry no way excuſes the Violence, or leſſens the Injury done to his Companion, and conſequently an Indictment of forcible Entry into a Moiety of a Manor, &c. is good.

Latch 221. Palm. 419.

But though Joint-tenants and Tenants in common being actually ejected had theſe Remedies at common Law, yet ſuch Remedies were only extended to Things real; and there was no Remedy where a Horſe, Hawk, &c. were ſeiſed by one Joint-tenant or Tenant in common, but by reſeizing it again when a proper Opportunity ſerved.

Lit. ſ. 323.

If there be two Tenants in common of a Manor to which Waif and Stray belong, a Stray doth happen, they are Tenants in common of the ſame; and if the one doth take the Stray, the other hath no Remedy by Action but to take him again; but if by Preſcription the one is to have the firſt Beaſt happening as a Stray, and the other the ſecond, there an Action lieth, if the one take that which pertains to the other.

Co. Lit. 200. a.

So if there be two Tenants in common of a Park or Dove-Houſe, and one of them deſtroy all the Deer, or take all the old Doves, and deſtroy the Flight; or if two have Land and Mere-Stones in common, and one of them carry them away; or if they have a Folding in common, and one diſturb the other to erect Hurdles, in all theſe Caſes Treſpaſs *Quare Vi & Armis* lies.

Co. Lit. 200. a. b.

If

Co. Lit. 200. b. If two ſeveral Owners of Houſes have a River in common, and one of them corrupt it, the other ſhall have an Action on the Caſe.

Co. Lit. 200. b. If one be willing to repair a Houſe or Mill which he holds in common, or jointly with another, he may have a Writ *de Domo reparanda* againſt him.

Co. Lit. 200. b. 2 Inſt. 403. If Land be given to two for Life, and to the Heirs of one of them, and Tenant for Life do Waſte, he that hath the Fee cannot have an Action of Waſte on the Statute of *Gloceſter*, but he may have one on *Weſtm.* 2. *cap.* 22. which enacts, that if there be two Tenants in common of a Wood, Turbary, Piſcary, *&c.* and one do waſte, the other ſhall have a Writ of Waſte, and the Waſter ſhall have Election before* Judgment, either to have his Part in certain aſſigned to him by the Oath of twelve Men, (and then the Place waſted ſhall be aſſigned for Part thereof,) or to grant that he will take no more for the future than his Companion ſhall approve of; and this Act by Conſtruction has been held to extend to Joint-tenants, but not to Parceners, becauſe they might have the Writ *de Partitione facienda* at Common-Law.

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Vid. Tit. *Trover* and *Converſion.* One Tenant in common cannot bring Trover againſt his Companion, becauſe they are both equally intitled to the Poſſeſſion.

JOINTURE.

Co. Lit. 36. b. 1 Co. 2. b. A Jointure is a competent Livelihood of Freehold for the Wife, of Lands, *&c.* to take Effect preſently in Poſſeſſion or Profit after the Death of the Huſband, for the Life of the Wife at leaſt, if ſhe herſelf be not the Cauſe of the Determination or Forfeiture thereof.

Under this Definition we ſhall conſider,

(A) The Original and firſt Introduction of this Proviſion. 221.

(B) Of its being a Bar of Dower; and herein of the 27 H. 8. c. 10. and the Rules to be obſerved in making a good Jointure, and ſuch a one as will be an effectual Bar of Dower. 222.

And herein,

1. That the Eſtate muſt take Effect immediately after the Death of the Huſband. 223.
2. That it muſt be for Term of the Wife's Life or greater Eſtate. 224.
3. That it muſt be made to herſelf, and not to others, in Truſt for her. 224.

4. That

4. That it muſt be in Satisfaction of her whole Dower. 224.

5. That it muſt be expreſſed to be in Satisfaction of her Dower; and therein how far a collateral Recompence ſhall be a Bar of Dower or Jointure. 224.

6. That it muſt not be made during Coverture. 226.

(C) How far her own or her Husband's Acts may defeat her of this Proviſion. 228.

(D) How far a Jointreſs is intitled to the Aid and Aſſiſtance of a Court of Equity. 229.

[(E) Of other Statutes relative to Dower, &c. 230.]

Of Diſcontinuances by Women of their Huſbands Eſtates, *vide* Tit. Diſcontinuance.

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* (A) Of the Original and firſt Introduction of this Proviſion.

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IT having been determined that at Common Law a Woman could not be endowed of an Uſe; and moſt Lands before the 27 *H.* 8. *cap.* 10. being put in Uſe, ſo that there was no Confidence to be had in the Dower at the Common Law; this obliged the Wife, or her Friends, either before or after the Marriage, to procure the Huſband to take the legal Eſtate from the Feoffees, and ſettle it to the Uſe of him and his Wife for Life, or in Tail, with what Remainders over he pleaſed; and this ſeems to have been the Original of Jointures.

Vide Tit. *Dower* and Tit. *Curteſy of England.*

But though this Method was an effectual Security to the Wife, yet was it of no Service to the Huſband, or his Heirs, in barring her of her Dower before the 27 *H.* 8. *cap.* 10. for by the common Law a Woman could not be barred of her Dower by any Aſſignment or Aſſurance to her, of other Lands whereof ſhe was not dowable, (except in the Caſe of Dower *ad Oſtium Eccleſiæ*, or *ex aſſenſu Patris*, which were allowed to be Dowers or Jointures of themſelves, and were a good Bar of any other Dower) were ſuch an Aſſignment or Aſſurance made by the Huſband before Marriage or after, or by the Heir after his Death; and though they were expreſly ſaid to be in full Bar and Recompence of her Dower, yet might ſhe recover her Dower notwithſtanding; for ſhe having a Right to be endowed of the third Part of all her Huſband's Lands, veſted and fixed in her immediately upon the Marriage and the Huſband's Seiſin thereof; this Right, like all others, could not be transferred or extinguiſhed but by a Releaſe thereof; and if no ſuch Releaſe was made, it continued ſtill in Being, for want of the proper Means to deſtroy it; and if it ſtill exiſted, her Remedy was open to recover and reduce it into Poſſeſſion; and of this there can be no Doubt as to any Eſtate or Purchaſe procured by the Huſband to be made to his Wife after Marriage, in Lieu and Satisfaction of Dower, for ſhe is not at this Day bound in ſuch Caſe; and if it were made before Marriage, it was at common Law no Bar, for two Reaſons; 1. Becauſe at the Time of making thereof ſhe had no Title to Dower, and therefore an Eſtate made to her then could be no Bar to a Right which accrued to her after. 2. Becauſe immediately upon the Marriage the Right firſt veſted in her, and

4 Co. 1. *Vernon's* Caſe. Dyer 91. Co. Lit. 34. b. 36. b. Bro. Tit. *Dower* 97. 2 Brown. 132.

could not be extinguiſhed or barred but by a Releaſe thereof; ſo if ſuch Aſſignment or Aſſurance were by the Heir *in Pais*, this was no Bar neither; (a) 4 Co. 5. but (a) if it were by Indenture or Fine, then it ſhould ſeem an Eſtoppel to her to Demand any other Dower, becauſe her Title to Dower was then compleat and certain; and ſhe has by this Aeceptance concluded herſelf to demand any Thing more.

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* Page 222 ‡ Jointure is not a Bar to Dower, when the Original Agreement is not in Writing, or if the Huſband is an Infant.

(B) Of its becoming a Bar ‡ of Dower; and herein of the 27 H. 8. cap. 10. and the Rules to be obſerved in making a good Jointure, and ſuch a one as will be an effectual Bar of Dower.

Bern. v. *Bern.* M. 8 Geo. 2. Caſes in *B. R. Temp.* Ld. *Hardwicke.*

Co. Lit. 36. b. 4 Co. 1. THE Maxims of the Common Law, that no Right could be barred before it accrued; that a Right or Title to a Freehold could not be barred by Acceptance of a collateral Satisfaction; and the Reaſons aforeſaid allowing the Wife to claim her Dower, and alſo the Benefit of ſuch Settlement as was made on her, which being contrary to Juſtice,

By the 27 *H.* 8. *cap.* 10. *par.* 6. it is enacted, " That where divers " Perſons have purchaſed, or have Eſtates made and conveyed of and in " divers Lands, Tenements, and Hereditaments, unto them and their " Wives, and to the Heirs of the Huſband, or to the Huſband and the " Wife, and to the Heirs of their two Bodies begotten, or to the Heirs of " one of their Bodies begotten, or to the Huſband and to the Wife for " Term of their Lives, or for Term of the Life of the ſaid Wife; or " where any ſuch Eſtate or Purchaſe of any Lands, Tenements, or Hereditaments, hath been or hereafter ſhall be made to any Huſband and to his " Wife in Manner and Form above expreſſed, or to any other Perſon or " Perſons, and to their Heirs and Aſſigns, to the Uſe and Behoof of the " ſaid Huſband and Wife, or to the Uſe of the Wife, as is before re- " hearſed, for the Jointure of the Wife, that then in every ſuch Caſe " every Woman married having ſuch Jointure made, or hereafter to be " made, ſhall not claim nor have Title to have any Dower of the Reſidue " of the (a) Lands, Tenements, or Hereditaments, that at any Time were " her ſaid Huſband's, by whom ſhe had any ſuch Jointure, nor ſhall de- " mand nor claim her Dower of and againſt them that have the Lands and " Inheritances of her ſaid Huſband; but if ſhe have no ſuch Jointure, then " ſhe ſhall be admitted and enabled to purſue, have and demand her " Dower by Writ of Dower, after the due Courſe and Order of the com- " mon Law of this Realm; this Act or any Law or Proviſion made to the " contrary thereof notwithſtanding.

(a) A Jointure made of Copyhold Lands is no Bar of Dower within this Statute. Cro. Car. 44. 4 Mod. 85.

Par. 7. Provided, " That if any ſuch Woman be lawfully expulſed or " evicted from her ſaid Jointure, or from any Part thereof, without any " Fraud or Covin, by lawful Entry, Action, or by Diſcontinuance of her " Huſband, then every ſuch Woman ſhall be endowed of as much of the " Reſidue of her Huſband's Tenements or Hereditaments whereof ſhe was " before dowable, as the ſame Lands and Tenements ſo evicted and ex- " pulſed ſhall amount or extend unto.

Par. 9. Provided alſo, " That if any Wife have, or hereafter ſhall have, " any Manors, Lands, Tenements, or Hereditaments unto her given or " aſſured

" aſſured after Marriage for Term of her Life or otherwiſe, in Jointure, " except the ſame Aſſurance be to her made by Act of Parliament, and " the ſaid Wife after that Fortune to overlive the ſame her Huſband in " whoſe Time the ſaid Jointure was made or aſſured unto her, that then the " ſame Wife ſo overliving ſhall and may be at her Liberty after the Death " of her ſaid Huſband to refuſe to have and take the Lands and Tenements " ſo to her given, appointed or aſſured during the Coverture, for Term of " her Life or otherwiſe, in Jointure, except the ſame Aſſurance be to her " made by Act of Parliament as is aforeſaid, and thereupon to have, aſk, de- " mand and take her Dower by Writ of Dower or otherwiſe, according to " the Common Law, of and in all ſuch Lands, Tenements, and Hereditа- " * ments, as her Huſband was and ſtood ſeiſed of any Eſtate of Inheritance *Page 223 " any Time during the Coverture ; any Thing, &c.

To make a good Jointure within this Statute, the ſix following Things are to be regarded,

1. That the Eſtate muſt take effect immediately from the Death of the Huſband.

Therefore if an Eſtate be made to the Huſband for Life, the Remainder to *J. S.* for Life, Remainder to the Wife for her Jointure, this is no good Jointure, for it is not within the Words or Intent of the Statute ; for the Statute deſigned nothing as a Satisfaction for Dower, but that which came in the ſame Place, and is of the ſame Uſe to the Wife, and though *J. S.* dies during the Life of the Huſband, yet this is not good ; for every Intereſt not equivalent to Dower, being not within the Statute, is a void Limitation to deprive the Wife of her Dower. 4 Co. 3. Hutton 51.

So if an Eſtate be made to the Uſe of *A.* for Life, the Remainder to the Wife for Life, this is not good, though *A.* dies, living the Huſband. 4 Co. 2. Hob. 151.

So if an Eſtate be made to the Huſband for Life, the Remainder to *J. S.* for Years, the Remainder to the Wife for her Jointure, this is not good, though the Years are expired in the Life-time of the Huſband. Hutt. 51. Winch 33.

But if an Eſtate be made to the Huſband for Life, the Remainder to *J. S.* for the Life of the Huſband, to ſupport contingent Remainders, Remainder to the Wife for Life, this is a good Jointure, though not within the expreſs Words of the Statute, for it is within the Equity and Deſign of it. 4 Co. 3.

If a Man makes a Feoffment to the Uſe of himſelf for Life, Remainder to the Son and his Wife, and the Heirs of the Body of the Son, this is no good Jointure, though the Wife hath an immediate Freehold ; for to be within the Caſes of the Statute whereby Dower is barred, the Wife muſt have (*a*) a ſole Property after the Death of her Huſband. Winch 33.

(*a*) That a Jointure within this Act by the firſt Limitation muſt take effect for Life in Poſſeſſion or Profit preſently after the Death of the Huſband, laid down in Co. Lit. 36. b. 4 Co. 2. a. Cro. Jac. 489. Hutt. 51. Winch 33.

A Feoffment in Fee to the Uſe of the Feoffee for Life, the Remainder to the Uſe of his ſecond Son for Life, Remainder to the Uſe of ſuch Wife as the Son ſhall take, Remainder to the Heirs of the Son ; the Father dies, the Son marries, and dies ; the Wife is not by this Settlement barred of her Dower ; for this at the Time of the Creation was no certain Proviſion for the Wife's Life, for the Son might have married and died in the Life of the Father. Sid. 3, 4. *per Bridgman.*

A Jointure limited to take effect immediately on the Death of the Huſband ſhall take effect as well on a civil as a natural Death ; therefore if the Huſband enters into Religion, is baniſhed, or abjures the Realm, the Wife ſhall have her Jointure. Co. Lit 133. Moor 851. 3 Bulſ. 188. Rol. Rep. 400. 2 Vern. 104

2. That

2. That it muſt be for Term of the Wife's Life or greater Eſtate.

Co. Lit. 36. b. 4 Co. 2. b. Therefore if an Eſtate be made to the Wife for the Life or Lives of many others, this is no good Jointure; for if ſhe ſurvives ſuch Lives, as ſhe may, then it would be no competent Proviſion during her Life, as every Jointure within the Statute ought to be.

Co. Lit. 36. So if a Term for 100 Years be limited to the Wife, if ſhe ſo long live, or abſolutely, this is no good Jointure; for the Statute provides, that when *Page 224 * the Wife hath an Eſtate for Life by Settlement, ſhe ſhall be barred of her Dower at Common Law; if ſhe hath any greater Eſtate, ſhe hath an Eſtate for her own Life included in it; but if ſhe hath any leſs Eſtate, it is out of the Statute.

4 Co. 3. a. If an Eſtate be limited to the Wife upon Condition, her Acceptance of ſuch a conditional Jointure makes it good; for this Eſtate ſupports the Wife well enough, and it is in her Power to continue it during her Life; therefore an Eſtate limited to the Wife (*a*) *durante Viduitate* is a good Jointure; for it cannot determine but by her Act.

(*a*) So ſays my Ld. *Coke*, if limited to her upon Condition that ſhe ſhall perform the Will of her Huſband, &c. this is a good Jointure within the Words and Intention of the Act, for that her Eſtate cannot determine without her Default. 4 Co. 2. b. 3. a. But for this *vide* Moor 31. pl. 103. Leon. 311. N. Bendl. pl. 247.

3. That it muſt be made to herſelf, and not to others, in Truſt for her.

Co. Lit. 36. b. This Rule, my Lord *Coke* ſays, is ſo neceſſary to be obſerved, that though the Wife ſhould aſſent to a Jointure made in Truſt for her, yet it would not be good; for the Statute only bars the Dower when by it the Poſſeſſion (which was formerly a Uſe) is executed in her.

But as the Intention of the Statute was to ſecure the Wife a competent Proviſion, and alſo to exclude her from claiming Dower, and likewiſe her Settlement, it ſeems that a Proviſion or Settlement on the Wife, though by way of Truſt, if in other Reſpects it anſwers the Intention of the Statute, will be inforced in a Court of Equity †.

† A Conveyance muſt be to the Wife herſelf, and not to Truſtees, in order to make the Proviſion a Jointure in point of Law. *Hervey* v. *Hervey*, M. 1739. 1 Atkyns, 561.

4. That it muſt be in Satisfaction of her whole Dower.

Co. Lit. 36. b. The Reaſon hereof is, that if it be in Satisfaction of Part only, it is uncertain for what Part it is in Satisfaction of her Dower, and therefore void in the Whole.

4 Co. 5. If an Eſtate be made to the Wife in Satisfaction of Part of her Dower before Marriage, and after Marriage other Lands are conveyed, wherein it is ſaid to be in full Satisfaction of all her Dower, if ſhe waives the Lands conveyed to her after Marriage, ſhe ſhall have Dower of all the Lands of her Huſband, notwithſtanding the Settlement is in Satisfaction of Part.

5. That

5. That it must be expressed to be in Satisfaction of her Dower; and therein how far a collateral Recompence shall be a Bar of Dower or Jointure.

My Lord *Coke* says, that it must be expressed or averred to be in Satisfaction of her Dower; but *quære*; for this does not seem requisite, either within the Words or Intention of the Statute. Co. Lit. 36. b.

Therefore where an Assurance was made to a Woman to the Intent it should be for her Jointure, but it was not so expressed in the Deed, the Opinion of the Court was, that it might be averred that it was for a Jointure, and that such Averment was not traversable. Owen 33. and there said, that it had been so likewise ruled between the Queen *and* Dame *Beaumont*.

But a Devise of an Estate to a Wife for Life cannot be averred to be in Satisfaction of Dower or Jointure, unless it be expressed to be so in the Will; for there can be no Averment contrary to the Will, and consequently there can be no Averment contrary to the Consideration implied in every Devise, which is the Kindness of the Testator. Co. Lit. 36. 4 Co. 4. *Page225

So where one devised Lands to his Wife during her Widowhood, and died, and she married again and brought Dower, and this Devise being pleaded in Bar, it was held no Bar: 1*st*, Because a Will imports a Consideration in itself, and cannot be averred to be in Bar of Dower, unless it be so expressed. 2*dly*, Dower cannot be of less Estate than for Life of the Wife. And a *third* Reason may be, that her Right to Dower cannot be barred by a collateral Recompence, since such collateral Recompence is no proper Conveyance of such Right. Moor, pl. 103.

A Man devised his Lands to his Wife till his Daughter *M.* should arrive to the Age of nineteen Years, and after to *M.* in Tail, Remainder over in Fee; and devises further, that *M.* should pay after her Age of nineteen Years to his Wife 12 *l. per Annum* in Recompence of her Dower, and if she failed in Payment, that then his Wife should have the Land for her Life; the Wife before her Daughter came to nineteen brought her Writ of Dower, and recovered a third Part; and after the Daughter came to nineteen, and for Non-payment of the 12 *l.* the Mother entered; and the Question was, if her Entry were lawful; and argued that it was, and that by bringing of her Writ of Dower she had not waved the Benefit to have the Lands by the Devise, because then she had no Title to it, but her Title accrued after, for Non-payment of the 12 *l.* But it was adjudged, that she, having recovered a third Part in Dower, should not have the Rent by the Will; for it is against the Intention of the Will that she should have both, and the Acceptance of one is a Waver of the other. Cro. Eliz. 128. *Gosling* and *Warberton*.

One seised in Fee of Lands held in Socage, and of other Lands in Tail held *in Capite*, devises by Will in Writing the third Part of all his Lands to his Wife in Recompence of her Dower, and dies; she enters into the third Part of the Fee-simple Lands without bringing her Writ of Dower, and therefore she was barred to have any more by 27 *H.* 8. *cap.* 10. of Jointures; which shews that she took this by the Devise, as a Jointure within that Statute, and that taking by the Devise she could have no more than the Devisor had Power to dispose of, which was only his Fee-simple Lands; and she by entering into a third Part thereof shews her Intention to have it as a Jointure, (for otherwise she could not enter till Assignment by the Heir or Sheriff;) but in this Case she being barred only by Reason of the Statute, as the Book says, it appears that, before that Statute, she would not have been barred of her Dower by such Devise. Dyer 220. 4 Co. 4.

A Man

2 Vent. 340. and 1 Chan. Caſes 181. *Pheaſant's* Caſe.

A Man marries an Orphan of *London*, who had a great Portion in the Chamber of *London*, the Huſband dies before taking of it out, but makes his Will, and deviſes this Money to his Wife, provided that ſhe ſhould not claim her Dower; and yet after his Death ſhe brought her Writ of Dower, and thereupon a Bill was brought in Chancery to have her releaſe her Dower, or renounce the Deviſe, and for an Injunction in the mean Time, but could not prevail, the Money belonging to her in her own Right by the Cuſtom, for want of the Huſband's altering the Property thereof; and though he had, yet it was admitted it would have been no Bar of Dower, being totally collateral thereto; though it ſhould ſeem ſhe would in ſuch Caſe have forfeited the Money by ſuing for Dower.

2 Chan. Ca. 24. 2 Vern. 365. Preced. Chan. 133.

On this Diſtinction it hath been often ruled in Chancery, that if Lands, Money, Goods, &c. are deviſed to a Woman, without ſaying in Lieu or Satisfaction of Dower, &c. yet the Wife ſhall have both; becauſe a Deviſe is ſaid to be conſidered as a Bounty, and implies a Conſideration in itſelf; but if it be in Lieu or Recompence of Dower, there the Wife cannot have both, but may (*a*) wave which ſhe pleaſes.

(*a*) But if *A.* charges Land in *D.* with a Portion for a Daughter by a firſt *Venter*, and then marries, and ſettles Part of thoſe Lands as a Jointure on a ſecond Wife, who has no Notice of the Charge, and *A.* believing that the Portion would take Place of the Jointure, by Will gives other Lands to the Wife in lieu thereof, and the Wife by Combination with the Heir refuſes to accept of the Deviſe; the Daughter ſhall hold the other Lands which deſcended to the Heir till ſatisfied her Portion. Vern. 219. *Reeve* and *Reeve.*

*Page 226 2 Vern. 365. *Lawrence* and *Lawrence.* Abr. Eq. 218-9. S. C. & *vide* Vern. 463.

* *J. S.* deviſed Legacies to his Wife out of his perſonal Eſtate, and deviſed to her Part of his real Eſtate during her Widowhood, and deviſed the Reſidue of his Eſtate to Truſtees, for twenty-one Years, for Payment of Debts and Legacies, and the Remainder of the whole Eſtate he deviſed to the Plaintiff, (who was his Godſon, and of his Name, but a remote Relation,) for Life, and to his firſt and other Sons in Tail; and my Lord Chancellor *Somers* decreed, that though it was not declared in the Will to be in Lieu and Satisfaction of Dower, yet as it may be plainly collected to be ſo intended, (he having made a Diſpoſition of his whole Eſtate,) and as a collateral Satisfaction, may be a good Bar to Dower in Equity, though not at Law, that ſhe muſt either take her Dower and wave the Deviſe, or accept the Deviſe and wave the Dower; but this Decree was reverſed by *Wright* Lord Keeper, and the Decree of Reverſal affirmed in Parliament.

Mich. 6. Geo. 2. *Jordan* ver. *Savage.*

J. S. ſeiſed of Copyhold Lands belonging to the Manor of *Whitechurch*, in which Manor there is the following Cuſtom, *viz.* that the firſt Wife of every Tenant ſhould have her Free Bench in all the Lands whereof her Huſband was ever ſeiſed during the Coverture; the ſecond Wife a Moiety, and the third a third Part ſo long as ſhe kept her Huſband above Ground; *J. S.* in Conſideration of a Marriage and Marriage Portion covenants with Truſtees, that within two Months after the Marriage he would ſettle all his Lands to the following Uſes, *viz.* as to Part of the Lands, to the Uſes of himſelf and his Wife for their Lives, Remainder to the firſt Son, &c. in Tale Male; and as to the other Moiety to the Uſe of himſelf for Life, Remainder to his firſt Son, &c. with a Proviſo that the Lands ſo ſettled on the Wife ſhould be in lieu of her cuſtomary Eſtate; and one of the Points in this Caſe was, whether this Jointure not being made expreſly in lieu of her Dower, but only ſaid ſo in the Proviſo, and ſhe being an Infant at the Time of making the Articles, and not a Party to them, ſhe ſhould be excluded from claiming her Free Bench; and it was held, that ſhe ſhould be obliged to abide by her Jointure, and the Caſe of *Vizet* and *Longdon* was cited, where a Sum of Money was ſettled upon a Woman before Marriage for her Proviſion and Maintenance; and the Maſter of the *Rolls* was of Opinion ſhe ſhould have both that and her Dower; but the Chancellor reverſed the Decree, and confined her to her Settlement.

6. That it muſt not be made during the Coverture.

This the very Words of the Act of Parliament require; and therefore if a Jointure be made to a Woman during Coverture in Satisfaction of Dower, ſhe may wave it after her Huſband's Death; but if ſhe enters and agrees thereto, ſhe is concluded; for though a Woman is not bound by any Act when ſhe is not at her own Diſpoſal, yet if ſhe (*a*) agrees to it when ſhe is at Liberty, it is her own Act, and ſhe cannot avoid it. Co. Lit. 36. 4 Co. 3.

(*a*) What ſhall be ſaid an Agreement or Refuſal, 3 Co. 26. a. 3 Leon. 272. And. 352. Poph. 88. Goulſ. 4, 84, 85.

If a Jointure be made to the Wife before Coverture, and the Huſband and Wife alien by Fine, the Wife ſhall not afterwards be endowed of any Lands of her Huſband's; for ſince ſhe quitted her Dower when ſhe was at her own Diſpoſal, ſhe can claim nothing but the Jointure, and that ſhe has paſſed away by the Fine levied; but if the Jointure was made during the Coverture, and then ſhe relinquiſhed it by Fine, yet ſhe ſhall have her Dower of the other Lands; for the Acceptance of a Jointure during the Coverture is no Bar of her Dower, and ſhe paſſing of it by Fine cannot be conſtrued an Acceptance of Property in them, * ſince that is capable of another Conſtruction, *viz.* to bar her of her Dower in thoſe Lands. Co. Lit. 36. b. Bulſ. 163. *Page 227

The Huſband after Marriage ſettled Lands to the Uſe of himſelf and Wife in (*b*) Tail, for her Jointure, and during the Coverture Part of the Lands were evicted, and the Huſband died, and the Wife entred into the Reſidue; and upon a Reference out of the Court of Wards to the two Chief Juſtices, it was reſolved, that ſhe ſhould have a Recompence for the Part evicted. Moor, 717. pl. 1002.

(*b*) But whether the Part ſettled in recompence ſhould be in Tail, or for Life only, *quære*; & *vide* 4 Co. 3. b.

A Seignory was granted to the Huſband and Wife, and their Heirs, the Tenant attorns, the Huſband dies, and the Seignory ſurvives to the Wife, and ſhe brought her Writ of Dower, in bar of which the Heir pleads Acceptance of Homage from the Tenant; and this was held a good Bar; for though ſhe might have diſagreed to ſuch Eſtate made during the Coverture, yet by the Acceptance of Homage ſhe hath concluded herſelf; and this Caſe differs from the Aſſignment by the Heir in *Pais* and her Acceptance; becauſe if he gives her a wrong Eſtate, and ſhe accepts thereof, this is no Bar of her rightful Eſtate; but here ſhe having two Titles, either as a Purchaſer to have the Whole, or as a Wife to have the third Part, her Acceptance of the one is a Waver of the other, becauſe ſhe cannot have both out of the ſame Land. 3 Leon. 272. 3 Co. 27.

If Lands are given to the Huſband and Wife, and the Heirs of the Huſband, who dies, the Wife may diſagree to this Eſtate made during the Coverture, and then it will be an Eſtate to the Huſband and his Heirs *ab initio*, and ſo ſhe ſhall have her Dower thereof; but if an Eſtate be made to the Huſband and Wife for the Life of the Huſband, Remainder to the right Heirs of the Huſband, it ſhould ſeem ſhe cannot in this Caſe diſagree, becauſe the Eſtate upon the Huſband's Death is determined and gone; though by this Contrivance all Women may be defeated of their Dower as to Eſtates purchaſed after the Marriage. Perk. 352-3. 3 Co. 27.

If an Eſtate be made to the Wife for her Jointure during the Coverture, the Remainder to *J. S.* in Fee, and the Wife waves this Jointure, *J. S.* ſhall have the Remainder; for here was a particular Eſtate at the Time of creating the Remainder, ſo that it had the Circumſtances of a Remainder, being the Reſidue of a particular Eſtate then in Being; and Co. Lit. 29. b.

ſince

since the particular Estate was defeasible by an Act that could not hurt the Remainder, the Remainder upon such Destruction of the particular Estate comes in Being.

Co. Lit. 348. a. A Man covenants to stand seised to the Use of himself in Tail, the Remainder to his Wife for Life, the Remainder to *B.* in Tail, and then he makes a Feoffment in Fee to the Use of himself and his Wife for their Lives, as a Jointure, the Remainder to *C.* and dies without Issue; the Wife is remitted; for where a later and defeasible, and a former and indefeasible Title concur in the same Person, there must be a Remitter.

Co. Lit. 348. a. But in this Case the Wife hath two Titles, both waveable by her; the first indefeasible by any third Person, the latter defeasible by a third Person; for upon her claiming by the second Title she waves the first, and consequently the Remainder in *B.* commences, and he shall have his Action, and therefore she must be in of her former Title, to save the Contention and Trouble of the Action.

Co. Lit. 357. Dyer 351. But if an Estate be made to the Husband in Tail, the Remainder to the Wife for Life, the Remainder to the right Heirs of the Husband, the Husband afterwards makes a Feoffment in Fee to the Use of the Husband and Wife for their Lives, the Remainder to the right Heirs of the Husband; the Husband dies without Issue; the Wife may claim by which she pleases, and is not remitted *nolens volens*, because here are not two Titles the one indefeasible, and the other defeasible by a third Person, but both equally firm; for the right Heir of the Husband upon the * Waver of the first Estate by the Wife can claim nothing in the Land contrary to the Feoffment of his Ancestor; and therefore that Estate which the Wife claims is indefeasible, and no Stranger is prejudiced by being put to his Action.

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2 Rol. Abr. 422. But if she makes no Election, she shall be supposed to be in of her elder Estate, because every one is presumed to chuse what is most for his Benefit.

Cro. Jac. 490. If the Wife has an old Right before the Coverture, and afterwards takes a Jointure of the same Lands, she shall be remitted.

Hob. 72. An Estate settled to the Husband for Life, Remainder to the Wife for a Jointure, except such of the Lands as the Husband should devise, this Exception is repugnant to the Grant, because the Settlement might be avoided by the Husband devising the Whole.

(C) How far her own or her Husband's Acts may defeat her of this Provision.

Co. Lit. 26. Dyer 358. IT has been already observed, that if a Man make a Jointure on his Wife either before or after Marriage, and they both join in a (*a*) Fine, that she is so far bound thereby, that if the Jointure was made before Marriage she is barred to claim Dower in any other Lands of the Husband's; but if the Jointure was made during Coverture, she may claim Dower in the other Lands.

(*a*) See Recovery as well as a Fine by a Feme Covert is sufficient to bar her, because the *Præcipe* in the Recovery answers the Writ of Covenant in the Fine to bring her into Court, where the Examination of the Judges destroys the Presumption of Law, that this is done by the Coercion of the Husband, for then it is to be presumed they would have refused her. 10 Co. 43. 2 Rol. Abr. 395.

2 Inst. 673. Hob. 225. But if a Wife joins with her Husband in a Bargain and Sale of the Lands by Deed indented and inrolled, yet it shall not bind her; for a Wife cannot

cannot be examined by any Court without Writ, and there is no Writ allowed in this Caſe.

But if a Feme Covert joins with her Huſband in levying a Fine to raiſe a Sum of Money by way of Mortgage, this ſhall bind her; yet in this Caſe ſhe doth not abſolutely depart with her Eſtate for Life, but there reſults a Truſt to the Wife to (*b*) redeem, and to reinſtate herſelf in her Jointure. 2 Chan. Ca. 162.

(*b*) And the Money ſhall be paid out of the perſonal Eſtate of the Huſband. Vern. 41, 213. 2 Vern. 436.——So if a Jointure be made of Lands which are in Mortgage, the Wife may redeem, and her Executor ſhall hold over till repaid with Intereſt. Chan. Ca. 271. 2 Vent. 343. S. P. decreed.

If Tenant in Tail of a Truſt makes a Mortgage, or acknowledges a Judgment or Statute, and then levies a Fine, and ſettles a Jointure, the Jointreſs ſhall hold it ſubject to the Mortgage or Judgment, in the ſame Manner as if the Mortgagor or Conuſor had been Tenant in Tail of the legal Eſtate, and after the Mortgage or Judgment, had levied a Fine, and made a Jointure, becauſe the ſubſequent Declaration of the Uſe of the Fine is merely the Act of the Tenant in Tail, and he cannot by any Act of his own make a ſubſequent Conveyance take place of a precedent, and the rather, becauſe the Feme claims under that Fee which Tenant in Tail got by the Recovery or Fine, and that Fee was ſubject to all the Charges he had laid upon it. Chan. Ca. 119, 120.

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*(D) How far a Jointreſs is intitled to the Aid and Aſſiſtance of a Court of Equity.

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IF a Man before Marriage articles to ſettle a Jointure on his intended Wife, and the Marriage is conſummated, and the Huſband dies before any Settlement made, an Execution of the Articles will be decreed in (*a*) Equity. 2 Vent. 343.

(*a*) That a Jointreſs in Equity is conſidered as a Purchaſer for valuable Conſideration, who may ſet aſide a prior voluntary Conveyance as fraudulent againſt her. Chan. Ca. 100.—But where by a Marriage Agreement the Son's intended Wife was to have more than would have been left for the Father, (though indebted) his Wife and two Daughters unpreferred, the Court of Chancery would not decree it principally, by reaſon of the Extremity of it, but left the Party to her Remedy by Law. 2 Chan. Ca. 17.

So where *A.* gave a voluntary Bond after Marriage to make a Jointure to his Wife, and he made a Jointure accordingly, and then the Wife delivered up the Bond, and the Jointure being evicted, the Court held that it ſhould be made good out of the perſonal Eſtate, eſpecially as there were no Creditors affected by it; for the Delivery of the Bond by a Feme Covert could no way bind her. Vern. 427. *Beard* and *Nuthal.*

So if a Jointreſs brings her Bill to have an Account of the real and perſonal Eſtate of her late Huſband, and to have Satisfaction thereout, for a Defect of Value of her Jointure Lands, which he had covenanted to be and to (*b*) continue of ſuch Value, and the Defendant inſiſts that this is a Covenant which (*c*) ſounds only in Damages, and properly determinable at Law, though it be admitted that a Court of Equity cannot regularly aſſeſs Damages, yet in this Caſe a Maſter in Chancery may properly inquire into Abr. Equ. 18.

(*b*) If a Man covenants to ſettle Lands of ſuch a Value as a Jointure, and this Covenant is omitted in the Settlement, yet it ſubſiſts in Equity; but the Value of the Land is not to be eſtimated according to the preſent Value, but as they were at the Time of the Jointure ſettled, unleſs the Covenant be ſo. Vern. 217. *Speake* ver. *Speake.* (*c*) An Action on the Caſe brought at Law for not making a Jointure. 2 Rol. Rep. 488.

the

the Value of the Defect of the Lands, and report it to the Court, which may decree such Defect to be made good, or send it to be tried at Law upon a *Quantum Damnificat'*.

Abr. Eq. 221. 2. *Carew* and *Carew*.

If there be a Jointress, and a Covenant that her Jointure shall be of such a yearly Value, and it falls short, though her Estate be not without Impeachment of Waste, yet she may commit Waste so far as to make up the Defect of the Jointure, and Equity will not (*d*) prohibit.

(*d*) But on a Motion to stay a Jointress Tenant in Tail after Possibility, &c. the Court held, that she being Jointress within the 11 H. 7. c. 20. ought to be restrained, being Part of the Inheritance which by the Statute she is restrained from aliening, and therefore granted an Injunction against wilful Waste. Abr. Eq. 221. *Cook* and *Winsford*.

Abr. Eq. 222. Hil. 1701. *Fothergill* and *Fothergill*.

J. S. made a Settlement on his eldest Son for Life, with Remainder to his first and other Sons in Tail, Remainder over, with Power to his Son to appoint any of the Lands not exceeding 100 *l. per Annum* to any Wife he should afterwards marry, for a Jointure, (the Father being under an Apprehension that he was then married to a Woman which the Father disliked, and had no Intention his Son should provide for;) the Father died, and the Son married that very Woman, (though there was strong presumptive Proof that he was married to her before,) and after Marriage appointed certain Lands to Trustees in Trust for her, for a Jointure, and covenants that if they were not of 100 *l. per Annum* Value, that upon Request made to him any Time during his Life, he would make them up so much out of other Lands in his Power. He lived several Years, and no Complaint was made that the Lands were not of that Value, nor Request to make it up, and * died; upon Issue on a Bill brought by the Widow to have the Jointure made up 100 *l.* my Lord Keeper said, that a Provision for the Wife or Children was not to be considered as a voluntary Covenant, and therefore decreed the Deficiency to be made up, notwithstanding the Circumstances of the Case, and her Neglect in not requesting it during Coverture; for the Laches of a Feme Covert cannot be imputed to her.

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2 Vern. 701. Vern. 479. S. P. though the Jointure was made after Marriage.

If a Bill is brought by an Heir at Law, or any other Person against a Jointress, whereby the Party would avoid the Jointure, under Pretence that his Ancestor was only Tenant for Life, &c. and he seeks for a Discovery of Deeds and Writings, whereby he would avoid the Title of the Jointress, he shall never have such a Discovery, unless he by his Bill submits to confirm her Title, and then he shall.

So if a Jointress prays a Discovery against an Heir at Law of Deeds and Writings, if the Heir submits by Answer to confirm the Jointress's Title, she shall have no such Discovery.

[(E) Of other Statutes relative to Dower, &c.

A Woman shall be endowed without Delay. *M. C.* 9 *H.* 3. *cap.* 7.—Women shall recover Damages for their Dower or Quarentine deforced, where their Husbands die seised. 20 *H.* 3. *cap.* 1.——Days to be given in Plea of Dower. *Dies commune in date.* 51 *H.* 3. *stat.* 3.——Four Days shall be given in the Year, at least. *St. Marleb.* 52 *H.* 3. *cap.* 12.——The Tenant pleading that the Demandant hath received her Dower, must shew that she hath received part of himself in the same Ville. *St. Westm.* 1. 3 *Ed.* 1. *cap.* 49.——If Tenant in Dower alien, the Heir shall have a Writ of Entry *in casu proviso*. *St. Glouc.* 6 *Ed.* 1. *cap.* 7.——Dower shall be recovered notwithstanding a feigned Recovery against the Husband by Default. *St. Westm.* 2. 13 *Ed.* 1. *cap.* 4.——A Wife eloping with

with her Adulterer ſhall loſe her Dower. *St. Weſtm.* 2. 13 *Ed.* 1. *cap.* 34. ——If Tenant in Dower alien, he in Reverſion may enter. 11 *H.* 7. *cap.* 20.——The Wife ſhall loſe her Dower, where the Huſband is attainted of Treaſon †. 5 & 6 *Ed.* 6. *cap.* 11. *ſect* 13.——But a Wife ſhall not loſe any Title of Dower which to her was accrued, by the Attainder of her Huſband by any Manner of Murder or other Felony whatſoever. *Co. Lit.* 37. a.——A Popiſh Recuſant ſhall not be endowed. 3 *Jac.* 1. *cap.* 5. *ſect.* 13.——The Widow of a Mortgagor not barred of her Dower, if ſhe did not join in the Mortgage. 4 *W.* & *M. cap.* 16. *ſect.* 5.——As to Proclamation in Dower, ſee 31 *El. cap.* 3.——Widows diſabled from aliening or diſcontinuing their Jointures. 11 *H.* 7. *cap.* 20. 32 *H.* 8. *cap.* 36. *ſect.* 2.]

† Whether High or Petty Treaſon. Co. Lit. 37. a.

JURIES.

THE Trial *per Pais*, or by a Jury of one's Country, is juſtly eſteemed one of the chiefeſt Excellencies of our Conſtitution; for what greater Security can any Perſon have in his Life, Liberty or Eſtate, than to be ſure of not being diveſted of, or injured in any of theſe, without the Senſe and Verdict of twelve honeſt and impartial Men of his Neighbourhood? ‡ And hence we find the common Law herein confirmed by *Magna Charta, cap.* 29. *Nullus Liber Homo capiatur, vel impriſonetur, aut diſſeiſietur de libero Tenemento ſuo, vel Libertatibus, vel Liberis Conſuetudinibus ſuis, aut utlagetur, aut exuletur, aut aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus niſi per legale judicium Parium ſuorum, vel per legem terræ.*

Forteſc. de Laud. Leg. Ang. c. 25. Co. Lit. 155. *Co. Preface to 3d and 8th Report.*

‡ See *De Lolme on the Engliſh Conſtitution c.* 8. *of Private Liberty, or the Liberty of Individuals, and c.* 9. *of Criminal Juſtice.*

Likewiſe the Antiquity of this Trial, and its being peculiar to us, have been taken notice of, as Matters which reflect Honour on our Conſtitution; for though there were antiently ſeveral other Methods of Trial, ſuch as by Battle, Ordeal, &c. yet have they, from the Inconveniencies attending them, been laid aſide, and this alone cultivated and improved, as the beſt Method of inveſtigating Truth.

Spelm. Gloſſ. verbo Jurata. Glan. lib. 2. c. 7.

We ſhall conſider this Head under the following Diviſions.

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2. Of

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(A) Of the ſeveral Kinds of Juries and particular Inqueſts; and herein of the Number ſuch Jury muſt conſiſt of.

JURIES are diſtinguiſhed into Grand and Petit Juries; the Grand Jury may (*a*) conſiſt of thirteen, or any greater Number; for theſe being the Grand Inquiſitors of the County, every Indictment and Preſentment by them muſt be found by twelve at leaſt; but it is not neceſſary that all above that Number ſhould concur in ſuch Preſentment or Indictment. Cro. Eliz. 654. 3 Inſt 30. 2 Inſt. 387, 2 Hal. Hiſt. P. C. 154.

(*a*) That in *Middleſex* three Grand Juries are returned every Term to ſerve in *B. R.* every Jury conſiſting of ſixteen, ſeventeen, or more, to inquire of Offences criminal committed in the ſeveral Parts of the County of *Middleſex* through the whole County; the Reaſon hereof is, that in *Middleſex* there are three hundreds, and for every ſeveral Hundred there is a particular Jury returned to ſerve for that Hundred only. 2 Lil. Reg. 124.—That in ſome Counties which conſiſt of Guildable, and ſuch Franchiſe where antiently ſeveral Juſtices of Gaol Delivery ſat, as in *Suffolk*, there are two Grand Juries, one for the Guildable, another for the Franchiſe, becauſe there are two ſeveral Commiſſions of Gaol-Delivery. 2 Hal. Hiſt. P. C. 26, 154.

Upon the Summons of any Seſſion of the Peace, and in Caſes of Commiſſions of Oyer and Terminer and Goal-Delivery, there goes out a Precept either in the Name of the King, or of two or more Juſtices, directed to the Sheriff, upon which he is to return twenty-four, or more, out of the whole County, namely, a conſiderable Number out of every Hundred, out of which the Grand Inqueſt at the Seſſions of the Peace, Oyer and Terminer or Goal-Delivery, are taken, and ſworn *ad Inquirendum pro Domino Rege & Corpore Comitatus.* 2 Hal. Hiſt. P. C. 154.

Thoſe

Thoſe returned to ſerve on the Grand Jury muſt be (*b*) *Probi & Legales Homines*, and ought to be of the ſame County where the Crime was committed; and therefore it is a good Exception at Common Law to one returned on a Grand Jury, that he is an Alien or Villein, or that he is (*c*) outlawed for a Crime, or that he was not returned by the proper * Officer, or that he was returned at the Inſtance of the Proſecutor; but theſe Exceptions muſt be taken before the Indictment found.

*Page 33 Cro. Eliz. 654. 3 Inſt. 30. 12 Co. 99.

2 Rol. Rep. 82. 2 Hal. Hiſt. P. C. 154-5. (*b*) Where Indictments found in inferior Courts have been quaſhed for want of the Words *Proborum & Legalium Hominum* in the Caption. Cro. Eliz. 751. Cro. Jac. 635. Palm. 282. 2 Rol. Rep. 400. 2 Rol. Abr 82. Poph. 202. Keb. 629. 2 Keb. 471. 3 Mod. 122. Ld. Raym. 592, 609. Lev. 208. But this Exception has been often overruled, becauſe *Prima Facie* all Men ſhall be intended honeſt and lawful. Keb. 50. 2 Keb. 135, 284. Cro. Jac. 41. Sid. 106, 367. (*c*) Though in a perſonal Action. 2 Hal. Hiſt. P. C. 155. But for this *vide* 3 Inſt. 32. 21 H. 6. 30. pl. 17. Fitz. Tit. *Proceſs* 208. Cro. Car. 134, 147. Jones 198. 12 Co. 99.

2 Hal. Hiſt. P. C. 155. But for this *vide* 2 Hawk. P. C. 216.

It is laid down by my Lord Chief Juſtice *Hale*, that at Common Law every Perſon returned on the Grand Jury ought to be a Freeholder at leaſt, and that the Statute of 2 *H.* 5. *cap.* 3. that requires Jurors that paſs upon the Trial of a Man's Life to have 40 *s. per Annum* Freehold, hath been the Meaſure by which the Freehold of Grand Jurymen hath been meaſured in Precepts of Summons of Seſſions.

(*d*) *Viz. Weſtminſt.* 2. c. 28. that old Men above the Age of ſeventy ſhall not be put on Juries.—By *Weſtm.* 2. c. 38. ſhall not have leſs than 20 *s.* yearly.--By 31 E. 1. commonly called the Statute *de his qui ponendi ſunt in Aſſiſis*, ſhall have Tenements to the Value of 10 *s.* yearly.--By 28 E. 1. commonly called the Statute of *Articuli ſuper Chartas*, none are to be put on Inqueſts and Juries but ſuch as be next Neighbours, moſt ſufficient, and leaſt ſuſpicious; and the like is enacted by 42 E. 3. c. 11. And to the ſame Purpoſe are the 23 E. 3. c. 6. and 34 E. 3. c. 4.———[Leaſeholders where the improved Rents amount to 50 *l. per Annum*, liable to ſerve as Jurors, *per* 4 Geo. 2. c. 7. ſ. 3.]

Alſo by ſeveral (*d*) Acts of Parliament it is provided, that thoſe who ſerve on the Grand Jury be ſuch as are duly qualified, the principal ones of which are the 11 *H.* 4. *cap.* 9. and 3. *H.* 8. *cap.* 12. the firſt whereof is as followeth: "Becauſe that now of late Enqueſts are taken at *Weſtminſter* of Perſons named to the Juſtices, without due Return of the Sheriff, of which Perſons ſome were outlawed before the ſaid Juſtices of Record, and ſome fled to Sanctuary for Treaſon, and ſome for Felony, there to have Refuge, by whom as well many Offenders were indicted, as other lawful liege People of our Lord the King, not guilty, by Conſpiracy, Abettment, and falſe Imagination of other Perſons, for their ſpecial Advantage and ſingular Lucre, againſt the Courſe of the common Law uſed and accuſtomed before this Time; our ſaid Lord the King, for the greater Eaſe and Quietneſs of his People, wills and granteth, that the ſame Indictment ſo made, with all the Dependance thereof, be revoked, annulled, void, and holden for none for ever; and that from henceforth no Indictment be made by any ſuch Perſons, but by Inqueſts of the King's lawful liege People, in the Manner it was uſed in the Time of his noble Progenitors, returned by the Sheriffs or Bailiffs of Franchiſes, without any Denomination to the Sheriffs or Bailiffs of Franchiſes before made by any Perſon of the Names which by him ſhould be impanelled, except it be by the Officers of the ſaid Sheriffs or Bailiffs of Franchiſes ſworn and known to make the ſame, and other Officers to whom it pertaineth to make the ſame, according to the Law of *England*; and if any Indictment be made hereafter in any Point to the contrary, that the ſame Indictment be alſo void, revoked, and for ever holden for none."

In the Conſtruction of this Statute the following Points have been reſolved;

12 Co. 99. 3 Inſt. 33

That if a Perſon not returned on a Grand Jury procure his Name to be read among thoſe that are returned, whereupon he is ſworn, &c. he may be indicted for a Contempt of this Statute.

That

That Indictments before (*a*) Juſtices of the Peace are clearly within this Statute. 12 Co. 98. 3 Inſt. 33. Cro. Car. Jones 198.

134. (*a*) But it ſeems doubtful whether a Coroner's Inqueſt be within it.

That a Perſon arraigned on an Indictment taken contrary to the Statute may plead ſuch Matter in Avoidance of the Indictment, and alſo plead over to the Felony. 3 Inſt. 34. Cro. Car. 134. Jones 198.

That he, who is outlawed on an Indictment without any Trial, may clearly ſhew in Avoidance of ſuch Outlawry, that the Indictment was taken contrary to the Statute; but the Court need not admit of the Plea of the Outlawry of an Indictor in Avoidance of any ſuch Indictment unleſs he who pleads it have the Record ready, unleſs it be an Outlawry of the ſame Court wherein the Indictment is depending; in which Caſe it is ſaid, that any one as *Amicus Curiæ* may inform the Court of it; alſo it ſeems the better Opinion, that no Exception againſt an Indictor is allowable, unleſs the Party takes it before Trial. 3 Inſt. 34. Cro. Car. 147.

* That if one of the Grand Jury, who find an Indictment, be within any of the Exceptions in the Statute, he vitiates the Whole, though never ſo many unexceptionable Perſons joined with him in finding it. *Page 234 11 H. 4. 41. pl. 8. S. P. C. 88.

That if a Priſoner indicted of Felony offer to take any ſuch Exception, he ſhall, upon his Prayer, have Counſel aſſigned him for his Aſſiſtance. 3 Inſt. 33. Cro. Car. 134, 147. Jones 198.

By the 3 *H.* 8. *cap.* 12. it is enacted, "That all Panels to be returned, "which be not at the Suit of any Party, that ſhall be made, and put in by "every Sheriff and their Miniſters, before any Juſtice of Goal-Delivery, "or Juſtices of Peace, whereof one to be of the *Quorum*, in their open "Seſſions, to inquire for the King, ſhall be reformed by putting to and "taking out of the Names of the Perſons which ſo be impanelled by "every Sheriff and their Miniſters, by the Diſcretion of the ſame Juſtices "before whom ſuch Panels ſhall be returned, and that the ſame Juſtice "and Juſtices ſhall command every Sheriff, and their Miniſters in his "Abſence, to put other Perſons in the ſame Panel by their Diſcretions, "and that the ſame Panels ſo reformed by the ſaid Juſtices be good and "lawful, and that if any Sheriff, or any other Miniſter, at any Time do "not return the ſame Panels ſo reformed, that then every ſuch Sheriff "and Miniſter ſo offending ſhall forfeit for every ſuch Offence twenty "Pounds, *&c.*

This Act extends not only to Panels of Grand Inqueſts returned, but alſo to Panels of the Petty Jury, commonly called the Petty Jury of Life and Death, which may be reformed by the Juſtices according to this Act, and the Sheriff is bound to return the Panel ſo reformed. 2 Hal. Hiſt. P. C. 156, 265.

It hath been holden, that this Statute doth not take away the Force of 11 *H.* 4. *cap.* 9. as to any Point wherein both may conſiſt together; and therefore if any Indictor be outlawed, or returned at the Nomination of any Perſon, contrary to 11 *H.* 4. *cap.* 9. except of the Juſtices authoriſed as abovementioned to reform the Panel, the Indictment may be avoided in the ſame Manner as before. 3 Inſt. 33. 2 Hawk. P. C. 219.

The Grand Jury, as has been already obſerved, muſt conſiſt of twelve at (*b*) leaſt, the Petty Jury of twelve, and can neither be more nor leſs; but it is ſaid, that particular (*c*) Inqueſts may conſiſt of a more or leſs † Number than twelve. *Trials per Pais* 80. F. N. B. 107. *Finch of Law* 400, 484.—A Writ of

Inquiry of Waſte by thirteen was holden good. Cro. Car. 414. (*b*) That to make a Jury in a Writ of Right, which is called the Grand Aſſiſe, there muſt be ſixteen, *viz.* four Knights, and twelve others, *Trials per Pais* 82. Or it may conſiſt of a greater Number. 2 Rol. Abr. 674.—The Jury in Attaint, called the Grand Jury, muſt be twenty-four; but if the Iſſue be upon a Matter out of the Point of the Attaint, as upon a Plea of Non-tenure, the Trial ſhall be by twelve. *Trials per Pais* 82. (*c*) That a Juror can be excepted againſt on an Inqueſt of Office. 6 Mod. 43.—That a Jury cannot be attainted on an Inqueſt of Office. Carth. 362. † See *infra*.

But

Vent. 113. But on a Writ of Error a Judgment out of an inferior Court was reverſed, becauſe being by Default, the Inquiry of Damages was only by two Jurors; and though a Cuſtom was alledged to warrant it, yet it was reſolved that there could not be leſs than twelve, though the Writ of Inquiry ſaith only *per Sacramentum Proborum & Legalium Hominum*, and not *duodecim* as in a *Venire*.

Cro. Car. 259. Sid. 233. 3 Keb. 326. Alſo it hath been frequently held, that a Cuſtom in an inferior Court to try by ſix Jurors is void; and that though ſuch Cuſtom is uſed in *Wales*, yet that that is by Force of the Statute 34 & 35 *H.* 8. *cap.* 26. *ſect.* 74. which appoints that ſuch Trials may be by ſix only where the Cuſtom hath been ſo.

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*Page 235 *(B) **Of the Jury Proceſs, and Manner of convening the Jury:** And herein,

1. Of the Neceſſity of ſuch Proceſs, and where a Panel may be returned by a bare Award without any Precept.

March 81. IT ſeems agreed, that a Perſon not duly ſummoned and returned is not obliged to ſerve on a Jury; as it hath been held, that if a Stranger cauſe himſelf to be ſworn in the Name of one who was of the Jury, it is ſuch a Miſdemeanor for which he may be indicted, and for which alſo an Action on the Caſe lies at the Suit of the Party injured.

2 Inſt. 568. 3 Inſt. 168. 2 Hawk. P. C. 405. But Juſtices of Goal-Delivery may have a Panel returned by the Sheriff without any Precept or Writ; and the Reaſon given for it is, that before their coming they may make a general Precept to the Sheriff in Parchment, under their Seals, to bring before them at the Day of their Seſſions twenty-four out of every Hundred, *&c.* to do thoſe Things which ſhall be enjoined them on the Part of the King, *&c.* and therefore it is ſaid, that they need not make any other Precept for the Return of a Jury for the Trial of any Iſſue joined before them, but that their bare Award that the Jury ſhall come is ſufficient, becauſe there are enough for that Purpoſe, ſuppoſed to be preſent in Court, whom the Sheriff may return immediately, whenever the Court ſhall demand their Service.

2 Inſt. 568. Sid. 364. (*a*) 2 Hawk. P. C. 406. Alſo it is ſaid that a Jury may be ſo returned before Juſtices of Peace at their Seſſions, becauſe the Precept for the Summons of the Seſſions hath a Clauſe to the ſame Effect, for the Summons of twenty-four out of every Hundred: But it is (*a*) doubted whether this Matter does not rather depend on Practice, and the conſtant Courſe of Precedents, than any Argument from the Reaſon of the Thing; and even in the Caſe of Juſtices of Goal-Delivery, the Law is otherwiſe, if they have a ſpecial Commiſſion.

2 Hal. Hiſt. P. C. 260-1. 2 Hawk. P. C. 406. Alſo the Precept to the Sheriff from Juſtices of Oyer and Terminer, in order for the holding of their Seſſions, hath in effect the very ſame Clauſe for the bringing of twenty-four before them out of each Hundred, at the Day of their Seſſions, *&c.* and yet it ſeems agreed, that they cannot have a Jury retured for the Trial of an Iſſue joined before them by force of a bare Award, but ought to make a particular Precept to the Sheriff for that Purpoſe under their Seals.

Dyer 118. 2 Hal. Hiſt. 260. 2 Hawk. P. C. 406. By the Courſe of the King's Bench no Jury can be returned into it from a foreign County, without Proceſs under the Seal of the Chief-Juſtice; but *Quære* if it may not be returned for a Trial in the County where it ſits by a bare *Præceptum eſt*?

2. Of

2. Of the ſeveral Kinds of Jury Proceſs, and the Manner of compelling a Jury to appear.

The firſt Proceſs for convening the Jury is the *Venire Facias*, which muſt be awarded on the Roll, and thereupon in the *Common Pleas* there iſſues the *Habeas Corpora*, and *Diſtringas Juratores*; but in the *King's Bench* and *Exchequer* after the *Venire* they proceed on the *Diſtringas*; for the *Venire* being in the Nature of a Summons, if the Jury did not appear thereon in thoſe Courts in which the King has a more immediate Concern, they proceed on the ſtrongeſt Proceſs, *viz.* the *Diſtringas*. *Trials per Pais* 64.

If all the Jury did not attend on the *Habeas Corpora* or *Diſtringas*, which was to bring them into Court, there was an *undecim*, *decem*, or * *octo Tales*, according as the Number was deficient, to force others to the King's Court to try the Iſſue; this was without (*a*) a new Summons or *Venire*, becauſe it was ſuppoſed that the firſt *Habeas Corpora* and *Diſtringas* had given Notice to the Vicinity that they ought to appear; and therefore the Supplement of a Jury were forced in without a particular Summons to them. *Page 236

(*a*) But if the whole Jury be challenged off, then a new *Venire Facias*, and if none of the Jury appear, then a *Diſtringas Juratores* ſhall iſſue, and no *Tales*. 2 Hal. Hiſt. P. C. 265.

There muſt be an Award on the Roll to warrant the Iſſuing the *Venire* or *Diſtringas*, and ſuch Proceſs muſt be continued from Time to Time againſt the Jurors, returnable on the ſame Days to which the Suit is continued on the Roll againſt the Parties. 2 Hawk. P. C. 298-9.

And therefore where a *Venire Facias* was made returnable on the 23d of *January*, and the *Diſtringas* teſted on the 24th, this was held a Diſcontinuance, and being in a criminal Caſe, not aided by any of the Statutes of *Jeofails*. 6 Mod. 281. Salk. 51. pl. 14. 2 Ld. Raym. 1061.

So where the *Venire* omits Part of the Iſſue or Iſſues to be tried, or where a *Venire* omits any of the Parties, theſe are Diſcontinuances. Cro. Eliz. 622. Rol. Rep. 22. 3 Bulſ. 311. Winch 73.

So where a Juror is named in the *Habeas Corpora* by a Name different from that in the Panel returned on the *Venire*, or where a Juror returned on ſuch a Panel is wholly omitted in the *Habeas Corpora*; but in theſe Caſes, if the Juror ſo miſnamed or omitted be not ſworn at the Trial of the Cauſe, it is queſtionable whether there be any Diſcontinuance at all. Sid. 66. Keb. 182, 191, 198, 215. 6 Mod. 285. 5 Co. 36. b. Cro. Eliz. 586.

Vide Poſtea Letter (I).

Where there are ſeveral Defendants who plead ſeveral Pleas, the Plaintiff may chuſe either to have one *Venire Facias* for all, or ſeveral for (*b*) every one of the Defendants; ſo where ſeveral Perſons are arraigned upon the ſame Indictment or Appeal, and ſeverally plead Not guilty, it is in the Election of the Proſecutor either to take out joint *Venire's* againſt them all, or ſeveral againſt each of them; but in an Appeal if one plead Not guilty, and the other plead a Releaſe made at *A.* it ſeems that there muſt be ſeveral *Venires*. Jones 425. *Trials per Pais* 57.

(*b*) It is ſaid, that where there are three Defendants, the Plaintiff may join two of them in one *Venire*, and take out another againſt the third. Cro. Eliz. 541. But for this *vide* 2 Rol. Abr. 596, 620, 667. Hob. 36. Cro. Eliz. 866. Cro. Jac. 550.

But where a joint *Venire* is firſt awarded for the Trial of all the Defendants together, and afterwards ſeveral *Venire's* for the Trial of each of them, this is a Diſcontinuance. 2 Hawk. P. C. 298.

2 Hawk. P. C. 407. and ſeveral Authorities there cited.

And where the ſame Jury is returned on joint Proceſs againſt ſeveral Defendants, if a Juror be challenged by any one of them, and thereupon drawn, he is by neceſſary Conſequence drawn as to all, becauſe there being but one Panel, the ſame Perſon cannot at the ſame Time be taken from it, and continue in it; and to prevent this Inconvenience, where one Jury is jointly returned before Juſtices of Gaol-Delivery, they may ſever the Panel; but after an Appellant has taken out a joint *Venire* againſt all the Appellees, he cannot afterwards take out ſeveral ones, though the firſt be never returned, becauſe it would cauſe a Diſcontinuance.

2 Hawk. P. C. 146. and ſeveral Authorities there cited. *Trials per Pais* 200.

Jurors being duly ſerved with Proceſs are compellable to appear; and therefore where more than one appear, but not enough to take the Inqueſt, but ſome of the others come within View, or into the Town where the Court is holden, but refuſe to come into Court; in theſe Caſes the Court may order thoſe who appear to enquire of the yearly Value of ſuch Defaulters Lands; which being done, the Court may either ſummon them to appear, on pain of the Sum found, or ſome leſſer Sum, or may fine them in like Sum without more ado; but ſuch

Page 237 Juror ſhall only loſe his Iſſues, and not the yearly Value of his Lands, unleſs the Party pray it; but one who makes default after Appearance is liable to ſuch Forfeiture without any Prayer; yet the Court in diſcretion will ſometimes only impoſe a ſmall Fine; alſo a Juror, who comes not to Town where the Court is holden, ſhall only loſe his Iſſues, or be amerced, but not fined; and it is ſaid, that a Juror is not amerceable at all at the Return of the firſt *Venire*, except before Juſtices of *Oyer* and *Terminer*.

Alſo by the 27 *Eliz. cap.* 6. *ſect.* 2. it is enacted, "That upon every "firſt Writ of *Habeas Corpora* or *Diſtringas* with a *Niſi Prius* delivered of "Record by the Sheriff, or other Miniſter or Miniſters to whom the "making of the Return ſhall appertain, ſhall return in Iſſues, upon every "Perſon impanelled and returned upon any ſuch Writ, at leaſt ten Shil-"lings; and at the ſecond Writ of *Habeas Corpora* or *Diſtringas* with a "*Niſi Prius* upon every Perſon impanelled and returned upon any Writ "twenty Shillings at the leaſt; and at the third Writ of *Habeas Corpora* "or *Diſtringas* with a *Niſi Prius*, that ſhall be further awarded, upon every "Perſon impanelled and returned upon ſuch Writ thirty Shillings; and "upon every Writ that ſhall be further awarded to try any Iſſues, to "double the Iſſues laſt before ſpecified, until a full Jury be ſworn, or the "Proceſs otherwiſe ceaſed or determined, upon pain to forfeit for every "Return of Iſſues contrary to the Form aforeſaid five Pounds."

And now by the 3 *Geo.* 2. *cap.* 25. *ſect.* 13. it is enacted, "That every "Perſon or Perſons whoſe Name or Names ſhall be drawn, (as by the Act "is directed) and who ſhall not appear after being openly called three "Times, upon Oath made by ſome credible Perſon, that ſuch Perſon ſo "making default had been lawfully ſummoned, ſhall forfeit and pay for "every Default in not appearing upon Call as aforeſaid, (unleſs ſome "reaſonable Cauſe of his Abſence be proved by Oath or Affidavit to the "Satisfaction of the Judge who ſits to try the ſaid Cauſe) ſuch Fine or "Fines not exceeding the Sum of Five Pounds, and not leſs than Forty "Shillings, as the ſaid Judge ſhall think reaſonable to inflict or aſſeſs for "ſuch Default."†

† Perſons ſummoned on Juries in Courts of Record, in Cities, Corporations, and Franchiſes, and not attending, may be fined, 29 Geo. 2. c. 19.

3. By whom ſuch Proceſſes are to be executed, and the Jury convened.

The Sheriff is the proper Officer by whom the Jury Proceſs is to be executed, unleſs he be partial, that is, ſuch a one, as from his Conſanguinity or Affinity, his being under the Power of either Party, *&c.* cannot be preſumed to be an indifferent Perſon, as every Officer who hath any way to do with the Adminiſtration of Juſtice ought to be; and in every ſuch Caſe the Proceſs ſhall be directed to the Coroners, if they are impartial, or to thoſe of them who are ſo, in caſe ſome of them lie under the afore-mentioned Prejudices; and in caſe all the Coroners are partial, or not indifferent, then the *Venire* ſhall be directed to two Elizors named by the Court, and againſt whom, for that Reaſon, no Challenge can be taken. Co. Lit. 158. a. Bro. Challenge 153, *vide infra*, Letter (E).

When Proceſs is once awarded to the Coroners, *&c.* for the Sheriff's actual Partiality, the Entry is *Vicecomes ſc. non intromittat*, and in ſuch Caſe Proceſs ſhall not afterwards be awarded to any new Sheriff: But where it was awarded to the Coroners, for that the Sheriff is Tenant, *&c.* it may be awarded to a new Sheriff. Co. Lit. 158. 2 Rol. Abr. 670.

So if a *Venire Facias* is awarded to the Coroner for Partiality in the Sheriff, and afterwards a *Tales* is awarded, which is returned by the Sheriff, this has been held Error. Cro. Eliz. 574. *Morgan* ver. *Wye*; & *vide* Cro. Eliz. 586.

* But if the *Venire* be awarded to the Coroners for Default in the Sheriff, and they do nothing upon the Writ, upon a Default diſcovered in the Coroner *de Puiſne Temps* the Party may ſhew this to the Court, and have a *Venire* awarded to the Sheriff, if there be an indifferent one, made in the mean Time; or elſe to Elizors; & *ſic e converſo*. *Page 238 *Trials per Pais* 46.

And therefore in Error of a Judgment in *Cheſter*, the Parties being at Iſſue, a *Venire* was awarded to the Sheriff, and at the Day of the Return it was entered, *quod Vicecomes non miſit Breve*, and then the Plaintiff prayed a *Venire facias* to the Coroners for Coſinage betwixt him and the Sheriff, which was awarded accordingly; and at the Day of Trial the Defendant made default, and there being Judgment thereon, it was aſſigned for Error, that after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a *Venire facias* to the Coroners without ſome Cauſe *de Puiſne Temps*; *ſed non allocatur*, becauſe there was nothing done upon the firſt Writ, and the Defendant having made default, it was not material. Cro. Eliz. 853.

Upon the Surmiſe of the Plaintiff that the Sheriff is his Couſin, and upon Prayer that the *Venire* be directed to the Coroners for Avoidance of his own Delay, that might happen by the Challenge of the Array, the Defendant ſhall be examined whether it be true or not; and if he confeſs it, then the *Venire* ſhall be awarded to the Coroners; for then it appears to the Court by the Defendant's Confeſſion, that the Sheriff is not indifferent; but if the Defendant denies it, then the Proceſs ſhall be awarded to the Sheriff, becauſe the Sheriff's Authority and Profit ſhall not be taken away without Cauſe apparent to the Court; but if the Defendant will alledge any ſuch Matter, and pray a *Venire facias* to the Coroners, there the Plaintiff ſhall not be examined, neither ſhall ſuch Allegations be allowed, becauſe Delays are for the Defendant's Advantage, and the Defendant may challenge the Jury for this Cauſe, and ſo is at no Prejudice. Co. Lit. 157. b. 158. a. Cro. Jac. 547. *Trials per Pais* 41. Jenk. 115.

If there be two Sheriffs of a County, and one of them is partial, the *Venire* may be directed to the other, and not to the Coroners; for the Coroner is not the proper Perſon to execute the Proceſs of the Court, but in ſuch Caſes where the proper Officer is wanting; which cannot be ſaid where there is one impartial Sheriff. Carth. 214. The *King* ver. *Warrington*, one of the Sheriffs of *Cheſter*.

4 Mod. 65. S. C. Skin. 104. pl. 3. S. P. adjudged between *Rich*, Sheriff of *London*, and Sir *Thomas Player*

Trials per Pais 41. 2 Lil. Reg. 124. *cont.* So if the Under Sheriff be a Party, yet the *Venire* may be directed to the High Sheriff, with this Proviſo, *quod Sub-Vic. tuus in nullo ſe intromittat cum Executione iſtius Brevis.*

Fitz. Tit. *Challenge* 121. After a Challenge to the Array, and allowed for the Partiality of the Sheriff, the Coroner may return the very ſame Jury.

Dyer 177. b. pl. 34. If the Sheriff return on the *Venire Facias*, *quod Breve iſtud ſic executum & indorſatum per* A. B. *nuper Vicecomitem Prædeceſſorem ſuum cum Panello, ubi in facto Panellum illud factum & arraiatum fuit per ipſum nunc Vicecomitem*, the Party may challenge the Array afterwards for Conſanguinity or Affinity of the Sheriff; and this ſhall be tried by two Triers, notwithſtanding this falſe Return.

Hob. 70. Upon a Surmiſe the *Venire Facias* was awarded to the Coroners, and the *Venire* was returned by two Coroners only, and the *Diſtringas* by three Coroners; and there being at the Time of the Award and Return of the *Venire Facias* and *Diſtringas* four Coroners, it was agreed that this was at Common Law plain Error; for that Coroners as Miniſters muſt all join, but as Judges they may divide; but that it was aided by the Statute of *Jeofails*, which cures the imperfect and inſufficient Returns of Proceſs by Sheriffs or other Officers.

Raym. 484. *Dominus Rex* ver. *Higgins.* *Page 239 If upon a Suggeſtion on the Roll the *Venire* is directed to the Coroners, who are two in Number, and both the Coroners are mentioned on the * Record to have returned the Panel, and in reality one only returned it; yet this cannot be excepted againſt, becauſe an Objection contrary to what appears on the Face of the Record.

Cro. Car. 138. *Crane* ver. *Holland.* Error of a Judgment in *Northampton*, becauſe in *Northampton* the Court being held before the Mayor and two Bailiffs, the *Venire fac.* upon the Iſſue was awarded to the two Bailiffs to return a Jury before the Mayor and Bailiffs *ſecundum conſuetudinem*, which being returned, and Judgment given, the Error aſſigned was, becauſe the Bailiffs being Judges of the Court, could not alſo be Officers, to whom Proceſs ſhould be directed, there being no Cuſtom that can maintain any to be both Officer and Judge; but all the Court (*abſent Hide*) conceived it might be good by Cuſtom, and that it is not any Error; for the Judges be not the Bailiffs only, but the Mayor and Bailiffs; and it is a common Courſe in many of the ancient Corporations where the Bailiffs are Judges, or the Mayor and they be Judges, yet in reſpect of executing Proceſs they be the Officers only, and one may be Judge and Officer *diverſis reſpectibus*; as in Rediſſeiſin the Sheriff is Judge and Officer, whereupon the Judgment was affirmed.

Co. Lit. 156. a. If the Array of a Panel is returned by a Bailiff of a Franchiſe, and the Sheriff return it as of himſelf, this ſhall be quaſhed; but if the Sheriff return a Jury within a Liberty, this is good, and the Lord of the Franchiſe is driven to his Remedy againſt him.

Co. Lit. 157. a. Keb. 357, 687. If the Sheriff returns a Panel of Jurors, ſtruck by two Strangers, that favour neither of the Parties, this is a good Array, and ſhall not be quaſhed; and therefore it is common for the Officers of the Court, by the Direction of the Judges, to give a Panel to the Sheriff, which he returns; but the Court ſeems not to have Power to compel the Sheriff to make this Return, but they can fine him, if a ſufficient Jury does not appear according to the Precept of the Writ.

Made perpetual by 6 Geo. 2. c. 37. By the 3 *Geo.* 2. *cap.* 25. for the better Regulation of Juries, it is enacted, "That the Perſon or Perſons required by the 7th and 8th of "King *William*, and the 3d and 4th of Queen *Anne*, to give in, or who "are, by Virtue of this Act, to make up true Liſts in Writing of the "Names of Perſons qualified to ſerve on Juries, in order to aſſiſt them to "compleat ſuch Liſts, (ſhall upon requeſt to any Pariſh Officer, who "ſhall have in his Cuſtody any of the Rates for the Poor, or Land-Tax) "have free Liberty to inſpect ſuch Rates, and take from thence the

"Names

" Names of ſuch Freeholders, Copyholders, or other Perſons qualified to " ſerve on Juries, dwelling within their reſpective Pariſhes, &c. for which " ſuch Liſt is to be given in and returned, and ſhall yearly, twenty Days " at leaſt before the Feaſt of St. *Michael* the Archangel, upon two or " more *Sundays*, fix upon the Door of the Church, &c. within their re- " ſpective Precincts, a true and exact Liſt of all ſuch Perſons intended " to be returned to the Quarter Seſſions, as qualified to ſerve on Juries, " and leave at the ſame Time a Duplicate of ſuch Liſt with a Church- " warden, Chapel-warden, or Overſeer of the Poor, to be peruſed by the " Pariſhioners without Fee or Reward, to the end that Notice may be " given of Perſons ſo qualified who are omitted, or of Perſons inſerted by " *Miſtake, who ought to be omitted out of ſuch Liſts; and if any Perſon *Page240 " not being qualified to ſerve on Juries, ſhall find his Name mentioned " in ſuch Liſt, and the Perſon required to make ſuch Liſt ſhall refuſe to " omit him, or think it doubtful whether he ought to be omitted, it ſhall " be lawful for the Juſtices of the Peace, at their reſpective General " Quarter Seſſions, to which the ſaid Liſts ſhall be ſo returned, upon " Satisfaction from the Oath of the Party complaining, or other Proof, " that he is not qualified to ſerve, to order his Name to be ſtruck out, " when the ſame ſhall be entered in the Book, to be kept by the Clerk of " the Peace for that Purpoſe.

Sect. 2. It is further enacted, " That if any Perſon required to return " or give in, or to make up any ſuch Liſt, or concerned therein, ſhall " wilfully omit any Perſon whoſe Name ought to be inſerted, or ſhall wil- " fully inſert any Perſon who ought to be omitted, or ſhall take any Mo- " ney, or other Reward, for omitting or inſerting any Perſon, he ſhall, " for every Perſon ſo omitted or inſerted, forfeit twenty Shillings for " every Offence, upon Conviction, before one or more Juſtice, where " ſuch Offender ſhall dwell, upon the Confeſſion of the Offender, or Proof " upon Oath; one Half to the Informer, and the other Half to the Poor " of ſuch Pariſh; and in caſe ſuch Penalty ſhall not be paid within five " Days after Conviction, the ſame ſhall be levied by Diſtreſs and Sale of " the Offender's Goods, by Warrant, returning the Overplus, if any; and " the Juſtice or Juſtices, before whom ſuch Perſon ſhall be convicted, " ſhall, in Writing, certify the ſame to the Juſtices at their next General " Quarter-Seſſions; which Juſtices ſhall direct the Clerk of the Peace, to " inſert or ſtrike out the Name of ſuch Perſon as ſhall by ſuch Certificate " appear to have been omitted or inſerted in ſuch Liſts, and Duplicates " of the Liſts, when delivered in at the Quarter-Seſſions, and entered in " ſuch Book, ſhall during the Continuance of ſuch Quarter-Seſſions, or " within ten Days after, be delivered or tranſmitted by the Clerk of the " Peace to the Sheriff of each reſpective County, or his Under-Sheriff, in " order for his returning of Juries out of the ſaid Liſts; and ſuch Sheriff, " or Under-Sheriff, ſhall immediately take care that the Names of the " Perſons contained in ſuch Duplicates ſhall be faithfully entered alpha- " betically, with their Additions and Places of Abode, in ſome Book or " Books to be kept by him or them for that Purpoſe; and that every " Clerk of the Peace, neglecting his Duty therein, ſhall forfeit 20*l.* to " ſuch Perſon as ſhall inform or proſecute, until the Party be thereof con- " victed upon an Indictment before the Juſtices at any General Quarter- " Seſſions of the Peace to be holden for the ſame County, &c.

And *Sect.* 3. it is further enacted, " That in caſe any Sheriff, Under- " Sheriff, Bailiff, or other Officer, to whom the Return of Juries ſhall " belong, ſhall ſummon and return any Perſon to ſerve on any Jury in " any Cauſe to be tried before the Juſtices of Aſſiſe or *Niſi* * *Prius*, or *Page241 " Judges of the Great Seſſions, or the Judge or Judges of the Seſſions " for the Counties Palatine, whoſe Name is not inſerted in the Duplicates

" ſo

" ſo delivered or tranſmitted, if any ſuch Duplicate ſhall be delivered or " tranſmitted; or if any Clerk of Aſſiſe, Judge's Aſſociate, or other Of- " ficer, ſhall record the Appearance of any Perſon ſo ſummoned and re- " turned as aforeſaid, who did not really and truly appear, then, and in " ſuch Caſe, any ſuch Judge, *&c.* ſhall, upon Examination in a ſummary " Way, ſet ſuch Fine or Fines upon ſuch Sheriff, or Under-Sheriff, Clerk " of the Aſſiſe, Judge's Aſſociate, or other Officer, for every ſuch Perſon " ſo ſummoned or returned as aforeſaid; and for every Perſon whoſe Ap- " pearance ſhall be ſo falſely recorded, as the ſaid Judge, *&c.* ſhall think " meet, not exceeding 10 *l.* and not leſs than 40 *s.*

Note; by the 4 Geo. 2. c. 7. this Clauſe is repealed as to the County of *Middleſex*, and no Perſon to ſerve who has ſerved within the two Terms before, when they are liable to ſerve again.

Sect. 4. " And for preventing Abuſes by *Sheriffs, Under-Sheriffs, Bailiffs, or other Officers concerned in the Summoning or Returning of Jurors*, it is " further enacted, That no Perſons ſhall be returned as Jurors to ſerve " on Trials at any Aſſiſes or *Niſi Prius*, or at any the ſaid Great Seſſions, " or at the Seſſions for the ſaid Counties Palatine, who have ſerved within " the Space of one Year before in the County of *Rutland*, or for four " Years in the County of *York*, or for two Years before in any other County, " not being a County of a City or Town; and if any ſuch Sheriff ſhall wil- " fully tranſgreſs therein, any ſuch Judge, *&c.* is required, on Examina- " tion and Proof of ſuch Offence in a ſummary Way, to ſet a Fine or " Fines upon every ſuch Offender, as he ſhall think meet, not exceeding " 5 *l.* for any one Offence.

Sect. 5. " It is further enacted, That the Sheriff, Under-Sheriff, or " other Officer, to whom the Return of Juries ſhall belong, ſhall from " Time to Time enter, or regiſter, in a Book, the Names of ſuch Per- " ſons as ſhall be ſummoned, and ſhall ſerve as Jurors on Trials at any " Aſſiſes or *Niſi Prius*, or in the ſaid Courts of Great Seſſions, or Seſ- " ſions for the ſaid Counties Palatine, together with their Additions and " Places of Abode alphabetically, and alſo the Times of their Services; " and every Perſon ſo ſummoned and attending or ſerving as aforeſaid, " ſhall (upon Application by him made to ſuch Sheriff, Under-Sheriff, or " other Officer,) have a Certificate teſtifying ſuch his Attendance or Ser- " vice done, which Certificate the ſaid Sheriff, Under-Sheriff, or other " Officer, is hereby directed and required to give without Fee or Reward; " and the ſaid Book ſhall be tranſmitted by ſuch Sheriff, Under-Sheriff, " or other Officer, to his or their Succeſſor or Succeſſors from Time to " Time.

Sect. 6. " It is further enacted, That no Sheriff, Under-Sheriff, Bailiff, " or other Officer, or Perſon whatſoever, ſhall directly or indirectly take " or receive any Money, or other Reward, to excuſe any Perſon from " ſerving or being ſummoned to ſerve on Juries, or under that Colour or " Pretence; and that no Bailiff, or other Officer, appointed by any " Sheriff, or Under-Sheriff, to ſummon Juries, ſhall ſummon any Perſon " to ſerve thereon, other than ſuch whoſe Name is ſpecified in a Mandate " ſigned by ſuch Sheriff, or Under-Sheriff, and directed to ſuch Bailiff, or " other Officer, and if any Sheriff, Under-Sheriff, Bailiff, or other Officer, " ſhall wilfully tranſgreſs in any of the Caſes aforeſaid, any ſuch Judge, " *&c.* is required, on Examination and Proof of ſuch Offence in

*Page 242 " a ſummary Way, to ſet a Fine or Fines upon any Perſon or Perſons " ſo offending, as he ſhall think meet, not exceeding 10 *l.* according to " the Nature of the Offence.

Sect. 7. " *And whereas by the ſaid Act of* 7 & 8 W. 3. *and by the* " 3 & 4 Ann. *all Conſtables, Tythingmen and Headboroughs, are obliged to* " *give in true Liſts at the reſpective Quarter Seſſions of the Peace holden* " *for each County, Riding, or Diviſion, of the Name and Places of all Per-* " *ſons within their reſpective Precincts or Places, qualified to ſerve on Juries,* " *to the Juſtices of the Peace in open Court, which hath by Experience been*

" *found*

" *found inconvenient and expenſive to ſeveral Conſtables, Tythingmen, and* " *Headboroughs, ſuch Quarter-Seſſions being often held at a great Diſtance* " *from their Abode; for Remedy whereof it is enacted*, That it ſhall be " lawful and ſufficient for all or any Conſtables, &c. after they ſhall " have made and compleated ſuch Liſts of Perſons qualified to ſerve on " Juries, for their reſpective Pariſhes or Precincts, and to ſubſcribe the " ſame in the Preſence of one or more Juſtice or Juſtices of the Peace, " for each reſpective County or Place, and alſo at the ſame Time to " atteſt the Truth of ſuch Liſts upon Oath, to the beſt of their Knowledge " or Belief, which Oath ſuch Juſtice or Juſtices reſpectively are required " to adminiſter; and the ſaid Liſts ſhall (being firſt ſigned by the ſaid " Juſtices reſpectively, before whom the ſame ſhall be atteſted on Oath, " and ſubſcribed as aforeſaid) be delivered by the ſaid Conſtables, &c. " to the Chief or High Conſtables of the Hundreds or Diviſions whereunto " the ſame ſhall reſpectively belong, who are required to deliver in ſuch " Liſts to the Juſtices of the Peace for the County, &c. at their reſpective " General Quarter-Seſſions in open Court, atteſting at the ſame Time, " upon Oath, their Receipt of ſuch Liſts from the Conſtables, &c. reſpec- " tively, and that no Alteration hath been therein made ſince their Receipt " thereof, and the ſaid Liſts ſo delivered in and atteſted, ſhall be deemed " as effectual as if they had been delivered in by the Conſtables, &c. " for their reſpective Pariſhes or Precincts.†

† The 24 Geo. 2. c. 18. allows Fees to Jurymen, and ſpecifies what Coſts ſhall be paid, for praying a Special Jury.

4. In what Time ſuch Proceſſes are returnable.

Proceſs againſt Jurors may be returnable immediately into the King's Bench for the Trial of an Indictment found in the (*a*) County where it ſits, whether for a Crime in ſuch County, or for a Treaſon beyond Sea; but for the Trial of an Indictment removed by *Certiorari* from a different County, there muſt be fifteen Days between the Teſte and Return of every Proceſs.

2 Rol. Abr. 626. 9 Co. 118. b. 2 Inſt. 568. 2 Hawk. P. C. 406.

(*a*) Whether ſuch Indictment were originally taken in the King's Bench, or taken before Juſtices of the Peace of the ſame County, and removed into the King's Bench by *Certiorari*. 2 Hal. Hiſt. P. C. 260.

Juſtices in *Eyre*, or of Goal-Delivery, may order a Jury to be returned immediately for the Trial of a Priſoner; alſo it hath been adjudged, that Juſtices of (*b*) *Oyer and Terminer*, or of the Peace, might * for the Trial of an Iſſue joined before them award a *Venire* returnable the ſame Day on which the Party is arraigned; but it is ſaid, that there are ſtrong Authorities to the contrary, unleſs the Priſoner conſent, or the Crime amount to Felony.

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2 Hawk. P. C. 406. and ſeveral Authorities there cited.

(*b*) That as to the Commiſſion of *Oyer* and *Terminer*, though there goes out a general Precept in the Names of three or more of the Commiſſioners, and under their Seals, fifteen Days before the Seſſions, directed to the Sheriff to return Twenty-four Jurors to try the Iſſue between the King and the Priſoners to be arraigned; yet this is but preparatory, and to have a Jury in Readineſs; for after the Priſoners are arraigned, and have pleaded to the Country, a Precept ought to iſſue to the Sheriff in Nature of a *Venire fac.* which may bear Teſte the ſame Day that the Priſoners plead, commanding the Sheriff to return Twenty-four, &c. to try the Iſſue upon ſuch a Day, 2 Hal. Hiſt. P. C. 261.——Or they may make the Precept returnable the ſame Day that the Priſoners plead, *viz. Adhoram primam poſt Meridiem*, &c. for Juſtices of *Oyer* and *Terminer* may take their Indictment and arraign the Priſoners, and try the ſame Day. *Ibid.*——And it is there alſo ſaid, that the Juſtices of the Peace, as to the Point of their Precepts of *Venire fac.* agree with Juſtices of *Oyer* and *Terminer*; for they are, as to this Purpoſe, Commiſſioners of *Oyer* and *Terminer*, and may indict, arraign, and try the ſame Day, in Caſes of Felony. 2 Hal. Hiſt. P. C. 261-2.

A *Venire*

2 Hal. Hiſt. P. C. 261. 2 Hawk. P. C. 406.

A *Venire* before Juſtices of *Oyer* and *Terminer*, returnable at a Day certain, is erroneous, unleſs the Seſſions appear to be adjourned to the ſame Day, becauſe otherwiſe it ſhall not be intended that their Commiſſion continued ſo long; but ſuch *Venire* may be returnable at the next Aſſiſes, and then tried by Virtue of 1 *E.* 6. *cap.* 7.

Here it may be proper to take notice, that the Statutes of 4 & 5 *W.* & *M. cap.* 24. and 7 & 8 *W.* and *M. cap.* 32. require that Jurors ſhall be ſummoned ſix Days before they appear, which ſeems to make it neceſſary that whenever a *Venire fac.* or particular Precept is required, there ſhould be ſix Days between its Teſte and Return; and to this Purpoſe it is enacted, by the 7 & 8 *W.* 3. *cap.* 32. "That every Summons of any Perſon qualified, *&c.* ſhall be made by the Sheriff, his Officer, or lawful Deputy, ſix Days before, at the leaſt, ſhewing to every Perſon ſo ſummoned the Warrant under the Seal of the Office, wherein they are nominated and appointed to ſerve; and in caſe any Juror, ſo to be ſummoned, be abſent from the uſual Place of his Habitation at the Time of ſuch Summons, in ſuch Caſe Notice of ſuch Summons ſhall be given, by leaving a Note in Writing, under the Hand of ſuch Officer, containing the Contents thereof, at the Dwelling-houſe of ſuch Juror, with ſome Perſon there inhabiting the ſame.

"Provided that thoſe Acts ſhall not extend to give or require any longer Time for the ſummoning of any Juries, that are to try any Iſſues joined in any of the ſaid Courts that are triable by Jurors of the City of *London* or County of *Middleſex*, than was by Law required before the making of the Act, nor ſhall extend or be conſtrued to give any longer Time, or other Day, for the Return of any Writ, Precept, or Proceſs of *Venire facias*, *Habeas Corpora* or *Diſtringas*, for the ſummoning, attaching or diſtraining of any Jury to appear, than was by Law required before the making of the Act; but that where there ſhall not be ſix Days between the Awarding of ſuch Writ, Precept or Proceſs, and Return thereof, every Juror may be ſummoned, attached or diſtrained to appear at the Day and Time therein mentioned or appointed, as he might have been before the Making of the Act."

5. Where the Jury muſt appear.

2 Inſt. 421-2. *&c.* 4 Inſt. 159. Cro. Car. 349.

At Common Law, the Jurors and Parties were to appear at the Court (*a*) where the Suit or Proſecution was depending, which occaſioned a great Expence, and a great Conflux of People to the ſuperior Courts; to Remedy which Inconveniency, it was ordained by *Weſtm.* 2. *cap.* 30. that all Pleas in either Bench, which require only an eaſy Examination, ſhall be determined in the Country, before the Juſtices of Aſſiſe, by virtue of the Writ preſcribed by that Statute, commonly called the Writ of *Niſi Prius*.

(*a*) The Award of a *Venire* returnable at a certain Day before Juſtices of *Oyer*, *&c.* needs not expreſs before what Juſtices it ſhall be returnable, for it cannot but be intended that it ought to be returned before the Court that awards it. 29 E. 3. 30. b. Dyer 315. pl. 99. 2 Keb. 855.

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2 Inſt. 423. *Trials per Pais* 63-4.

* The Manner of contriving it was to direct the *Venire* to return the Jury at ſome Day the next Term, unleſs the Juſtices *prius tali Die*, & *Loco Venerint*; and thus the *Niſi Prius* was at firſt on the *Venire*, and continued in that Manner from *Ed.* 1. to *Ed.* 3. for though there were no Iſſues returned on the *Venire* to make them appear at *Niſi Prius*; yet it was ſo much a greater Difficulty on them to appear afterwards at *Weſtminſter*; which if they did not, the *Diſtringas* iſſued, that it had its Effect to bring them in their proper Counties; the Writ was contrived to command

mand them to come into Court, becauſe it would have been improper for the Court to have commanded them to come into any other Place; ſo that their Appearance before the Juſtices of Aſſiſe is an Excuſe for their Non-Appearance in Bank; but if they did not appear at the Aſſiſe, nor at *Weſtminſter*, then iſſued a *Habeas Corpus* and *Diſtringas* to bring them up.

The antient Practice of the Defendant's being eſſoinable on the *Venire* was a great Miſchief in this Proceſs, becauſe if he did not appear, the Jury were afterwards obliged to appear in Bank; and there was another Miſchief in this Proceſs as it then ſtood, that the Parties not ſeeing the Panel beforehand, they could not be prepared to make their Challenge; and the firſt of theſe Miſchiefs was pretty well remedied by laying the Coſts on the Defendant when the Plaintiff prevailed; but the ſecond Miſchief had no Remedy till 42 *E.* 3. *cap.* 11. whereby it is ordained, that no Inqueſts but Aſſiſes and Delivery of Gaols be taken by Writ of *Niſi Prius*, or other Manner, at the Suit of Great or Small, before that the Names of all of them that ſhall paſs in the Inqueſt be returned into the Court; and this ſet the Proceſs on the ſame Foot it now ſtands. *Trials per Pais* 65.

From henceforward they could not place the *Niſi Prius* in the *Venire*, as was directed by the Statute of *Weſtminſter* 2. becauſe it is directed that no Inqueſt be taken at *Niſi Prius* until the Inqueſt be returned in Court, and therefore the Clauſe of *Niſi Prius* was taken out of the *Venire* and placed to the *Habeas Corpus* and *Diſtringas*, which was ſo awarded on the Roll in the *Jurat'*; this had many good Effects; 1*ſt*. For that the Plaintiff and Defendant knew the Names of the Jury, in order to their Challenges. 2*dly*, The *Venire* being returned, the Defendant had no Eſſoin on the *Habeas Corpus* and *Diſtringas*, but was obliged to appear, or elſe by *Weſtminſter* 2. *cap.* 27. the Inqueſt was taken by Default as if he had appeared. Another Advantage was, that the Jury on the *Niſi Prius* were fined if they did not appear; and therefore the Clauſe in the *Diſtringas* is *quod Habeas Corpora eorum coram nobis apud Weſtm' Die Lunæ prox' poſt vel coram Juſt. ciariis noſtris ad Aſſiſas in Com' tuo tenend' aſſign', ſi prius Die*, &c. and ſince they could fine them on this Proceſs according to their Offence, they granted *Niſi Prius* in the enſuing *Diſtringas*, and did not compel them to try it at Bar, which was more convenient that the antient Way, where the appearing Juror was obliged by his Companions Default to come up to *Weſtminſter*; but now every one has Iſſues returned on him for his own Default. *Trials per Pais* 63.

The Day at *Niſi Prius* and in Bank are in Conſideration of Law the ſame, becauſe the Writ of *Niſi Prius*, which gives Authority to the Judge to try the Cauſe in the Country, is inſtead of the Court, and therefore the *Poſtea* certified by him on the Day of Bank is the ſame as if the Jury had come up to the Court, and the Trial had been had in open Court; and this, as has been ſaid, is for the Eaſe of the Subject, that the Jury and Witneſſes may not come out of the proper County. 6 Mod. 9.

It ſeems agreed, that an Iſſue joined in the King's Bench upon an Indictment or Appeal, whether for Treaſon or Felony, or a Crime of an inferior Nature, committed in a different County from that wherein the Court ſits, may be tried in the proper County by Writ of *Niſi Prius*, by Virtue of the Statute of *Weſtm.* 2. *cap.* 30. Cro. Car. 348. 2 Inſt. 424. 4 Co. 43. 4 Inſt. 160. Raym. 367. 6 Mod. 246.

* Yet inaſmuch as the King is not expreſly named in this Statute, and it is a general Rule that he ſhall not be bound by a Statute which doth not expreſly name him, it ſeems to have been generally holden, that wherever the King is a Party it is irregular to grant a Trial by *Niſi Prius* without a ſpecial Warrant, or the (*a*) Aſſent of his Attorney; but it ſeems the Court *Page 245 2 Leon. 110. 6 Mod. 123.

(*a*) In an Indictment of Barretry, which ſeems to require great Examination, the Court refuſed to grant a Trial by *Niſi Prius* at the Motion of the Attorney General, till the King by his Letters had ſignified his Pleaſure that it ſhould be ſo tried. Cro. Car. 348.

Court may grant it in an (*a*) Appeal in the ſame Manner as in any other Action.

(*a*) But not where the Jury is to be from two Counties. Dyer 46. pl. 6.

6. What Number are to be returned.

Co.Lit.155. a. Although by the Words of the Writ of *Venire facias* the Sheriff is only to return twelve, yet by antient Courſe he was obliged to return twenty-four; and this, ſays my Lord *Coke*, is for Expedition of Juſtice; for if twelve ſhould only be returned, no Man ſhould have a full Jury appear or be ſworn in reſpect of Challenges without a *Tales*, which would be a great Delay of Trials.

4 Co. 36. Cro. Eliz. 587. Cro.Car.223 But though the Sheriff return a leſſer Number, as where the Sheriff returned only twenty-three, and a ſufficient Number appear, and try the Iſſue, this will be aided by the Statutes of *Jeofail* as a Miſreturn.

2 Hal. Hiſt. P. C. 263. The Precept that iſſues before a Seſſions of Goal-Delivery, Oyer and Terminer, and of the Peace, is to return twenty-four, and commonly the Sheriff returns upon that Precept forty-eight.

2 Hal. Hiſt. P. C. 263. But the Award or Precept to try the Priſoner after he hath pleaded, is only *Venire facias* twelve, and (*b*) twenty-four are returned by the Sheriff on that Panel.

(*b*) But it has been held that in Trials on the Crown Side for Criminals the Sheriff may be commanded to return any Number the Court pleaſe, and accordingly in Sir *H. Vane*'s Trial the Sheriff returned ſixty. Keling 16.

Godb. 370. Keb. 310. At Common Law in Civil Cauſes, it ſeems the Sheriff might have returned above twenty-four if he pleaſed; and therefore by the Statute of (*c*) *Weſtminſter* 2. *cap.* 38. it is recited, That whereas the Sheriffs were uſed to ſummon an unreaſonable Multitude of Jurors, to the Grievance of the People, it is ordained, that from thenceforth in one Aſſiſe no more ſhall be returned than twenty-four.

(*c*) This Statute extends not to Jurors returned for Trial of criminal Perſons. Kel. 16.

Before this Statute the Sheriff uſed to return a ſeparate Jury in every Cauſe.

By the 9th *Sect.* of this Statute, the Number in *Wales* for the Grand Seſſions not to be leſs than ten, nor more than fifteen out of every Hundred, and to be ſummoned eight Days before.

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—By the 10 *Sect.* the Number in the Counties Palatine the ſame as in other Parts of *England*, and to be ſummoned fourteen Days before.

And now by the 3 *Geo.* 2. *cap.* 25. *ſect.* 8. it is enacted, "That every "Sheriff or other Officer to whom the Return of the *Venire facias Jura-* "*tors*, or other Proceſs, for the Trial of Cauſes before Juſtices of Aſſiſe "or *Niſi Prius*, in any County in *England*, doth or ſhall belong, ſhall "upon his Return of every ſuch Writ of *Venire facias*, (unleſs in Cauſes "intended to be tried at Bar, or in Caſes where a ſpecial Jury ſhall be "ſtruck by Order or Rule of Court) annex a Panel to the ſaid Writ, con- "taining the Chriſtian and (1) Surnames, Additions, and Places of Abode of "a competent Number of Jurors named in ſuch Liſts as qualified to ſerve "on Juries, the Names of the Perſons to be inſerted in the Panel annexed to "every *Venire facias* for the Trial of all Iſſues at the ſame Aſſiſes in each "reſpective County, which Number of Jurors ſhall not be leſs than forty- "eight in any County, nor more than ſeventy-two, without Direction of "the Judges appointed to go the Circuit and ſit as Judges of Aſſiſe or "*Niſi Prius* in ſuch County or one of them, who are reſpectively hereby "impowered and required, if he or they ſee Cauſe, by Order under his or "their reſpective Hand or Hands, to direct a greater or leſſer Number; and "then ſuch Number, as ſhall be ſo directed, ſhall be the Number to ſerve "on ſuch Jury, and that the Writs of *Habeas Corpora Juratorum* or *Diſtringas* "ſubſequent to ſuch Writ of *Venire facias*, need not have inſerted in the "Bodies of ſuch reſpective Writs the Names of all the Perſons contained "in

(1) Theſe Names are to be put in a Box, and drawn in the Manner we daily ſee.

" in ſuch Panel; but it ſhall be ſufficient to inſert in the mandatory Part " of ſuch Writs, reſpectively, *Corpora ſeparalium Perſonarum in Panello huic " Brevi annexo nominatorum*, or Words to the like Import, and to annex " to ſuch Writs reſpectively Panels containing the ſame Names as were re- " turned in the Panel to ſuch *Venire facias*, with their Additions and Places " of Abode, that the Parties concerned in any ſuch Trials may have timely " Notice of the Jurors who are to ſerve at the next Aſſiſes, in order to " make their Challenges to them, if there be Cauſe; and that for the " making the Returns and Panels aforeſaid, and annexing the ſame to the " reſpective Writs, no other Fee or Fees ſhall be taken than what are now " allowed by Law to be taken for the Return of the like Writs and Panels " annexed to the ſame, and that the Perſons named in ſuch Panels ſhall " be ſummoned to ſerve on Juries at the then next Aſſiſes or Seſſions of " *Niſi Prius* for the reſpective Counties to be named in ſuch Writs, and " no other."

7. Of awarding Proceſs by *Proviſo*.

If the Plaintiff after Iſſue joined neglects to try his Cauſe the firſt Aſſiſes in the Country, or the firſt Term in *Middleſex* or *London*, the Defendant is at liberty to bring down the Cauſe by *Proviſo*, ſo called by the Clauſe in the *Venire facias*, which ſays, *Proviſo ſemper quod ſi duo Brevia inde tibi pervenerint, unum eorundem tantum retorn' & exequaris*; for both Plaintiff and Defendant having put themſelves upon their Country, the Plaintiff's Laches ſhall not prevent the Defendant's diſcharging himſelf from the Action, and therefore the Proceſs is as well open for him as for the Plaintiff. *Trials per Pais* 60, 61.

This Proceſs by *Proviſo*, (*i. e.* with a Clauſe that if two Writs come to the Sheriff, he ſhall execute one of them only) may be taken out not only when the Plaintiff neglects to take out the *Venire* the ſame Term, but alſo upon his Neglect to get it returned; and in like Manner if the Plaintiff makes the like Default in ſuing out an *Habeas Corpora*, or other ſubſequent Proceſs, the Defendant may ſue out the like Proceſs by *Proviſo*. Dyer 215. pl. 51, 284. pl. 34. Cro. Car. 484. 2 Rol. Abr. 665-6. Keilw. 176. pl. 11.

But where the Defendant hath ſued out any Proceſs by *Proviſo*, there are Authorities that the Plaintiff is to ſue out the proper ſubſequent Proceſs upon it in the ſame Manner as if he had ſued out the firſt, and that it is irregular for a Defendant to take out any ſuch ſubſequent Proceſs till the Plaintiff has made a Default in reſpect of the ſame Kind of Proceſs, except only in ſuch Actions wherein the Defendant is an Actor as well as the Plaintiff, as in Replevin or Error, or *Quare Impedit* againſt a Patron only, or Prohibition, &c. in which Actions the Defendant may either take out Proceſs by *Proviſo*, without any Default in the Plaintiff, or may, if he think fit, take it out in the ſame Manner, as the Plaintiff, without any Cauſe of *Proviſo*. 2 Jon. 34. Dyer 193. pl. 28, 284. pl. 34. 2 Lev. 5, 6. 2 Sand. 336. 6 Mod. 246.

It ſeems agreed, that neither in Actions wherein the King is ſole Party, nor in Indictments, there can be any Proceſs taken out by *Proviſo*, becauſe no Laches are imputable to the King; alſo it hath been queſtioned whether there can be any ſuch Proceſs in Informations *Qui tam*, becauſe the King is in ſome ſort a Party. 2 Leon. 110. Keb. 195. 6 Mod. 246. *cont.* Sid. 316.

But it ſeems agreed, that it may be ſo awarded in any Appeal, whether Capital or not Capital, in the ſame Manner as in other Actions, after the Appellant hath made Default in relation to the very ſame Kind of Proceſs. Keilw. 176. pl. 70.

*By the 7 & 8 *W.* 3. *cap.* 32. which gives a *Venire facias de Novo*, where the Cauſe is not tried the firſt Aſſiſes, it is enacted, " That if any Defen- " dant or Tenant in any Action depending in any of the Courts of *Weſt-* " *minſter* ſhall be minded to bring to Trial any Iſſue joined againſt him, *Page 247

" when

" when by the Courſe in any of the ſaid Courts he may lawfully do the " ſame by *Proviſo*, ſuch Defendant or Tenant ſhall or may, of the iſſuable " Term next preceding ſuch intended Trial to be had at the next Aſſiſes, " ſue out a new *Venire facias* to the Sheriff by *Proviſo*, and proſecute the " ſame by Writ of *Habeas Corpora* or *Diſtringas*, with a *Niſi Prius*, as " though there had not been any former *Venire facias* ſued out or returned " in that Cauſe; and ſo *toties quoties* as the Matter ſhall require."

8. Of the Neceſſity of returning a Panel into Court, and where a Priſoner may demand a Copy of it.

By the 42 *E.* 3. *cap.* 11. it is recited, that divers Miſchiefs had happened, becauſe that the Panels of Inqueſts, which had been taken before Juſtices by Writ of *Scire facias* and other Writs, had not been returned before the Seſſions of the Juſtices at the *Niſi Prius*, and otherwiſe, ſo that the Parties could not have Knowledge of the Names of the Perſons which ſhould paſs in the Inqueſt; whereby divers of the People have been diſinherited and oppreſſed; and thereupon it is ordained, " That no Inqueſt but (*a*) Aſſiſes and De- " liverances of Gaols be taken by Writ of *Niſi Prius*, nor in any other Man- " ner, at the Suit of the Great or Small, before the Names of all of them " that ſhall paſs in the Inqueſt be returned in the Court."

(*a*) The Statute of 6 H. 6. c. 2. provides alſo for Aſſiſes.

3 Inſt. 175.

This Statute extends as well to Writs of *Niſi Prius* in Criminal Caſes as in Civil, and to Jurors returned upon a *Tales* as well as to thoſe returned upon a principal Panel.

2 Hawk. P. C. 410.

But it ſeems that in Trials before the Juſtices of Goal-Delivery the Priſoner has no Right to a Copy of the Panel before the Time of his Trial, except only in Caſes within the Purview of 7 & 8 *W.* 3. *cap.* 3. which enacts, " That every Perſon indicted and tried for High Treaſon, or " Miſpriſion thereof, (except it be for counterfeiting the Coin, *&c.*) ſhall " have a Copy of the Panel of the Jurors who are to try him duly returned " by the Sheriff, and delivered unto him two Days at leaſt before he ſhall " be tried."

2 Hawk. P. C. 410.

It hath been adjudged to be ſufficient within the Intent of this Act, to deliver to the Priſoner a Copy of a Panel arrayed by the Sheriff before it is returned to Court, if the very ſame Panel be afterwards returned.

9. Of the Trials going off *pro Defectu Juratorum*; and therein of drawing a Juror.

Vide the Statute 7 & 8 *W.* 3. c. 32. which gives a *Venire facias de novo*, in caſe the Cauſe be not tried the firſt Aſſiſes.

If a *Venire* is awarded, and the Parties do not go to Trial the next Aſſiſes, but it lies for ſeveral Terms, the Continuance may be made by a *Vic' non miſit Breve*; but if a *Niſi Prius* be awarded, and ſome of the Jury appear, and the Panel be not full, ſo that the Trial is not carried on, they enter thoſe of the Jury that appeared, and *alii non venerunt, ideo reſpectuentur* to the next Term *pro Defectu Jurat'*, and at the Day in the next Term they award an *Alias Diſtringas* to the next Aſſiſes, with a *Niſi Prius* until the next Term.

Vent. 28. Raym. 84.

It is held by the Opinion of ſome, that in a Criminal Caſe not Capital, after a Jury ſworn and impanelled, and all the Evidence given, the King's *Counſel may, without the Party's Conſent, withdraw a Juror, and have the Cauſe tried over again.

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Carth. 465.

But herein the better Opinion ſeems to be; 1*ſt*, That in capital Caſes a Juror cannot be withdrawn, though all Parties conſent to it. 2*dly*, That in Criminal

Criminal Cases not Capital a Juror may be withdrawn, if both Parties consent, but not otherwise. 3*dly*, That in all (*a*) Civil Causes, a Juror cannot be withdrawn, but by Consent of all Parties.

(*a*) Where the Jurors lying all Night could not agree, a Juror by Consent was drawn. Cro. Car. 484.

It hath been held, that a Juror withdrawn from the Panel by Consent of both Parties, to the Intent the Trial might for that Time go off *pro Defectu Juratorum*, it being necessary for the Jury to have a View, may be of the Jury, when the Cause comes to be tried at a subsequent Time, and that this being neither a principal Cause of Challenge, nor to the Favour, cannot be Error. *Ca. Law and Eq.* 390. *Hart* and *Bainard.*

(C) In what Cases and in what Manner, a Tales is grantable.

SINCE the (*b*) 3 *Geo.* 2. for the Regulation of Juries, and by which the Sheriff cannot return less than forty-eight Jurors, the Use of a *Tales* seems to be taken away; but as the Statute herein extends only to Civil Causes, it will still be necessary to consider the Manner of awarding a *Tales*, especially in criminal Cases.

(*b*) It hath been held since this Statute, that a *Tales de Circumstantibus* was allowable upon special Juries, by *Raymond*, C. J. in the Case of The *King* versus *Franklin*, *Trin.* 5 Geo. 2. 2 Kel. 77. pl. (39). 2 Sess. Cas. 333. pl. 189. 21. Vin. Abr. 313. pl. 12 †.

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† In Special Jury Causes, and in common, a Tales is allowable.—It is the constant Practice.

If all the Jury did not attend on the *Habeas Corpus* or *Distringas*, whether by reason of the Death of some of the Persons returned, or for any other Cause; or if so many be challenged and drawn, that there do not remain a sufficient Number to make a Jury; or if after the Jury is charged one or more of them die, there are at Common Law the Writs of *Undecim*, *Decem*, or *Octo Tales*, according as the Number was deficient, to force others into Court to try the Issue, or by (*c*) Statute the Plaintiff may pray a *Tales de Circumstantibus* to prevent the Delay of the *Decem Tales*. 10 Co. 104. Dyer 359. pl. 2. 2 Rol. Abr. 671. Plow. 100. 2 Hal. Hist. P. C. 266.

(*c*) For this Purpose, *vide* the Statutes. 35 H. 8. c. 6. made perpetual by 2 & 3 E. 6. c. 32. 4 & 5 Ph. & Mar. c. 7. 5 Eliz. c. 25. 14 Eliz. c. 9. 7 & 8 W. 3. c. 32.

A *Tales* may be granted as well on the Application of the Defendant as Plaintiff; but it seems that a Defendant cannot regularly pray it till there has been a Default in the Plaintiff. Cro. Car. 484. 10 Co. 104. 2 Rol. Abr. 671. and in Dyer 359. pl. 2. it is said, that if a full Jury do not appear, and the Plaintiff prays a *Distringas* without praying any *Tales*, the Court ought to grant it at the Prayer of the Defendant.

In Capital Cases the *Tales* may be granted for a larger Number than the first Process; as for sixty, or forty, or any other even Number, in order to prevent Delays from peremptory Challenges; and in this Respect a *Tales* in Capital Cases is different from what it is in any other Case; it being an allowed Rule, that in all (*d*) other Cases the *Tales* must be for a less Number than the first Process. Bulst. 121. Dyer 213. pl. 41.

(*d*) But a *Tales de Circumstantibus* may be of any uncertain Number. 10 Co. 105. a.

Every

*Page 249 * Every ſubſequent *Tales* in Capital, as well as in all other Caſes, muſt be
10 Co. 105. a. for a leſs Number than the former, except the former were quaſhed, in
Keilw. 176. which Caſe the next may be for the ſame Number.

10 Co. 104. The quaſhing the Array of the principal Panel doth not quaſh that of
Dyer 245. pl. 64. the *Tales*, but the Inqueſt ſhall be taken by thoſe returned on the *Tales*, if there be a ſufficient Number, otherwiſe more ſhall be added to them by a new *Tales*; but if all the Perſons returned on a *Habeas Corpora* be challenged and drawn, there ſhall not be a *Tales* awarded but a new *Venire*; for the Word *Tales* plainly refers to ſome others, to whom the Perſons returned are to be like; alſo if the firſt *Habeas Corpora* be quaſhed, the ſecond with a *Tales* cannot be quaſhed with it, and the Party muſt go on as if the *Venire* had only been returned, and nothing done upon it; for where a Proceſs is quaſhed, all that follows and depends upon it falls with it.

Cro. Eliz. 502. 2 Rol. Abr. 671. It ſeems, that a *Tales* is not grantable on the Return of a *Venire*, but only on the Return of a *Habeas Corpora* or *Diſtringas*, becauſe it appears not before ſuch Return, but that a full Jury may appear.

Rol. Abr. 798. A *Diſtringas* or *Habeas Corpora*, with a Command to add ſo many more to thoſe ſummoned on the *Venire*, is the firſt Proceſs againſt the *Tales*.

Cro. Jac. 677. If a Juror be withdrawn after a Trial commenced, whereon a *Tales de Circumſtantibus* was awarded, and afterwards a new *Habeas Corpora* be taken out with a *Tales*, it ſhall appoint the *Tales* to be added to the Jurors firſt returned, and alſo to thoſe returned on the *Tales de Circumſtantibus*.

Lev. 223. Raym. 367. Keb. 490. 6 Mod. 246. The Statutes, which authorize Juſtices of *Niſi Prius* to award a *Tales de Circumſtantibus*, extend as well to all Capital Caſes as to others; but it ſeems that ſuch a *Tales* cannot be prayed for the King upon an Indictment, or Criminal Information, without a Warrant from the Attorney General, or an expreſs Aſſignment from the Court, before which the Inqueſt is taken.

It ſeems not to be clear, that a *Tales* is grantable by Juſtices of *Oyer*, &c. Keilw. 176. pl. 10. Plow. 100. Yelv. 23. Jenk. 340. or of (*a*) Goal-delivery; but if a Trial be put off before Juſtices of Goal-delivery for want of a full Jury, they may, without doubt, order a larger Panel, whereon the former Jurors ſhould be returned in the ſame Order as before, and called to be ſworn as they ſtand, without any more Regard to thoſe who were ſworn before, than to the others; and the like Method is to be obſerved as to a Jury returned with a *Tales*.

(*a*) That before Juſtices of Gaol-Delivery this Learning of *Tales* is not of much Uſe, becauſe there is no particular Precept to the Sheriff to return either Jury or *Tales*, but the general Precept before the Seſſions, and the Award or Command of the Court upon the Plea of the Priſoner. 2 Hal. Hiſt. P. C. 266.

Mich. 6 Geo. 2. in *B. R. Bell* ver. *Knight*, *vide* 2 Rol. Abr. 672. Styl. 16. On a Writ of Error of a Judgment given in the Court of *Briſtol* it was ſolemnly adjudged, that a Cuſtom in an inferior Court to try by a *Tales de Circumſtantibus* was void, as it breaks down that important Rule, that Trials muſt be *per Pares*, and admits an unlimited Latitude of gleaning together any Set of Men for Jurors, however profligate and unfit for the Office, and intirely deprives the Parties of their Challenges.

Sel. Caſ. Evid. 110. It was agreed to be common Practice in the Circuits, that if but one Juror appears and he is challenged, there may be twelve Taleſmen ſworn, who may try the Cauſe.

* (D) In what Caſes and in what Manner ſpecial Juries are appointed.

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SPECIAL Juries are appointed on Motion and Application to the Court for that Purpoſe, on which, if the Court think it reaſonable, the Sheriff is to attend the Secondary or Maſter with his Book of Freeholders, who, in the Preſence of the Attornies on both Sides, names Forty-eight Freeholders, and then each Party ſtrikes out twelve, by one at a Time, the Plaintiff or his Attorney beginning firſt, and the remaining Twenty-four are returned by the Secondary, as the Jury, to try the Cauſe. 2 Lit. Regiſt. 123. that the Court may order a Jury of Merchants if they think it convenient. 2 Lil. Regiſt. 122.

If the Rule was entered into by Conſent, it is ſaid to be a Contempt in the Attorney not to be preſent; but to remedy any Inconveniency, from hence, a Rule was made, that when a Maſter is to ſtrike a Jury, *viz.* Forty-eight out of the Freeholders Book, he ſhall give Notice to the Attornies of both Sides to be preſent; and if the one comes, and the other does not, he that appears ſhall, according to the antient Courſe, ſtrike out twelve, and the Maſter ſhall ſtrike out other twelve for him that is abſent. 2 Lil. Reg. 127. Salk. 405. pl. 1.

And it is ſaid, that if by Rule of Court the Maſter is ordered to ſtrike a Jury, in caſe it be not expreſſed in ſuch Rule that the Maſter ſhall ſtrike Forty-eight, and each of the Parties ſhall ſtrike out twelve, the Maſter ſhall ſtrike Twenty-four, and the Parties have no Liberty to ſtrike out any. Salk. 405. pl. 1.

It is ſaid that a Special Jury may be granted to try a Cauſe at Bar without the Conſent of the Parties, but never at *Niſi Prius*, unleſs for good Cauſe ſhewn, ſuch as Partiality of the Sheriff, *&c.* Mod. Ca. *Law* and *Eq.* 248.

Alſo it is ſaid to be contrary to the Courſe of the Court of *B. R.* in Capital Caſes, to order the Clerk of the Crown to ſtrike a Special Jury as is done by the Secondary in Civil Cauſes upon Trials at Bar †. 2 Jon. 222.

† See the next Clauſe.

By the 3 *Geo.* 2. *cap.* 25. *ſect.* 15. reciting, that whereas ſome Doubt had been conceived touching the Power of his Majeſty's Courts of Law at *Weſtminſter*, to appoint Juries to be ſtruck before the Clerk of the Crown, Maſter of the Office of Prothonotaries, or other proper Officer of ſuch reſpective Courts, for the Trials of Iſſues depending in the ſaid Courts, without the Conſent of the Proſecutor or Parties concerned in the Proſecution or Suit then depending, unleſs ſuch Iſſues are to be tried at the Bar of the ſame Courts, it is enacted, "That it ſhall and may be lawful to and for "his Majeſty's Courts of King's Bench, Common Pleas and Exchequer at "*Weſtminſter*, reſpectively, upon Motion made on behalf of his Majeſty, "or on the Motion of any Proſecutor or Defendant in any Indictment or "Information for any Miſdemeanor or Information in Nature of a *Quo* "*Warranto*, depending or to be brought or proſecuted in the ſaid Court of "Exchequer, or on the Motion of any Plaintiff or Plaintiffs, Defendant or "Defendants, in any Action, Cauſe or Suit whatſoever depending, or to "be brought and carried on in the ſaid Courts of King's Bench, *&c.* or in "any of them; and the ſaid Courts are hereby reſpectively authorized and "required upon Motion aforeſaid, in any of the Caſes afore-mentioned, There can be no ſpecial Jury in Treaſon or Felony. 21 Vin. Abr. 301. pl. 5. From the Penning of this Act, it appears to extend only to the Trial of any Iſſue joined, therefore the Court will not grant a Special Jury upon a Writ of Inquiry. Mich. 25 Geo. 2. *Symonds* v. *Parminter* ‡. No Special Jury after common Jury Proceſs returned. 2 Barnes, 377, 385. Special Jury ſtruck and returned by Elizors of the Court. 2 Barnes 382.

‡ But the Court ſometimes, on Motion, makes a Rule for the Sheriff to ſummon a good Jury, meaning thereby Men of a ſuperior Rank or Station to thoſe commonly ſummoned.

"to

" to order and appoint a Jury to be ſtruck before the proper Officer of each " reſpective Court, for the Trial of any Iſſue joined in any of the ſaid Caſes, " and triable by a Jury of twelve Men, in ſuch Manner as Special Juries " have been and are uſually ſtruck in ſuch Courts reſpectively, upon Trials " at Bar had in the ſaid Courts, which ſaid Jury, ſo ſtruck as aforeſaid, " ſhall be the Jury returned for the Trial of the ſaid Iſſue.

*Page 251 See Andr. 51, 53. 2 Str. 1080. Suppl. to Lil. Abr. 7.

* And by *Sect.* 16. of the ſaid Statute it is further enacted, " That the " Perſon or Party, who ſhall apply for ſuch Jury to be ſtruck as aforeſaid, " ſhall bear and pay the Fees for the Striking ſuch Jury, and ſhall not have " any Allowance for the ſame upon Taxation of Coſts.

Barnes 97. Pract. Reg. C. P. 248. Caſ. of Pract. C. P. 138.

Sect. 17. *Provided*, " That where any Special Jury ſhall be ordered, by " Rule of any of the ſaid Courts, to be ſtruck by the proper Officer of ſuch " Court, in the Manner aforeſaid, in any Cauſe ariſing in any City or " County of a City or Town, the Sheriff or Sheriffs, or Under-Sheriff of " ſuch City, or County of a City or Town, ſhall be ordered by ſuch Rule " to bring, or cauſe to be brought before the ſaid Officer, the Books or " Liſts of Perſons qualified to ſerve on Juries within the ſame; out of " which Juries ought to be returned by ſuch Sheriff or Sheriffs, in like " Manner as the Freeholders Book hath been uſually ordered to be brought, " in order to the Striking of Juries for Trials at the Bar in Cauſes ariſing " in Counties at large; and in every ſuch Caſe the Jury ſhall be taken and " ſtruck out of ſuch Books or Liſts reſpectively."

Mod. Ca. *Law* and *Eq.* 245. The *King* ver. *Burridge*. 3 Will. Rep. 439. 2 Stra. 1019.

A Rule was made for a Special Jury, which was entred into by Conſent; and afterwards, when the Parties attended the Maſter, the Defendant ſtruck out ſome Hundredors, and at the Trial challenged the Array for want of Hundredors, which the Judge of Aſſiſe allowed a good Challenge; and this was held ſuch a Breach and Contempt of the Rule, that an Attachment was granted for it.

The *King* ver. *Johnſon*, Mich. 8 Geo. 2. in *B. R.* 2 Stra. 1000. 2 Kel. 110.

But where in the Trial of a *Quo Warranto*, the Defendant challenged the Array of a Special Jury, that had been ſtruck at his Requeſt, for Partiality in the Sheriff; and an Attachment being moved for, and the Caſe next above relied on, it was denied; and ſaid *per Curiam*, that the Attachment in the Caſe *ſupra* was granted by reaſon of the Abuſe of the Rule; but here the only Foundation is the Jury's being ſo ſtruck at his Requeſt, which is not alone ſufficient; for he had a Right to challenge the Array on the Proceſs's being directed to a wrong Officer; and the Rule might have been fulfilled another Way, *viz.* as the Sheriff was partial, a proper Entry might have been made, and Proceſs directed to the Coroner.

(E) Who are to be returned; and herein of the Qualifications and ſeveral Cauſes for which they may be challenged: And herein,

1. Of Challenges to the Array or to the Polls; and herein where the Inſufficiency or Partiality of the Sheriff or Returning Officer is a principal Cauſe of Challenge, or to the Favour.

Co. Lit. 156. a.

A Challenge (*a*) to Jurors is twofold; either to the Array, or to the Polls, *i. e.* to the particular Jurors; to the Array of the principal Panel, and to the Array of the Tales; and herein my Lord *Coke* obſerves, that the Jurors Names are ranked in the Panel one under another, which Order

(*a*) For the ſeveral Significations of the Word Challenge, *vide*

Order or Ranking the Jury is called the Array; as in common Speech we say *Battail Array* for the Order of Battle; so as to challenge the Array of the Panel, is at once to challenge or except againſt all the Perſons ſo arrayed or impanelled, in reſpect of the Partiality or Default of the Sheriff, Coroner, or other Officer who made the Return. Co. Lit. 155. b.

* This Kind of Challenge is twofold, either a principal Cauſe of Challenge, or to the Favour, like that to the Polls or particular Jurors; for they thought there could be no better Rule to aſcertain what ſhould be a proper Challenge to their Officer, than what was a proper Challenge to each Juror's Partiality; for they did not ſuppoſe that they had a Jury *per quos rei veritas melius ſciri poterit*, unleſs they were ſettled by a Perſon abſolutely indifferent. * Page 252 Co. Lit. 156.

A Principal is grounded on ſuch a manifeſt Preſumption of Partiality, that if it be found true it unqueſtionably ſets aſide the Array or the Juror, but a Challenge to the Favour leaves it to the Diſcretion of the Triers. Co. Lit. 156.

There are many principal Cauſes of Challenge to the Array; as if the Officer return any Juror at the Party's Denomination, or that he may be more favourable to one Party than the other; or if the Array be returned by a Bailiff of a Franchiſe, and the Sheriff return it as of himſelf; in which Caſe the Party ſhould loſe his Challenges in a Default in the Bailiff, becauſe the Return on Record is in the Sheriff's Name; but if the Sheriff return one within a Liberty, this is good, and the Lord of the Franchiſe is put to his Action againſt him. Co. Lit. 156.

If the Sheriff be liable to the Diſtreſs of either of the Parties mediately or immediately, or if he be his Servant or Officer in Fee, or of Robes, or his (*a*) Counſellor or Attorney, or have Part of the Land depending on the ſame Title; or if he has been Godfather to a Child of either of the Parties, or either of them to his; or if either of them have an Action of Debt againſt him; or if an Action of Battery, or ſuch like, which imply Malice, are depending between them, theſe are principal Challenges to the Array. Co. Lit. 156. *Trin. per Pais* 166. (*a*) But by *Finch of Law* 402. theſe are Challenges to the Favour only.

But if either of the Parties be ſubject to the Diſtreſs of the Sheriff, *&c.* or if the Sheriff, *&c.* have an Action of Debt againſt either of the Parties, theſe are Cauſes of Challenge to the Favour only; for the Sheriff, *&c.* thereby is not under the Party's Influence, but the Party under his Co. Lit. 156.

Conſanguinity, how remote ſoever, between the Sheriff or Juror and either of the Parties, or Affinity by Marriage of either Party himſelf with the Couſin of the Sheriff or the Juror, or *e converſo*, are principal Cauſes of Challenge to the Array, or to the Polls; but if the Marriage be between the Son of the one and Daughter of the other, it is a Cauſe of Challenge to the Favour only; and he, that challenges the Array or a Juror for a Couſinage, muſt ſhew how the Party is Couſin; but if it be found that he is Couſin it is (*b*) ſufficient, whether it be found in the Manner alledged or not; and here my Lord *Coke* notes, that a Baſtard can have no Kindred. Co. Lit. 156. Leon. 88. (*b*) That being Couſin, though in 8th or 9th Degree, is ſufficient. Dyer 319. a. pl. 13.——The Array of a Panel, becauſe the Sheriff was Couſin to the Plaintiff; and upon a Traverſe it was found that they were Couſins, but not in ſuch Manner as the Defendant had alledged; and *per Cur.* the Array was quaſhed, for the Manner is not material, but whether Couſin or not. Owen 44.

That the Sheriff and one of the Parties are Fellow Servants, not a principal Cauſe of Challenge, but only to the Favour. Dyer 367. pl 40.

It has been doubted, whether the (*c*) Leſſor in Ejectment, being of Rol. Rep. 328. Hutt. 25. Cro. Jac. 21. Moor 894. *Eyre* ver. *Baniſter*. (*c*) It is ſaid that where the Defendant juſtifies as Servant to *J. S.* and that the Land is the Freehold of *J. S.* it is a principal Challenge, that a Juror is within the Diſtreſs of *J. S.* for that the Title is to be tried. Hutt. 25.—But in this Caſe of an Ejectment it has been held in the Houſe of Lords, in the Caſe of *Holborn* ver. *Banington* 1719, that the Leſſor of Plaintiff, being a Peer, and no Knight returned, was no Cauſe of Challenge, becauſe he did not appear to be Party to the Record.—And the S. P. was reſolved Mich. 9 Geo. 2. between *Grimſton*, Leſſee of Lord *Gower* and *Gardner*; *& vide* Skin. 229. pl. 8. S. P. See now 24 Geo. 2. c. 18. ſ. 4. [No Challenge to the Array for want of a Knight. *Vide* alſo] 2 tra. 1023.

Kin to the Sheriff in ſuch a Manner as to make it a principal Cauſe of Challenge, in caſe he had been Plaintiff or Defendant, has been a principal Cauſe of Challenge, and by ſome it hath been held a principal Cauſe, for tho' this is but a fictitious Action, yet the Leſſor only being concerned in Intereſt, and the Plaintiff a fictitious Perſon, the Courts take notice of the
*Page 253 Leſſor as the * real Plaintiff, by ordering him in certain Caſes to pay Coſts, &c. but the better Opinion is, that it is no principal Cauſe of Challenge; that he not being Party to the Record, the Judges *ex officio* are not obliged to take notice of him, and that to do it in this Caſe would tend to Delay, which the Courts always avoid.

Cro. Eliz. 369. *Hore* ver. *Broom.* The Array of a Panel was challenged *ore tenus*, becauſe it was returned by the Sheriff two Days after he had received a Writ of Diſcharge; and it was ſaid *per Cur.* that it could not be challenged for that Cauſe, becauſe it would be a direct Averment againſt the Record, for it is returned by him as Sheriff, and the Return accepted; but by the Advice of the Court the Party made his Challenge to the Array, becauſe it was favourably made, and returned in favour of the Party, &c. and Iſſue being joined thereupon, and all this Matter given in Evidence, the Court directed the Triers, that it was not duly made and returned, for it was without Warrant; whereupon the Array was quaſhed.

2 Vent. 58. in the Caſe of the Sheriff of *Bucks.* But where a Challenge to the Array was taken, becauſe the Sheriff who made the Return had continued in his Office for more than three Months, and not taken the Oaths, and ſubſcribed the Declaration required by the Act 25 *Car.* 2. *cap.* 2. made for preventing the Dangers by Popiſh Recuſants; and ſo his Office, by that Act, was void to all Intents and Purpoſes before he made his Return of the Jury; but the Challenge was diſallowed by the Court, for he muſt be taken here as Sheriff *de facto*; and if ſuch a Challenge ſhould be allowed, no Trial could be had, but ſhould be put of, unleſs the Party were ready to ſhew that the Sheriff had taken the Teſt.

Cro. Eliz. 581. *Cham.* ver. *Matthew.* The Plaintiff for his Expedition ſurmiſed that he was Servant to the Sheriff of the County where the Action was brought and triable, and prayed a *Venire fac.* to the Coroners, and the Defendant *non dedixit*; whereupon Proceſs was awarded to the Coroners; and after Trial, and Verdict for the Plaintiff, it was moved that this Proceſs was miſawarded, and a Miſ-trial, for Proceſs ought not to be awarded to the Coroners but where the Challenge is Principal; and here to ſay that he was Servant to the Sheriff, is no principal Challenge, but only to the Favour, wherefore, &c. but the Court held, for as much as if the Sheriff had returned this Panel, it had been a good Cauſe to quaſh the Array for Favour, (*a*) that the Plaintiff to avoid that Delay might well ſhew it, and have Proceſs to the Coroners; and the rather, this being a (*b*) judicial and not an original Writ; and the Clerks ſaid there were many Precedents accordingly.

(*a*) But Cro. Jac. 547. S. P. ſeems to have adjudged *contra.* (*b*) *Vide* Plow. 74.

Co. Lit. 156. b. 157. b. If the Challenge to the Array be found againſt the Party he ſhall have his Challenge to the Polls; but neither Party ſhall take a Challenge to the Polls, which they might have had to the Array.

2. Where Inſufficiency and not being *Liber Homo* is a good Cauſe of Challenge to the Polls.

Fortef. Laud. Leg. Ang. c. 25. 2 Inſt. 27. A Challenge to the Polls is, as has been obſerved, a Challenge to the particular Jurors, who, it ſeems, of old could not be challenged; for theſe

by

by the feudal Law, as the *Pares Curtis*, were the Judges; and therein the Rule was *Pares qui Ordinariam Jurisdictionem habent recusari non possunt*; but though those Suitors, as Judges of the Court, could not be challenged, yet the *Pares*, when brought up by Writ, were subject to be challenged; and the Reason is, that there are several Qualifications required by the Writ, *viz.* that they be *Liberos & Legales Homines de vicineto* (of the Place laid in the Declaration) *quorum quilibet habeat decem* † *Libras terrar' tenementor' vel reddit' per ann' ad minus, per quos rei veri-* * *tas melius sciri poterit, & qui nec* (of the Plaintiff nor Defendant) *aliqua affinitate attingunt, ad faciend' quand' Jurat' Patriæ inter partes prædict'.* These Qualifications were inserted, because this Manner of Trial was different from below; for there the Trial being by all the *Pares*, if there was a Majority amounting to twelve, the Cause was decided by such a Number as were necessary; but here, because they brought up but twelve, and they were all to be of one Mind, in order to make the Verdict, therefore it was necessary there should be several Qualifications mentioned in such Persons who are to give in the Verdict in that Cause; and if any of the Qualifications were wanting in any one, it was a sufficient Reason to reject such Person.

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† Jurors in *London* to be Freeholders and worth 100 *l.* 3 Geo. 2. c. 25. s. 19.—Leaseholders of 50 *l. per Annum*, qualified, by 4 Geo. 2. c.

7. s. 3.—Qualifications of Jurors in Capital Cases, settled by 3 Geo. 2. c. 25. s. 20. *Vide post* 256.

The first Qualification is, that they should be *Liberi & Legales Homines*; hence it has been always clearly held, that Aliens, Minors or Villeins, cannot be Jurors.

Co. Lit. 156. b. 157. b. 172. b. 7 Co. 18. in *Calvin*'s Case. 2 Rol. Abr. 656.

Also Infamy is a good Cause of Challenge to a Juror; as that he is outlawed, or that he had been adjudged to any Corporal Punishment whereby he becomes infamous, or that he hath been convicted of Treason or Felony, or Perjury or Conspiracy, or Forgery on 5 *Eliz. cap.* 14. or attainted in an Attaint for giving a false Verdict; and it hath been holden, that such Exceptions are not solved by a Pardon; and it was antiently holden, that Excommunication was also a good Challenge; yet it seems that none of the above cited Challenges are principal ones, but only to the Favour, unless the Record of the Outlawry, Judgment or Conviction, be produced, if it be a Record of another Court; or the Term, &c. be shewn, if it be a Record of the same Court.

Co. Lit. 6. b. 155. b. 158. a. Cro. Car. 134. 2 Bulst. 158. 2 Rol. Abr. 949. 2 Lev. 263. Raym. 380. Hal. Hist. P. C. 303. 2 Hawk. P. C. 417-8.

The *Venire facias* was *Probos & Legales Homines*; and it was objected, that it ought to have been (*a*) *Liberos Legales Homines*, there being a Difference between *Probus*, *Liber & Legalis*; for that *Legalis* is he who is not outlawed, and against whom no Exception can be taken in this Behalf; that *Probus* is not taken notice of in Law; and *Liber Homo* is not only one that hath Freehold Land, but that hath Freedom of Mind, and stands indifferent, no more inclining to the one than to the other; but it was adjudged that *Probos & Liberos* are of one Sense, and that the Statute of *Westminster* 2. which gives the *Venire*, does not tie the Writ to the very Words.

Raym. 417. *Attorn. Gen.* ver *Blood & al'.* Keb. 563. S. C.

(*a*) *Libros* for *Liberos* in the *Venire* amended after Verdict. Cro. Eliz. 618.

3. Where the Want of a Freehold, or competent Estate, is a good Cause of Challenge.

It seems to be admitted by the Statute of 21 *E.* 1. *de his qui Ponendi sunt in Assisis*, and also by the Register, that at Common Law there was no Necessity that Jurors should have any Freehold as to Inquests before Justices in *Eyre*, or in Cities or Burghs; for it seems, that in Corporations the Freedom, and not the Freehold, made them *Liberos Homines*.

Raym. 485. Vent. 366.

Keilw. 46. Cro. Eliz. 413. 2 Hawk. P. C 415. 2 Hal. Hiſt. P. C. 272.

Alſo it ſeems agreed, that the Common Law doth not require that a Juror ſhould in any Caſe have a Freehold of any certain Value; and upon this Ground it hath been adjudged, that a Freehold worth but 20*s.* or 5*s.* or even 1*d.* is ſtill a ſufficient Qualification for a Juror in ſuch Caſes as are not within the Statutes, which require a Freehold of greater Value.

2 Hawk P. C. 415. and the Authorities there cited. *State Trials*, vol. 6. 58. *Francia*'s Caſe, fol. 245. *Ibid. Layer*'s Caſe

Alſo by ſome Opinions it is holden, that the Common Law did not require that a Juror ſhould in an Caſe have a Freehold; but this is not only contrary to what ſeems implied by the Books, which, in ſaying that the Common Law did not require a Freehold of any certain Value, plainly ſuppoſe that it required ſome Freehold, but hath been alſo contradicted by many expreſs Authorities; agreeably to which it ſeems to be ſettled at this Day, that the Want of a Freehold is a good Challenge *of a Juror in all Caſes not otherwiſe provided for by Statute, and conſequently in a Trial for High Treaſon in *London* as well as in any other County †.

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† See the Note inf. 253 and *infra*, and 256.

Keilw. 46. p. 2. 92. pl. 5 Dyer 9. pl. 26. Co. Lit. 156. b. 1. 272 Plow. 85. a. 2 Rol. Abr. 648.

But it ſeems agreed, that wherever the Letter of the Common or Statute Law require that a Juror ſhould have a Freehold, the Meaning is fully ſatisfied by his having the Uſe of a Freehold, and that it is not material whether he have it in his own or his Wife's Right, or whether it be abſolute or upon Condition, or an Eſtate of Inheritance, or only for Term of one's own or another's Life, ſo that it be in the ſame County wherein the Suit is brought, and actually continue in the Juror till the Time when he is ſworn.

But this Matter, as to the Freehold and Value of Jurors, has been regulated and ſettled by divers Statutes; to which Purpoſe, by the Statutes of *Weſtm.* 2. *cap.* 38. and 21 *E.* 1. *de his qui ponendi ſunt in Aſſiſis*, it is enacted, "That none ſhall be (*a*) put in Aſſiſes or Juries, except in Cities, Burghs, or trading Towns, who have not Tenements to the yearly Value of 40*s.*"

(*a*) In the Conſtruction hereof it has been held, that a Juror can neither be challenged by the Parties for being returned contrary to theſe Acts, nor alledge ſuch Matter himſelf for his Diſcharge, but muſt take his Remedy by Action againſt the Sheriff, or by Writ of Privilege, for his Diſcharge. 2 Inſt. 448.

By the 2 *H.* 5. *cap.* 3. it is enacted, "That no Perſon ſhall be admitted "to paſs in any Inqueſt upon Trial of the Death of a Man, nor in any "Inqueſt betwixt Party or Party, in Plea Real or Plea Perſonal, whereof "the Debt or the Damage declared amount to forty Marks, if the ſame "Perſon have not Lands or Tenements of the yearly Value of 40*s.* "above all Charges of the ſame, ſo that it be challenged by the Party, "*&c.*"

(*b*) Keilw. 92. (*c*) Cro. Eliz. 413.

It has been (*b*) held that this Statute extends as well to collateral Iſſues as to the general one, but (*c*) that it doth not extend to an Indictment or Information for a Crime not Capital.

2 Rol. Abr. 647. Keilw. 92. 3 Mod. 149.

It hath been held, that a Feoffee to the Uſe of another, or one who has only a dry Remainder, are not qualified to be Jurors within the Meaning of thoſe Statutes, becauſe, whatſoever the Value of the Lands may be, they have no Income from them.

By the 23 *H.* 8. *cap.* 13. "Every Natural-born Subject, who doth en-"joy and uſe the Liberties and Privileges of any City, Borough, or Town "Corporate, where he dwells and makes his Abode, being worth in "moveable Goods and Subſtance to the clear Value of 40*l.* ſhall be ad-"mitted in Trial of Felonies in every Seſſions and Gaol-Delivery to be "holden in and for the Liberty of ſuch City, *&c.* albeit he have no Free-"hold; but this Act ſhall not extend to any Knight or Eſquire in ſuch "City, *&c.*"

Special

Special Proviſion is made by 11 *H.* 7. *cap.* 21. and 4 *H. cap.* 3. for Jurors in *London* in Real and Perſonal Actions above the Value of forty Marks.

By the 1 R. 3. c. 4. a Juror in the Torn was to have 20 *s.* Freehold, and 1 *l.* 6 *s.* 8 *d.* Copyhold.——By the 27 Eliz. c. 6. the 40 *s.* by 2 H. 5. c. 3. was extended to 4 *l.*

By the 4 & 5 *W.* & *M. cap.* 24. it is enacted, "That all Jurors (other "than Strangers upon Trials *per Medietatem Linguæ*) who are to be re- "turned for Trials of Iſſues joined in any of the Courts of King's Bench, "Common Pleas or Exchequer, or before Juſtices of Aſſiſe or *Niſi Prius*, "*Oyer* and *Terminer*, Gaol-Delivery, or General Qurter-Seſſions of "the Peace in any County of this Realm of *England*, ſhall every of "them have in their own Name, or in Truſt for them within the ſame "County, ten Pounds by the Year, at leaſt, above Repriſes, of Free- "hold or Copyhold Lands or Tenements, or of Lands or Tenements "of (*a*) ancient Demeſne, or in Rents, or in all or any of the ſaid * Page 256 "Lands, Tenements or Rents in Fee-ſimple, Fee-tail, or for the Life of "themſelves, or ſome other Perſon; and that in every County in *Wales*, "every ſuch Juror ſhall have in the ſame County ſix Pounds by the Year, "at leaſt, in Manner aforeſaid, above Repriſes."

(*a*) But by the Common Law a Freehold in ancient Demeſne was not ſufficient. Co. Lit. 156. b.

Provided that it ſhall be lawful to return any Perſon on a *Tales* in *England* who ſhall have 5 *l.* by the Year, or in *Wales* who ſhall have 3 *l.* by the Year, in Manner aforeſaid.

In this Statute, as alſo in the Statutes 27 *Eliz. cap.* 6. and 16 & 17 *Car.* 2. *cap.* 3 *ſect.* 2. there is a Saving to all Cities, Boroughs and Towns Corporate, of their ancient Uſages; from whence it hath been ſettled, that Trials in thoſe Places continue as before, or as preſcribed by the 23 *H.* 8. *cap.* 13. which requires Jurors to be worth 40 *l.* in Goods, *&c.* leſt there ſhould be a Failure of Juſtice, it being generally impracticable to get a ſufficient Number of ſuch Freeholders as the Statutes require in Towns; but it has been agreed, that for Trials in *London* for (*b*) High Treaſon, every Juror ought to have ſuch Freehold or Copyhold as is required by 4 & 5 *W.* & *M. cap.* 24.

Vent. 366. Skin. 91. pl. 8.

(*b*) *Stat. Tri.* vol. 6. fol. 58. *Francia's* Trial.

By the 3 *Geo.* 2. *cap.* 25. *ſect.* 18. it is enacted, "That any Perſon or "Perſons having an Eſtate in Poſſeſſion in Land, in their own Right of "the yearly Value of 20 *l.* or upwards, over and above the reſerved Rent "payable thereout, ſuch Lands being held by Leaſe or Leaſes for the "abſolute Term of 500 Years, or more, or for 99 Years, or any other "Term, determinable on one or more Life or Lives; the Names of every "ſuch Perſon or Perſons ſhall and may, and are hereby directed and re- "quired to be inſerted in the reſpective Liſts, in order to their being in- "ſerted in the Freeholders Book; and the Perſons appointed to make ſuch "Liſts, are hereby directed to inſert them accordingly; and ſuch Leaſe- "holder, or Leaſeholders, ſhall and may be ſummoned or impanelled to "ſerve on Juries, in like Manner as Freeholders may be ſummoned and "impanelled, by virtue of this or any other Act or Acts of Parliament for "that Purpoſe, and be ſubject to the like Penalties for Non-appearance; "any Law, *&c.*

And by *Sect.* 19. it is further enacted, "That the Sheriffs of the City of "*London* for the Time being, ſhall not impanel or return any Perſon or "Perſons to try any Iſſue joined in any of his Majeſty's Courts of King's "Bench, Common Pleas and Exchequer, or to be or ſerve on any Jury "at the Seſſions of *Oyer* and *Terminer*, Goal-Delivery, or Seſſions of the "Peace, to be had or held for the ſaid City of *London*, who ſhall not be

"a Houſ-

" a Houſholder within the ſaid City and have Lands, Tenements, or Perſonal Eſtate, to the Value of 100*l.* and the ſame Matter and Cauſe " alledged by way of Challenge, and ſo found, ſhall be taken and admitted as a principal Challenge; and the Perſon or Perſons ſo challenged ſhall and may be examined, on Oath, of the Truth of the ſaid " Matter.

And by *Sect.* 20. it is further enacted, " That the Sheriffs, or other Officers, to whom the returning of Juries doth or ſhall belong, for any " County, City, or Place reſpectively, ſhall not impanel or return any " Perſon or Perſons to ſerve on any Jury, for the Trial of any Capital " Offence, who at the Time of ſuch Return would not be qualified in " ſuch reſpective County, City, or Place, to ſerve as Jurors in Civil Cauſes " for that Purpoſe; and the ſame Matter and Cauſe, alledged by way of " Challenge, and ſo found, ſhall be admitted and taken as a principal " Challenge; and the Perſon or Perſons ſo challenged ſhall and may be " examined, on Oath, of the Truth of the ſaid Matter.

By the 4 *Geo.* 2. *cap.* 7. reciting, " That whereas by the very frequent " Occaſions there are for Juries in the County of *Middleſex*, and by the

*Page 257 *ſmall Number of Freeholders that are in the ſaid County, the Sheriffs of the ſaid County may be under Difficulties in procuring Juries; for Remedy whereof it is enacted, " That all Leaſeholders upon Leaſes, where the " improved Rents or Value ſhall amount to fifty Pounds or upwards *per* " *Annum*, over and above all Ground-Rents, or other Reſervations, payable by virtue of the ſaid Leaſes, ſhall be liable and obliged to ſerve " upon Juries, when they ſhall be legally ſummoned for that Purpoſe; " any Thing in this or any former Act to the contrary, *&c.*"

4. Where the Jury's not being convened from a right Place is a good Cauſe of Challenge.

Vide 2 Hawk. P. C. 182-3. 403. *Vide* Tit *Actions Local and Tranſitory.* 5 Mod. 405.

The Jury is regularly to come from that County in which the Matter is alledged to ariſe, and antiently from the Vicinity or very Hundred, perſuant to that Maxim, *Vicini Vicinorum Facta præſumuntur ſcire*, Perſons living in the Neighbourhood being eſteemed the moſt proper Judges of the Facts done within its Limits, as being moſt likely to be proved by Witneſſes, and charged upon Perſons with whoſe Integrity and Reputation they are beſt acquainted.

2 Rol. Abr. 601, 603.

But if a Declaration contains Matters lying in two Counties that join, the Jury may come out of both Counties, becauſe the Sheriffs may be ſuppoſed to meet on the Bounds of each County, and impanel the *Pares* there; but if the Counties cannot join, and conſequently the Sheriffs cannot meet each other in order to impanel, as if the Iſſue were, whether a Road from *London* to *York*, and from *York* to *London*, *&c.* this may be tried in either County.

5 Mod. 223.

So it is ſaid, that if a Man forge a Deed in one County, and publiſh it in another, the Trial ſhall be by a Jury of both Counties; for that the Writing, as well as the Publication of that Writing, is material †.

†He may be tried in the one for *Forging*, or in the other for *Uttering*, knowing it to be forged.

Hob. 330. 2 Brownl. 212.

A Party Jury of the Counties of *Bedford* and *Hereford* came to the Bar, and firſt was ſworn one of one County, and another of the other County, and ſo on in order, till one of the County of *Bedford* was challenged, and then the Court proceeded to the next of that County till one was ſworn, and ſo of the other County, until ſix of each County were ſworn; for if there

there ſhould be ſix ſworn of the County firſt, and ſix of the other afterwards, it were diſorderly and (*a*) erroneous.

(*a*) If the Iſſue be to be tried by two Counties, and one full Inqueſt appear of one County, but the Inqueſt remain for Default of Jurors of the other County, a *Tales* ſhall be awarded to the County where the Default is, not to the other. *Trials per Pais* 69.

If the Jury did not come from the Hundred, it was (*b*) a good Cauſe of Challenge to the Array, and it ſeems that originally they were (*c*) all obliged to be of the Hundred; this was changed by Statute, and they were ſettled firſt at (*d*) ſix, afterwards at (*e*) two, from the Difficulty of getting Hundredors, and the Partiality they found amongſt them, Neighbours having generally a particular Attachment to one Party more than the other. Co.Lit. 157. a. Hard. 228. *Tri. per Pais* 185. 21 Vin. Abr. 217. (*b*) But ſee now Stat. 4. An. c. 16. ſ. 6. [Writs of *Venire* to be *de corpore comitatus.*] 24 Geo. 2. c. 18. ſ. 3. (*c*) It is ſaid, that upon Indictments of Treaſon or Felonies, the Priſoner pleading Not guilty, there ought at common Law to be four Hundredors returned, the Statute requiring ſix, and two Hundredors, not extending to Treaſon or Felony.—But my Lord *Hale* ſays, that he never knew any Challenge for Default of Hundredors upon a Trial of an Indictment for Felony or Treaſon. 2 Hal. Hiſt. P. C. 272. (*d*) By 35 H. 8. c. 6. (*e*) By 27 Eliz. c. 6.

And as the Jury was to come from the Hundred, it was neceſſary to lay the *Venue* from ſome known Place where the Fact is ſuppoſed to be done; as in a Vill, Caſtle, Manor, Foreſt; becauſe if it was not a known Place, there could be no proper Direction to the Sheriff who were the *Pares* that were to try the Fact there: it has been held, that a Street * or Lane is no proper Place for a *Venue*, becauſe it is not ſuppoſed to be ſufficiently known to the Sheriff in what Hundred it is; but a Street in a Pariſh is a proper *Venue*, becauſe it is ſufficiently known in what Hundred the Pariſh is. For this *vide* 2 Hawk. P. C. 182. * Page 258

If the Lord of the Hundred be a Party, then it is ſufficient they ſhould come from the next Hundred. Co.Lit. 157. a.

So if an Action be brought on the Statute of *Winton*, there, from the apparent Partiality, the Jury muſt come from the next Hundred where the Robbery was committed; for the proper *Pares* for the Trial of every Fact are the neareſt (*f*) impartial Men to the Place where the Fact was done. 2 Rol. Abr. 596. (*f*) It is ſaid that no Inhabitant of a County ought to be Juror for the Trial of an Iſſue, whether the County be bound to repair a Bridge or not. 6 Mod. 307.

He that takes ſuch a Challenge muſt ſhew in what Hundred the Viſne lies, and he muſt take it before ſo many are ſworn as will ſerve for the Hundred, and he that is challenged for the Hundred ſhall not be drawn abſolutely, but ſhall remain *propter Hundredum.* Co.Lit. 158. a. Dyer 231. pl. 3.

If a Perſon dwell in the Hundred, whether he have any Freehold there or not, or if he had a Freehold there when he was returned, and ſell it before he appear, he is a good Hundredor; but if he ſell all his Freehold, he may be challenged abſolutely †. Co.Lit. 157. a. † Ld. *Coke* ſays, 157. a. if, after his Return, he ſelleth away his Land, he may be challenged.——But as the Stat. 4 Ann. c. 16. directs the *Venire* to be *de corpore comitatus*, this Law is now obſolete, and only ſtands here, to ſhew what the Law formerly was; in Civil Suits, *&c. aliter*, as to Proſecutions Criminal, *&c. vide infra.*

If divers Hundreds are in a Leet, or if the Cauſe of Action aroſe in divers Hundreds, the Hundredors may come from any of them. Co.Lit. 157. a.

And now by the 4 & 5 *Annæ cap.* 16. no Hundredors are required, except in Proſecutions criminal, and on penal Statutes, becauſe in other Caſes the *Venire* ſhall be *de Corpore Comitatus*, and that too in Trials of Iſſues on penal Statutes by 24 *Geo.* 2. *cap.* 18. *ſ.* 2.

5. Where

5. Where Partiality in the Juror is a good Cauſe of Challenge; and therein where it ſhall be ſaid a principal Cauſe of Challenge, or to the Favour.

Co. Lit. 158. a. Stat. 3 Geo. 2. c. 25. ſ. 8. perpetuated by 6 Geo. 2. c. 37. whereby one Panel is to be returned for the whole County, and not leſs than 48 in each Panel Cauſes of Challenges to the Polls, are not ſo minutely entered into as formerly. Co. Lit. 158. a.

Jurors ought to be *omni Exceptione Majores*, and by the Words of the Writ ſuch *per quos Rei Veritas melius ſciri poterit, & qui nec* the Plaintiff, *nec* the Defendant, *aliqua Affinitate attingunt*; which Words contain all Cauſes of Objection from Partiality or Incapacity, Conſanguinity, and Affinity; therefore if the Juror be under the Power of either Party, as if Counſel, Servant of the Robes, or Tenant, they are expreſly within the Intent of the Writ; ſo if he has declared his Opinion touching the Matter, or has been choſen Arbitrator by one Side, or is a Pariſhioner of the Pariſh whereof the other Party is Parſon, and the Right of the Church comes in queſtion, or has done any Act by which it appears that he cannot be impartial, as if he has eat or drank at the Expence of either Party, or taken Money to give his Verdict, theſe are principal Cauſes of Challenge.

But though a Juror is not under the Diſtreſs of either Side, or has not given apparent Marks of Partiality, yet there may be ſufficient Reaſon to ſuſpect he may be more favourable to one Side than the other; and this is a Challenge to the Favour; as if the Juror's Son has married the Plaintiff's Daughter; becauſe this is not contained within the Words of the Writ, and therefore no principal Cauſe of Challenge, but only to the Favour, becauſe ſuch Juror is not within the Power of the Party; and in theſe Inducements to Suſpicion of Favour the Queſtion is, whether the Juryman is indifferent as he ſtands unſworn; for a Juryman ought to be perfectly impartial to either Side; for otherwiſe his Affection will give Weight to the Evidence of one Party, and an honeſt but weak Man may be ſo much biaſſed, as to think he goes by his Evidence, when his *Page 259 * Affections add Weight to the Evidence. Now ſince the Writ expects thoſe by whom the Truth may be beſt known, it excludes all thoſe who are apparently partial without any Trial, becauſe they are not under the Qualifications in the Writ, ſince the Truth cannot be unknown to them; but where the Partiality is not apparent, but only ſuſpicious, then the Juror is to be tried whether favourable or not, that is, whether he comes within the Deſcription of the Writ: and if the Triers think he does, then he is to be ſet aſide †.

† Suppoſing a Juror has laid a Wager, as to the Event of a Cauſe; *Qu.* if this is not a Challenge to the Favour.

Co. Lit. 157. b. (*a*) Challenges are allowed where the Iſſue concerns a City or Corporation, and they are to make the Panel, or where any of their Body be to go on the Jury, or any of Kin unto them, though the Body Corporate be not directly Party to the Suit. Hob. 87. Sand. 344.—So where a Dean and Chapter bringing an Aſſiſe, a Juror was challenged becauſe he was Brother to one of the Prebendaries. Hob. 87.

If an Action be brought (*a*) by a Corporation, and the Juror be of Kin to any Member, it is a principal Challenge.

Co. Lit. 157. If a Juror be challenged for being of Kin to one Party, it is no Counter-Plea that he is of Kin alſo to the other; for the *Venire* commands the Sheriff to return thoſe who are of Kin to neither.

Co. Lit. 158. 9 Co. 71 a. An Arbitrator choſen by both Parties, whether he have treated of the Matter or not, or choſen by one Party, if he has never treated thereof, or a Commiſſioner choſen by one Party for Examination of Witneſſes, and appointed under the Great Seal, cannot be challenged principally; but for ſuch Cauſe one may be challenged for Favour.

If

If a Juror be Couſin to him in Reverſion, it is only a Challenge to the Favour, becauſe he in Reverſion is not Party to the Record; but it would be a principal Challenge if he be Party by Voucher, Aid, or Receipt. Co. Lit. 158.

It is a principal Cauſe of Challenge, that the Juror is a Witneſs named in the Deed, or hath formerly given a Verdict on the ſame Cauſe, whether between the ſame Parties, or others; but this is only a Challenge to the Favour if the Record be of another Court, and not ſhewn forth; but if it be of the ſame Court, it is ſufficient to ſhew the Day and the Term. Co. Lit. 157. Cro. Eliz. 33. pl. 13.

By the 25 *E.* 3. *cap.* 3. it is enacted, "That no Indictor ſhall be put on Inqueſts upon Deliverance of the Indictees of Felony or Treſpaſs, if he be challenged for the ſame Cauſe by him who is ſo indicted; and this hath been adjudged a good Exception not only on the Trial of the ſame Indictment, but alſo on the Trial of another Indictment or Action, wherein the Matter found in ſuch former Indictment is either directly in iſſue, or happens to be material." Sid. 244. 2 Hawk. P. C. 418.

It is a good Cauſe of Challenge, that a Juror hath a Claim to the Forfeiture to be cauſed by the Conviction, or that he hath declared his Opinion beforehand; yet this has been adjudged to be no Cauſe of Challenge where it hath appeared to proceed not from any ill Will, but from a Knowledge of the Cauſe. 2 Hawk. P. C. 418.

But it is no good Cauſe of Challenge, that the Juror has found others guilty on the ſame Indictment; for the Indictment in Judgment of Law is ſeveral againſt each Defendant, and every one muſt be convicted by particular Evidence againſt himſelf. 2 Hawk. P. C. 418.

It hath been ruled to be a good Challenge on the Part of the King, that the Juror hath given his Dogs the Names of the King's Witneſſes. 3 Hawk. P. C. 418.

Though the King may take either a principal Challenge, or to the Favour, yet it is ſaid that the Subject cannot take a Challenge to the Favour againſt the King, becauſe every one is bound by his Allegiance to favour the King: It is ſaid to be a principal Challenge againſt the King, that the Jury is of his Livery, or his immediate Tenant. 2 Hawk. P. C. 418.

In an Information of Forgery the Defendant challenged one of the Jury, for that the Proſecutor had been lately entertained at his Houſe; and this was admitted to the Favour, though againſt the King. Vent. 309. which ſeems *cont.* to Cro. Eliz. 663.

* A Juror was challenged becauſe he was Tenant of a Manor to which there was a Court-Leet, of which the Plaintiff was Steward; and it was held that this was no principal Challenge, but only to the Favour. *Page 260 Allen 29.

Upon a Trial at Bar the Queſtion was, whether the Fair called *Wayhill Fair* ſhould be kept at *Wayhill*, or at *Anderry*, and one of the Jury was challenged becauſe he lived at *Wayhill*; and the Objection was, that the Fair occaſioned Manure to improve the Ground; on the other Side it was conſidered, that the Fair occaſioned Trampling of the Graſs; and this being a Challenge to the Favour, two of the Jurors were ſworn to be Triers; and their Oath was, *You ſhall well and truly try whether* A. *(the Juryman challenged) ſtand indifferent between the Parties to this Iſſue.* Salk. 152. pl. 1.

Either Party labouring a Juror to appear, is no Cauſe of Challenge at all, but a lawful Act †. Dyer 45. a. pl. 27.

† But *qu.* if the Party had ſtated his Caſe to the Juror?

6. Where the Degree and Quality of the Juror is a good Cauſe of Challenge; and herein who are exempt from ſerving on Juries.

It ſeems to be agreed, that all Perſons, whoſe Attendance is required in the ſuperior Courts of Juſtice, ſuch as Serjeants at Law, Counſellors, Attornies, *Vide* Tit. *Privilege.*

Attornies, and other Officers of the Courts, are ſo far privileged as not to be ſummoned on Juries; alſo Peers of the Realm are excluded, as not coming within the Qualifications mentioned in the Writ, *viz. Ad faciendum quand' Jurat' Patriæ*; for they are not *Pares Patriæ*, but *Pares* of an higher Rank; and therefore it is clearly (*a*) agreed, that if a Peer be returned on a Jury, and bring a Writ of Privilege, he ſhall be diſcharged; alſo it ſeems to be the (*b*) better Opinion, that even without ſuch a Writ he may challenge himſelf, or be challenged by either Party.

(*a*) Dyer 314. Moor 167. (*b*) 2 Rol. Abr. 646. Co. Lit. 157. 9 Co. 49. 6 Co. 53. Jones 153.

Paſch. 17. Car. 2. Sir *Edw. Bainton*'s Caſe.

But Members of the Houſe of Commons ſeem not to have any Privilege to be exempt from ſerving on Juries; yet in the Caſe of Sir *Edward Bainton*, who being returned on a Jury in *B. R.* the Court would not force him to be ſworn againſt his Will, he being a Parliament-Man, and the Parliament then ſitting.

4 Inſt. 269. —And it is ſaid, that they may have a Writ *De non ponendis in Aſſiſis & Juratis* againſt the Sheriff, or any one who hath Return of Writs; and if notwithſtanding ſuch Writ the Sheriff will return them, they may have an Attachment. 1 Co. 105.—A Juror ſurmiſed at the Bar, that he was a Tenant in Antient Demeſne, and had his Charter in his Hand, and prayed to be exempted from the Jury, and diſcharged; but the Court did not regard it, but cauſed him to be ſworn; and it was held, that his proper Remedy was againſt the Sheriff, and that if he had made Default and loſt Iſſues, he might ſhew his Charter in the Exchequer upon the Amercement eſtreated, and there he ſhould be diſcharged. Leon. 207. ——By the Common Law a Freehold in Antient Demeſne was not a ſufficient Qualification for a Juror. 9 H. 7. 1. pl. 2. Bro. Challenge 157. Co. Lit. 156. b. But it is made ſo by 4 & 5 W. 3. c. 24. *Vide ante* 255, 6.

Tenants in Antient Demeſne are not to be impanelled to appear at *Weſtminſter*, or elſewhere in any other Court, upon any Inqueſt or Trial of any Cauſe.

Sid. 127, 243. Raym. 113. Hard. 389, &c.

It ſeems agreed, that the King by Grant or his Charter may exempt one, two, or more from ſerving on Juries; but he cannot exempt a whole County or Hundred, becauſe in ſuch Caſe there would be a Failure of Juſtice; alſo it ſeems that ſuch Exemption does not extend to Jurors returned into the King's Bench, unleſs there be expreſs Words including that Court; alſo by the better Opinion, the Sheriff cannot return ſuch Privilege of Exemption, but each particular Juror muſt come in and demand it.

2 Inſt. 446. F.N.B. 165. *Page 261

By the Statute of *Weſtminſter* 2. *cap.* 38. it is expreſly provided, "That neither Old Men above the Age of ſeventy Years, nor Perſons perpetually "ſick, nor thoſe who are infirm at the Time of their Summons, nor thoſe "* who do not reſide in the County, ſhall be put in Juries, or in the leſſer "Aſſiſes:" In the Conſtruction of which it hath been held, that though ſuch Perſons may ſue out a Writ of Privilege for their Diſcharge, grounded on this Statute, yet if they be actually returned, and appear, they can neither be challenged by the Party, nor excuſe themſelves from not ſerving, if there be not a ſufficient Number without them †.

† But the Court, on Application, will generally excuſe, if there is a ſufficient Number remaining.

Dalt. Sher. 121. *Trial per Pais* 86.

Clerks or Perſons in (*c*) Holy Orders, Coroners, Miniſters of the Foreſt, Officers of the Army, and other Officers and Miniſters belonging to the King ‡, are exempt from ſerving on Juries.

(*c*) Where before the Return the Party became a Miniſter of the Church, and at the Day of the Return he appeared, and prayed to be diſcharged, according to the Privilege of thoſe of the Miniſtry; but the Court would not allow of his Prayer, becauſe that at the Time of the Panel made he was a Layman. 4 Leon. 190. *Beecher*'s Caſe.——‡ Sometimes, where the Perſon's Attendance was not immediately neceſſary, the Court has refuſed to excuſe a Perſon in the King's Service.

By the 6 *W.* 3. *cap.* 4. " Every Perſon uſing and exerciſing the Art of " an Apothecary in the City of *London*, or within ſeven Miles thereof, " being free of the Society of Apothecaries in the ſaid City, and who ſhall " have been duly examined and approved, *&c.* for ſo long Time as he " ſhall exerciſe the ſaid Myſtery, and no longer, ſhall be exempted from " ſerving on any Jury or Inqueſt; and other Perſons exerciſing the ſaid Art " of an Apothecary in any other Parts of this Kingdom, who have ſerved " as Apprentices ſeven Years, according to the Statute 5 *Eliz. cap.* 4. ſhall " likewiſe be exempted from ſerving on Juries for ſo long Time as they " ſhall uſe and exerciſe the ſaid Art, unleſs ſuch Perſon voluntarily conſent " to ſerve."

By the 7 & 8 *W.* 3. *cap.* 21. all regiſtered Seamen are exempted from ſerving on Juries.

By the 7 & 8 *W.* 3. *cap.* 34. it is enacted, " That no Quaker, or reputed " Quaker, ſhall ſerve on Juries."

7. Where from the Quality of either Party it is a good Cauſe of Challenge, that a Knight is not returned.

Here we muſt obſerve, that if a Peer be impleaded by a Commoner, yet ſuch Caſe ſhall not be tried by Peers, but by a Jury of the Country; for though the Peers are the proper *Pares* to a Lord of Parliament in (*b*) Capital Matters, where the Life and Nobility of a Peer is concerned, yet in Matter of Property the Trial of Facts is not by them, but by the Inhabitants of thoſe Counties where the Facts ariſe, ſince ſuch Peers living through the whole Kingdom, could not be generally cogniſant of Facts ariſing in ſeveral Counties, as the Inhabitants themſelves where they are done; but this Want of having Noblemen for their Jury was compenſated as much as poſſible, by returning Perſons of the beſt Quality.

See Stat. 24 Geo. 2. c. 18. f. 4. whereby this Challenge is taken away. 2 Stra. 1025. *ante* 252.

(*b*) In which Caſe a Peer cannot challenge any of his Peers, becauſe the whole Peers ſit upon him, who are his proper Judges. Moor 621. Co. Lit. 156.

And therefore if a Peer of the Realm or Lord of Parliament be Demandant or Plaintiff, Tenant or Defendant, there muſt be a Knight (*c*) returned of his Jury, be the Lord (*d*) Spiritual or Temporal, or elſe the Array may be quaſhed; but (*e*) if he be returned, although he appear not, yet the Jury may be taken of the Reſidue; and if others be joined with the Lord of Parliament, yet if there be no Knight returned, the Array ſhall be quaſhed againſt all.

Co. Lit. 156. a. 6 Co. 53.

(*c*) By 24 Geo. 2. c. 18. f. 4. this Challenge is taken away.

(*d*) That a Biſhop being indicted for a Treſpaſs, a Knight ought to be returned. Leon. 5 *.

(*e*) That if a Knight be but returned on a Jury when a Nobleman is concerned, it is not material whether he appear and give his Verdict or no. Mod. 226.

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* *Sed qu.* If not within the Statute 24 Geo. 2. c. 18. which takes away ſuch Challenge?

But though a Peer may be concerned in the Event of a Cauſe, as if he have the Reverſion upon an Eſtate for Life, and an Action is brought againſt the Tenant for Life, yet it is no Cauſe of Challenge if a Knight be not returned.

Skin. 229. pl. 8.

* Upon an Iſſue between a Peer of the Realm and another, if the *Venire facias* be *quod ſummoneat* 12 *Liberos & Legales Homines*, and does not ſay

* Page 262

Rol. Abr. 37. between the Earl of *Worceſter* and *Frode*.

tam

tam Milites quam alios, as the Regiſter is, (*a*) though the Peer of the Realm may aſſign it for Error, yet the other cannot, becauſe it does not concern him.

(*a*) Yet this being the Error of the Court, it is ſaid it may be aſſigned by either. 2 Sand. 258.——And it is ſaid, that the other Party may take Advantage of a Knight's not being returned, as well as the Peer. 2 Show. 423. But *vide* the Statute 24 Geo. 2. c. 18.

Mod. 226. 2 Mod. 182. Counteſs of *Northumberland*'s Caſe.

If there be no other Knights in the County, a Serjeant at Law that is a Knight may be returned, and his Privilege ſhall not excuſe him.

Skin. 229. pl. 8. Counteſs of *Conway*'s Caſe. 2 Show. 422-3.

A Challenge to the Array *qui nullo Milite in eodem Panello exiſtente returnat'*, is not good; but it muſt be averred, that ſuch a one and ſuch a one returned upon the Panel are not Knights, and then it may be tried.

Mich. 9. Geo. 2 in *B. R.* in the Caſe of *Grimſton* and *Gardner*; & *vide ſupra* of Challenges to the Array.

It hath been ſettled, that the Leſſor of the Plaintiff being a Nobleman, it was no Cauſe of Challenge to the Array, that a Knight was not returned, though there be an Averment that the Ejectment is brought to try the Peer's Title, becauſe the Leſſor does not appear as a Party to the Record.

Co. Lit. 156. a. Leon. 303. Dalſ. 68. Jenk. 11, 89.

Alſo in an Attaint there ought to be a Knight returned of the Jury, and in a Writ of Right four Knights were to be returned.

8. Of Trials *per Medietatem Linguæ*, where an Alien is Party.

By the 28 *E.* 3. *cap.* 13. *ſect.* 2. it is enacted, "That in all Manner of "Inqueſts and Proofs which be to be taken or made againſt Aliens and "Denizens, be they Merchants or others, as well before the Mayor of the "Staple as before any other Juſtices or Miniſters, although the King be "Party, the one Half of the Inqueſt or Proof ſhall be Denizens, and the "other Half Aliens, if ſo many Aliens and Foreigners be in the Town or "Place where ſuch Inqueſt or Proof is to be taken, that be not Parties, "nor with the Parties in Contracts, Pleas, or other Quarrels, whereof ſuch "Inqueſts or Proofs ought to be taken; and if there be not ſo many Ali-"ens, then ſhall be put in ſuch Inqueſts or Proofs as many Aliens as ſhall "be found in the ſame Towns or Places, which be not thereto Parties, nor "with the Parties as aforeſaid, and the Remnant of Denizens which be "good Men, and not ſuſpicious to the one Party nor to the other."

2 Hawk. P. C. 410. (*b*) And therefore it hath been adjudged, *quorum quilibet habeat quatuor Libratas terræ*, &c. ſhall be applied to the *Engliſh* only. Cro. Eliz. 272, 841.

In the Conſtruction of this Statute it hath been agreed, that the Statutes which require that the Jurors ſhall have Tenements to a certain Value, do not (*b*) extend to Aliens returned by Virtue of this Statute, but only to Denizens, who are to have Lands or Tenements to the ſame Value as in other Caſes.

2 Hawk. P. C. 419.

Alſo it is ſettled, that thoſe on the Grand Jury, or who find an Indictment againſt an Alien need not be Aliens.

2 Hawk. P. C. 419.

Neither is it neceſſary that the Petit Jury in an Action or Appeal by an Alien againſt an Alien, ſhould be Half Aliens, and Half *Engliſh*; for the Words are, *All Inqueſts*, &c. *between Aliens and Denizens.*

If

• If an Alien neglect to pray the Benefit of the Statute (*a*) before the Return of a common *Venire*, he can neither except to ſuch *Venire*, nor pray a ſubſequent Proceſs *de Medietate Linguæ*. • Page 263 Dyer 28. pl. 180, 145. pl. 60, 304. pl. 51, 357. pl. 45. 2 Rol. Abr. 643. Cro. Eliz. 869.

(*a*) If upon an Indictment of Felony againſt an Alien he plead Not guilty, and a common Jury be returned, if he doth not ſurmiſe his being an Alien, before any of the Jury ſworn, he hath loſt that Advantage; but if he alledge that he is an Alien, he may challenge the Array for that Cauſe, and thereupon a new Precept or *Venire* ſhall iſſue, or an Award be made of a Jury *de Medietate Linguæ*; but it is more proper for him to ſurmiſe it upon his Plea pleaded, and thereupon to pray it. 2 Hal. Hiſt. P. C. 272.

The Return of a *Venire de Medietate Linguæ* ought to (*b*) ſhew which of the Jurors are Denizens, and which Aliens, and a full Number of each muſt appear to be ſworn; if there be not enough to make up a full Number of ſix Denizens and ſix Aliens, the Juſtices of *Niſi Prius* (*c*) may, by Conſtruction of the Statutes which give a *Tales de Circumſtantibus*, award ſuch *Tales* for ſo many Denizens and Aliens as ſhall be wanting. Cro. Eliz. 818.

(*b*) But this being only a Miſreturn, is helped by Verdict in Caſes within the Statutes of Jeofail. Cro. Eliz. 84.

(*c*) 10 Co. 104 Cro. Eliz. 305.

If on a *Venire* of Half Denizens and Half Aliens the Sheriff return twelve all Aliens, and among them ſome who in Truth are not ſuch, the Party ſhall not be concluded by ſuch Return, but may notwithſtanding challenge the Array for want of a ſufficient Number of Aliens. 2 Rol. Abr. 643.

Some of the Precedents of Awards of *Venire's de Medietate Linguæ* mention, that the Aliens to be returned ſhall be of the ſame Country whereof the Party alledges himſelf; but others direct generally, that one Half of the Jury ſhall be Aliens, without ſpecifying any particular Country; and theſe laſt ſeem moſt agreeable to the Statute, and to be confirmed by the late Practice, and great Number of Authorities. 2 Hawk. P. C. 420.

It hath been held, that Denizens ſo made by Letters Patent are Denizens within the Intent of this Statute; alſo that before the Union of *England* and *Scotland* under *James* I. a *Scot* was not an Alien within the Meaning of this Statute. 2 Hawk. P. C. 420.

It hath been held, that as to Treaſon this Statute is repealed by 1 & 2 *Ph. & Mar. cap.* 10. which requires that Trials of Treaſon ſhall be according to the Common Law. 2 Hal. Hiſt. P. C. 271. 2 Hawk. P. C. 420.

By the 1 & 2 *P. & M. cap.* 4. *ſect.* 3. & 5 *El. cap.* 20. *ſect.* 3. Perſons made Felons, as *Egyptians*, are to be tried by the Inhabitants of the County or Place where they ſhall be taken, and not *per Medietatem Linguæ*.

9. Of peremptory Challenges.

By the Common Law, in all Capital Caſes (in which only peremptory Challenges were allowed) the Priſoner could challenge thirty-five peremptorily; and this was becauſe the Trial by the Petty Jury came inſtead of the Ordeal, and the Petty Jury of twelve being after the Manner of the Canonical Purgation, and becauſe the whole *Pares* were not on his Jury, but only a ſelect Number was choſen by the Criminal himſelf, as was uſual among the Canoniſts, therefore they took a middle Way, and gave the Defendant Liberty to challenge peremptorily any Number under three Juries, four Juries being as many as generally appeared, to make the total *Pares* of the County. Lamb. 4. c. 14.

This Kind of Challenge, as has been obſerved, was allowable by the Common Law in all Capital Caſes, both upon Indictments and Appeals, and alſo in Miſpriſion of High Treaſon; but it was enacted by 33 *H.* 8. *cap.* 23. *ſect.* 5. *That it ſhould not be allowed in any Caſes of High Treaſon, nor Miſpriſion of High Treaſon*; which Statute being repealed by 1 *Ph. & Mar.* 2 Hal. Hiſt. P. C. 268. 2 Hawk. P. C. 413.

cap.

* Page 264 * *cap.* 10. the antient Courſe of the Common Law, as to Trials of Treaſon is reſtored, and conſequently ſuch Challenge revived; but it is made a Doubt, whether by any Statute it is revived in Caſe of Miſpriſion of Treaſon, the Statute 1 *Ph. & Mar. cap.* 10. not extending, as it is ſaid to Miſpriſion of High Treaſon.

2 Hal. Hiſt. P. C. 267. 2 Hawk. P. C. 413. It is enacted by 22 *H.* 8. *cap.* 14. *ſect.* 7. made perpetual by 32 *H.* 8. *cap.* 3. That no Perſon arraigned for any Petit Treaſon, Murder or Felony, be admitted to any peremptory Challenge above the Number of Twenty; but it has been held that 1 & 2 *Ph. & Mar. cap.* 10. *ſect.* 7. which reſtores the Courſe of the Common Law as to Trials of Treaſon, has revived the old Challenge of Thirty-five in Trials of Petit Treaſon; and therefore it is agreed, that at this Day, in Caſes of High Treaſon, and Petit Treaſon, the Priſoner may challenge Thirty-five peremptorily, and Twenty in all other Capital Offences.

2 Hal. Hiſt. 267. 2 Hawk. P. C. 411. and ſeveral Authorities there cited. This peremptory Challenge ſeems, by the better Opinion, to be only allowable when the Priſoner pleads the General Iſſue; therefore by the Common Law, if a Man were outlawed of Felony or Treaſon, and brought a Writ of Error upon the Outlawry, and aſſigned ſome Error in Fact, whereupon Iſſue was joined, he could not challenge peremptorily; the like Law if he had pleaded any foreign Plea in Bar or in Abatement, which went not to the Trial of the Felony, but of ſome collateral Matter only.

2 Hal. Hiſt. P. C. 263. There ſeems to be ſome Diverſity of Opinions in caſe of a Priſoner's Challenging peremptorily more than he is allowed by Law; and herein my Lord *Hale* lays down the Law to be, that at Common Law if the Priſoner peremptorily challenged above Thirty-five Perſons, and inſiſted upon it, and would not leave his Challenge, then in caſe of an Indictment of High Treaſon it amounted to *Nihil dicit*, and Judgment of Death ſhould be given againſt him; but in caſe of Petit Treaſon or Felony, the Priſoner anciently was put to *Peine fort & dure*, as declining the Trial the Law appointed; the Conſequence whereof was only the Forfeiture of his Goods, but it amounted to no Attainder, and conſequently no Eſcheat of his Lands; and thus, ſays he, the Practice was until the Beginning of the Reign of *H.* 7. but afterwards by the Advice of all the Judges of both Benches, it was reſolved, that the Party ſo peremptorily challenging above Thirty-five, ſhould have Judgment of Death, and that it amounted to an Attainder, for having pleaded to the Felony, and put himſelf upon the Country, here could be no ſtanding mute; and therefore the Judges reſolved on this Courſe as moſt conſonant to Law, to be practiſed in all Circuits; but for all this, adds he, the better Opinion of later Times, as well as of former is, that the Judgment in the Caſe of ſuch a peremptory Challenge of above Thirty-five at the Common Law, in caſe of Felony, was not an Attainder but only Penance, to which the Party was awarded without having any Jury impanelled.

2 Hal. Hiſt. P. C. 296, 270. 2 Hawk. P. C. 414. There ſeems alſo ſome Diverſity of Opinions, as to what is to be done with a Priſoner who, ſince the Statute of 22 *H.* 8. *cap.* 14. challenges about Twenty in Felony; and herein the better Opinion ſeems to be, that he ſhall neither forfeit his Goods, nor have Judgment of Death, nor of *Peine fort & dure*, but ſhall only be over-ruled as to his Challenges, ſo far as they exceed Twenty, and put upon his Trial; and herewith agrees my Lord *Hale*, and that, he ſays, for two Reaſons; 1. Becauſe the Statute hath made no Proviſion to attaint the Felon, if he challenges above the Number of Twenty. 2. Becauſe the Words of the Statute of 22 *H.* 8. *cap.* 14. are, *That he be not admitted to challenge above the Number of Twenty*; ſo that if he challenge above Twenty peremptorily, his Challenge ſhall only be diſallowed.

2 Hal. Hiſt. P. C. 268. If twenty Men are indicted for the ſame Offence, though by one Indictment, yet every Priſoner is allowed his peremptory Challenge; and if there

* there be but one *Venire fac.* awarded to try them, the Perſons challenged by any one ſhall be withdrawn againſt them all. * Page 265

If *A.* be indicted and plead Not Guilty, the Jury appears, he challengeth ſix of the Jury for Cauſe, and the Cauſes found inſufficient, and the ſix are ſworn, and the reſt of the Jury challenged off, whereby the Inqueſt remains *pro defectu Juratorum*; a *Tales* granted, and the Jury appear, the Priſoner may challenge peremptorily any of the ſix that were before challenged, for Cauſe allowed and ſworn, for it is poſſible a new Cauſe of Challenge may intervene after the former Swearing; but if a Man challenge him for Cauſe, he muſt ſhew a Cauſe happened after the former Swearing. 2 Hal. Hiſt. P. C. 270.

But if the Priſoner, upon the firſt Panel, had challenged, for Inſtance, fifteen peremptorily, and then the Jury remains for Default of Jurors, and a *Diſtringas* with a forty *Tales* is granted, he ſhall challenge peremptorily no more than will fill up his Number, *viz.* in caſe of Felony, at this Day, five more, and in caſe of Treaſon, or Petit Treaſon, twenty more, to make up his full Number of twenty peremptory Challenges in the firſt Caſe, and thirty-five in the laſt. 2 Hal. Hiſt. P. C. 270.

10. Of Challenges by the King.

The King, or any one on his Behalf, may, on ſufficient Cauſe, challenge either the Array, or the Polls, in the ſame Manner as a private Perſon may; alſo by the Common Law, the King, without aſſigning any Reaſon, but barely alledging *quod non ſunt boni pro Rege* might have challenged peremptorily as many as he thought proper. Co. Lit. 156. 2 Inſt. 431. 2 Hal. Hiſt. P. C. 271.

But this is remedied by 33 *E.* 1. *ſtat.* 4. commonly called *Ordinatio de Inquiſitionibus*, which enacteth as follows; "Of Inqueſts to be taken before "any of the Juſtices, and wherein our Lord the King is Party, how-"ſoever it be, it is agreed and ordained by the King, and all his Counſel, "that from henceforth, notwithſtanding it be alledged by them that ſue "for the King, that the Jurors of thoſe Inqueſts, or ſome of them, be "not indifferent for the King, yet ſuch Inqueſts ſhall not remain untaken "for that Cauſe; but if they that ſue for the King will challenge any of "thoſe Jurors, they ſhall aſſign of their Challenge a Cauſe certain, and "the Truth of the ſame Challenge ſhall be inquired of according to the "Cuſtom of the Court."

In the Conſtruction of this Statute it hath been clearly ſettled, that the Words thereof being general, it extends to all Cauſes, as well Criminal as Civil, whereto the King is Party. Moor 595. Co. Lit. 159.

It hath alſo been agreed, and is now the eſtabliſhed Practice of the Courts, that if the King challenge a Juror before the Panel is peruſed, he needs not ſhew any Cauſe of his Challenge till the whole Panel be gone through, and it appear that there will not be a full Jury without the Perſon ſo challenged; and if the Defendant, in order to oblige the King to ſhew Cauſe preſently, challenge *touts paravaile*, yet it hath been adjudged that the Defendant ſhall be firſt put to ſhew all his Cauſes of Challenge, before the King need to ſhew any. Co. Lit. 156. Vent. 309. Raym. 473. Skin. 82. 2 Hal. Hiſt. P. C. 271.

11. At what Time a Challenge is to be taken.

It is laid down as a Rule, that there can be no Challenge either to the Array, or Polls, before a full Jury appears; and therefore in a Caſe where the Plaintiff, after he had prayed a *Tales*, challenged the Array thereof for Partiality in the Sheriff; though it was objected, that this being by his own Deſire, he was afterwards eſtopped to take any Exceptions to Hob. 235. *Vicars* ver. *Langham.*

the

Page 266 the Sheriff; yet the Challenge was allowed good, and the *Venire* directed to the Sheriffs; for if he had not prayed a *Tales*, there could not have been a full Jury, and then there could be no Challenges.

Co. Lit. 158. a. Yelv. 23. Cro. Car. 291. Hob. 235. 2 Rol. Abr. 658. Jenk. 310. 2 Brownl 275. 2 Hal. Hiſt. P. C. 274.

Alſo it is laid down as a Rule, that no Juror can be challenged without Conſent after he hath been ſworn, either in a Criminal or Civil Caſe, or either at the Suit of the King or Subject, whether on the ſame Day, or according to the better Opinion, on a former on the ſame Trial, unleſs it be for ſome Cauſe which happened ſince he was ſworn.

Co. Lit. 158. a.

He who hath ſeveral Cauſes of Challenge againſt a Juror muſt take them all at once.

Co. Lit. 158. a.

If a Jury be challenged by one Party and found indifferent, the other Party may challenge him afterwards.

Co. Lit. 158. a.

In caſe of Treaſon, or Felony, if a Priſoner challenge a Juror for Cauſe which is held inſufficient, he may afterwards challenge him peremptorily.

Co. Lit. 158. a. See now Stat. 4 Ann. c. 16. ſ. 6. & 24 Geo. 2. c. 18. ſ. 3.

A Challenge for the Hundred muſt be taken before ſo many to be ſworn as will ſerve for Hundredors, or elſe the Party loſeth the Advantage thereof.

Co. Lit. 158. a.

After a Challenge to the Array, the Party may challenge the Polls; but after a Challenge to the Polls, there can be no Challenge to the Array.

12. How ſuch Challenge is to be tried.

Co. Lit. 155. 157. b.

Here we muſt take notice, that a principal Cauſe of Challenge being grounded on ſuch a manifeſt Preſumption of Partiality, that if it be found true, it unqueſtionably ſets aſide the Array, or the Juror, without any other Trial than its being made out to the Satisfaction of the Court, before which the Panel is returned; but a Challenge to the Favour, where the Partiality is not apparent, muſt be left to the Diſcretion of the Triers.

2 Rol. Rep. 363. Co. Lit. 158. 2 Hal. Hiſt. P. C. 275.

If the Array be challenged, it lies in the Diſcretion of the Court how it ſhall be tried; ſometimes it is done by two Attornies, ſometimes by two Coroners, and ſometimes by two of the Jury; with this Difference, that if the Challenge be for Kindred in the Sheriff, it is moſt fit to be tried by two of the Jurors returned; if the Challenge found in Favour of Partiality, then by any other two aſſigned thereunto by the Court.

Co. Lit. 158. 2 Hal. Hiſt. P. C. 275.

As to a Challenge to the Polls, if a Juror be challenged before any Juror ſworn, two Triers ſhall be appointed by the Court; and if he be found indifferent, and ſworn, he and the two Triers ſhall try the next Challenge; and if he be tried, and found indifferent, then the two firſt Triers ſhall be diſcharged, and the two Jurors tried and found indifferent ſhall try the reſt.

2 Hal. Hiſt. P. C. 275.

If the Plaintiff challenge ten, and the Priſoner one, then he that remains ſhall have added to him one choſen by the Plaintiff and another by the Priſoner, and they three ſhall try the Challenge; if ſix be ſworn, and the reſt challenged, the Court may aſſign any two of the ſix ſworn to try the Challenges.

Co. Lit. 158. a.

The Triers cannot exceed two, unleſs it be by Conſent; which was taken up in Imitation of the Trial of the Summons of the Party, which was by two Perſons; this being (*a*) whether ſuch a Juror as was deſcribed

(*a*) And his Oath is, You ſhall well and truly try whether *A.* the Juryman challenged, ſtand indifferent between the Parties to this Iſſue. Salk. 152. pl. 1. ——Where a Challenge is to the Array for Favour, the Plaintiff may either confeſs it, or plead to it; if he pleads, the Judges aſſign Triers to try the Array, which ſeldom exceed two, who being choſen and ſworn, the Aſſociate, or Clerk in Court, doth declare and rehearſe unto them the Matter and Cauſe of the Challenge, and after he

ſcribed in the Writ, was warned, *viz.* one *per qu' rei verit' melius ſciri poterit, &c.*

* Page 267 he hath ſo done, concludes to them thus; and ſo your Charge is to inquire, whether it be an impartial Array or a favourable one, and if they affirm it, the Clerk enters underneath the Challenge *Affirmatur*; but if the Triers find it favourable, then thus, *Calumnia vera. Trials per Pais* 165.

The Triers, as far as they act therein, are Officers of the Court, and liable to be puniſhed for any Miſdemeanor; alſo it is ſaid, (*a*) that if they find againſt Law, and the Direction of the Court, they may be fined and impriſoned.

Palm. 363. (*a*) But Q. whether they are not in this Reſpect to be conſidered as Jurors, and acting in a judicial Capacity?

The Truth of the Matter alledged as Cauſe of Challenge, muſt be made out, by (*b*) Witneſſes, to the Satisfaction of the Triers; alſo the Juror challenged may, on a *Voir dire*, be aſked ſuch Queſtions as do not tend to Infamy or Diſgrace; ſuch as, whether he hath a Freehold, whether he hath an Intereſt in the Cauſe; and in a Civil Cauſe, whether he hath given his Opinion before-hand upon the Right, which he might have done as Arbitrator between the Parties.

Co. Lit. 158. *Trials per Pais* 158. Salk. 153. pl. 3. (*b*) That one Witneſs to prove the Challenge is ſufficient. Show. 173.

But in no Caſe can a Juror be aſked, whether he hath been whipped for Larceny, or convict of Felony, or whether ever he was committed to *Bridewell* for a Pilferer, or to *Newgate* for clipping and coining, or whether he is a Villein or outlawed; becauſe theſe kind of Queſtions tend to make a Man diſcover that of himſelf which tends to his Shame, Infamy, and Diſgrace; alſo it was held in (*c*) a Trial for High Treaſon, that the Priſoner, in order to challenge a Juror, could not aſk him, whether he had not declared his Opinion before-hand that he was guilty, or would be hanged, becauſe theſe Queſtions tend to Reproach, as charging him with a Miſdemeanor.

Keeling 9. *Trials per Pais* 158. (*c*) Salk. 153. pl. 3. *Coke's* Trial.

If a Challenge be taken, and the other Side demur, and it be debated and the Judge over-rule it, it is entered upon the original Record; and if at *Niſi Prius* it appears upon the *Poſtea* what the Judge hath done; but if the Judge over-ruled the Challenge upon Debate without a Demurrer, then it is proper for (*d*) a Bill of Exceptions.

Skin. 101. pl. 19. Hutt. 24. (*d*) That ſuch Bill muſt be, that he over-ruled the Challenge, not *quod recuſ'* the Challenge. Skin. 101

It is ſaid, that a Demurrer upon a Challenge is not like to a Demurrer upon a Plea; for in caſe of a Demurrer upon a Challenge, as ſoon as the Demurrer is agreed on at the Bar, it is good enough, without other Circumſtances, ſuch as Counſel's Hand, *&c.* and the Prothonotaries of right ought to enter ſuch Demurrer.

3 Leon. 222.

(F) How Jurors are to be impanelled and ſworn.

BY the 3 *Geo. cap.* 25. *ſect.* 11. it is enacted, "That the Name of "each and every Perſon who ſhall be ſummoned and impanelled, "with his Addition and the Place of his Abode, ſhall be written in "ſeveral and diſtinct Pieces of Parchment, or Paper, being all, as near as "may be, of equal Size and Bigneſs, and ſhall be delivered to the Marſhal of ſuch Judge of Aſſiſe or *Niſi Prius*, or of the ſaid Great "Sellions,

*Page 268 " * Seſſions, or of the Seſſions of the ſaid Counties Palatine, who is to try " the Cauſes in the ſaid County, by the Under-Sheriff of the ſaid " County, or ſome Agent of his, and ſhall, by Direction and Care of " ſuch Marſhal, be rolled up all, as near as may be, in the ſame Manner, " and put into a Box or Glaſs to be provided for that Purpoſe; and when " any Cauſe ſhall be brought on to be tried, ſome indifferent Perſon, by " Direction of the Court, may and ſhall, in open Court, draw out twelve " of the ſaid Parchments, or Papers, one after another; and if any of the " Perſons, whoſe Names ſhall be ſo drawn, ſhall not appear, or be chal- " lenged and ſet aſide, then ſuch further Number, until twelve Perſons " be drawn, who ſhall appear, and after all Cauſes of Challenge ſhall be " allowed as fair and indifferent, and the ſaid twelve Perſons ſo firſt drawn " and appearing, and approved as indifferent, their Names being marked " in the Panel, and they being ſworn, ſhall be the Jury to try the ſaid " Cauſe; and the Names of the Perſons ſo drawn and ſworn ſhall be kept " apart by themſelves, in ſome other Box or Glaſs to be kept for that Pur- " poſe, till ſuch Jury ſhall have given in their Verdict, and the ſame is " recorded; or until ſuch Jury ſhall, by Conſent of the Parties, or Leave " of the Court, be diſcharged; and then the ſame Names ſhall be rolled " up again and returned to the former Box or Glaſs, there to be kept with " the other Names remaining at that Time undrawn; and ſo *toties quoties*, " as long as any Cauſe remains then to be tried.

Sect. 12. Provided, " That if any Cauſe ſhall be brought on to be tried " in any of the ſaid Courts reſpectively, before the Jury in any other " Cauſe ſhall have brought in their Verdict, or be diſcharged, it ſhall " and may be lawful for the Court to order twelve of the Reſidue of the " ſaid Parchments, or Papers, not containing the Names of any of the " Jurors who ſhall not have ſo brought in their Verdict, or be diſcharged, " to be drawn in ſuch Manner as is aforeſaid, for the Trial of the Cauſe " which ſhall be ſo brought on to be tried."

2 Hal. Hiſt. P. C. 293. In Capital Caſes the Sheriff returns the Panel of the Jury, who being called, and appearing, the Priſoners are told by the Clerk, that theſe good Men now called, and appearing, are to paſs on their Lives and Deaths, therefore if they will challenge any of them, they are to do it before they are ſworn; and if no Challenge hinder, the Jury are commanded to look on the Priſoners, and then ſeverally twelve of them, (*a*) neither more nor leſs, are ſworn.

(*a*) But if thirteen are by Miſtake ſworn, the Swearing of the laſt by Miſtake is void, and the other twelve ſhall ſerve.——But if eleven be ſworn by Miſtake, no Verdict can be taken of the eleven; and if it be, it is Error; and ſo in a Preſentment; but if twelve be recorded ſworn, no Averment lies that one was unſworn.—Upon Not guilty pleaded, twelve are ſworn to try the Iſſue; after their Departure one of the twelve leaves his Companions, which being diſcovered to the Court, by Conſent of all Parties, *B.* another of the Panel, is ſworn in the Place of *A.* and afterwards *A.* returns to his Companions, which being made known to the Court, *A.* is called and examined, why he departed; he anſwered, to drink; and being examined whether he had ſpoken with the Defendant, denied it upon his Oath; whereupon *B.* was diſcharged from giving any Verdict, and the Verdict taken of *A.* and the other eleven, and *A.* fined for his Contempt. 2 Hal. Hiſt. P. C. 296.

2 Hal. Hiſt. P. C. 294. (*b*) An Exception was taken to a Judgment in an inferior Court, that it was twelve Although there be twenty Priſoners at the Bar for ſeveral Felonies, and the Oath is general to try between the King and the Priſoners at the Bar, yet the Jury is to inquire of no (*b*) more than what they are particularly charged with; and therefore though twenty have pleaded, and ſtand at the Bar when the Jury is ſworn, yet the Court may ſtay any Number of the Priſoners, and ſo the Jury ſtand charged with no more than what are

Probi electi, triati, jurati, &c. without ſaying *ad veritat' de præmiſſis dicend'*; and this was held Error; for they might be ſworn in another Cauſe at the ſame Court; and the Difference was ſaid to be betwixt a Jury in criminal and civil Matters; for the Oath which the Jury take in criminal Matters, is that they ſhall truly try and true Deliverance make of the Priſoners at the Bar, *&c.* ſo the Court may charge them with as many Priſoners as they think fit; but in civil Matters the Jury muſt be ſworn anew in every ſevera Caſe. Mich. 29. Car. 2. in *C. B. Watſon* and *Goodman.*

* are thus particularly charged upon them; and when they go from the Bar, and have brought in their Verdict touching these Particulars charged upon them, then if the same Jury pass upon the remaining Prisoners, yet they are to be called over again, the Prisoners reminded of their Challenges and the Jury sworn *de novo* upon the Trial of the Rest of the Prisoners. *Page 269

(G) How to be kept and discharged.

WHEN the Jurors depart from the Bar, (*a*) a Bailiff ought to be sworn to keep them together, and not to suffer any to speak with them. 2 Hal. Hist. P. C. 296.

(*a*) That a Bailiff is to be sworn in a civil as well as a criminal Case. Palm. 380.

After their Departure they may desire to hear one of the Witnesses again, and it shall be granted, so he deliver his Testimony in (*b*) open Court; and also they may desire to propound Questions to the Court, for their Satisfaction, and it shall be granted, so it be in open Court. 2 Hal. Hist. P. C. 296.

(*b*) Therefore in a civil Case where the Jury withdrew to confer about their Verdict, one of the Witnesses, that was before sworn, on the Part of the Defendant, was called by the Jurors, and he recited again his Evidence to them, and they gave their Verdict for the Defendant; and Complaint being made to the Judges of Assise of this Misdemeanor, he examined the Jury, who confessed all the Matter, and that the Evidence was the same in effect that was given before, & *non alia nec diversa*; and this Matter being returned upon the *Postea*, the Opinion of the Court was, that the Verdict was not good, and a *Venire fac. de novo* was awarded. Cro. Eliz. 189. *Metcalfe* and *Dean*.

The Jury must be kept together without Meat, Drink, Fire or Candle, till they are agreed. C. Lit. 227. b. 2 Hal. Hist. P. C. 297. See Observations on the Statutes 302. Note (*k*) for the Origin of this.

So in an inferior Court, if the Jury will not agree on their Verdict, the way is, as in other Courts, to keep them without Meat, Drink, Fire or Candle, till they agree; and the Steward may from Time to Time adjourn the Court till such Agreement. Salk. 201. pl. 3. 7 Mod. 1.

If they agree not before the Departure of the Justices of Gaol-Delivery into another County, the Sheriff must send them along in Carts, and the Judge may take and record their Verdict in a foreign County. Vent. 97. 2 Hal. Hist. P. C. 297. But it is made a *Quære*, whether in such Cases the Session may be adjourned before the Verdict taken.

If there be eleven agreed, and but one dissenting, who says he will rather die in Prison, yet the Verdict shall not be taken by eleven, no nor yet the Refuser fined or imprisoned; and therefore where such a Verdict was taken by eleven and the twelfth fined and imprisoned, it was, upon great Advice, ruled the Verdict was void, and the twelfth Man delivered, and a new *Venire* awarded; for Men are not forced to give their Verdict against their Judgment. 2 Hal. Hist. P. C. 297.

If the Jury say they are agreed, the Court may examine them by Poll; and if in Truth they are not agreed, they are fineable. 2 Hal. Hist. P. C. 299.

It seems to have been anciently an uncontroverted Rule, and hath been allowed even by those of the contrary Opinion, to have been the general Tradition of the Law, that a Jury sworn and charged in a Capital Case cannot be discharged (without the Prisoner's Consent) till they have given a Verdict; and notwithstanding some Authorities to the contrary in the Reign of King *Charles* the Second, this hath been holden for clear Law, both in the Reign of King *James* the Second, and since the Revolution. 2 Hawk, P. C. 439. and several Authorities there cited; & *vide* 2 Hal. Hist. P. C. 294-5.

Page 270 (H) In what Caſes and in what Manner to have a View.

2 Rol. Abr. 725. Tit. *View.* 2 Inſt. 480. Bro. Tit. *View.* Fitz. Tit. *View.*

AT Common Law, in (*a*) moſt Real Actions, after the Demandant had counted, the Tenant might have demanded the (*b*) View of the Land; or if it were a Rent, or other Thing, View of the Land out of which it iſſued; and this was, that Things might be reduced to a greater Certainty; but becauſe this was uſed often by the Tenant for Delay, and thereby the Demandant greatly prejudiced.

(*a*) But it is ſaid, that at Common Law View did not lie in a Writ of Dower *unde nihil habet, Intruſion, Breve d'entry en le quibus, Nuper obiit, Rationabili Parte.* 2 Rol. Abr. 725. *Booth, Real Actions* 38. (*b*) That there are two Sorts of Views in real Actions; 1. View by the Party, 2. View by the Jurors, as in an Aſſiſe of Novel Deſſeiſin, Waſte, Aſſiſe of Nuſance, the Party ſhall not have View, becauſe the Jurors ſhall have View. Booth 38.

(*c*) 13 E. 1. c. 28.

By (*c*) *Weſtm.* 2. *cap.* 48. it is ordained and provided, "That from thenceforth View ſhall not be granted but in caſe when View of Land is "neceſſary; and if one loſe Land by Default, and he that loſeth moveth "a Writ to demand the ſame Land, and in caſe when one by an Exception "dilatory abateth a Writ after View of the Land, as by Non-tenure, or "Miſnaming of the Town, or ſuch like, if he purchaſe another Writ, in "this Caſe, and in the Caſe before-mentioned, from henceforth the View "ſhall not be granted, if he had View in the firſt Writ. In a Writ of "Dower, where the Dower in Demand is of Land, that the Huſband "alienedto the Tenant, or his Anceſtors, where the Tenant ought not to "be ignorant what Land the Huſband did alien to him or his Anceſtor, "though the Huſband died not ſeiſed, yet from henceforth View ſhall not "be granted to the Tenant. In a Writ of Entry alſo that is abated, be-"cauſe the Demandant miſnamed the Entry; if the Demandant purchaſe "another Writ of Entry, if the Tenant had View in the firſt Writ, he "ſhall not have it in the ſecond. In all Writs alſo where Lands be de-"manded, by reaſon of a Leaſe made by the Demandant, or his Anceſtor, "unto the Tenant, and not to his Anceſtor; as that which he leaſed to "him, being within Age, not whole of Mind, being in Priſon, and ſuch "like, View ſhall not be granted hereafter; but if the Demiſe were made "to his Anceſtor, the View ſhall lie as it hath done before."

Booth 37. 2 Rol. Abr. 726.

Since this Statute, the Demandant, as to any of the Caſes within the Statute, may counterplead the View, *i. e.* alledge Matter in Pleading which ouſts him of View; as where he that loſeth Land by Default brings a *Quod ei deforciat* for the Recovery of it, the Tenant ſhall not have View, becauſe he is well enough aſcertained of the Land by the former Record; ſo where View was had in a former Writ, and that Writ was abated after View for ſome Miſtake that appeared upon the View, as Non-tenure, Miſnaming of the Town; ſo in Dower, when it is brought againſt the ſame Tenant that purchaſed the Land of the Huſband; ſo if the Huſband died ſeiſed, it is a good (*d*) Counterplea of View in Dower.

(*d*) For this *vide Dower* Letter (I).

2 Sand. 254.

In an Action of Waſte, in which it was agreed that a View ſhould have been awarded, and that ſix, at (*e*) leaſt, of the Jurors ſhould have viewed the Place, it was reſolved, that if a View be awarded, though not returned by

(*e*) Wherever the Plaintiff is to recover *per viſum Juratorum*, there ought to be ſix of the Jury that have had the View, or know the Land in queſtion, ſo as to be able to put the Plaintiff in Poſſeſſion if he recover. Co. Lit. 158. b.——[I don't recollect any Objection ever taken that ſix at leaſt had not viewed. — And Cauſes are often tried, where leſs than ſix viewed, and where all that viewed, have not appeared at the Trial. See the Note fol. 271.]

by the Officer, and the Trial goes on, and a Verdict had, that the Omiſſion of the Officer in not Returning the View is not Error; for it was the • Duty of the Court to examine whether the Jury had a View or not; and if they found they had not, the Trial ought to have been ſtayed. • Page 271

So in an Aſſiſe in which it was likewiſe agreed, that a View was requiſite in the ſame Manner, if the Officer does not return the View, it is not Error; for the Words of the Writ are, & *interim videant*, and not & *interim haberi fac' Viſum*; ſo that the Jurors might have had the View when the Officer was not preſent; and if it were otherwiſe, the Party might have challenged the Jury for this Cauſe; and though the Officer had returned, that the Jurors had had the View, yet if upon Examination in Court it appeared otherwiſe, the Parties could not be concluded by ſuch Return. 2 Sand. 254-5.

If the Court make a Rule, that the Jury ſhall have a View, and that they ſhall not hear any Evidence thereupon, and they notwithſtanding hear Evidence; this is a good Cauſe of Challenge, and likewiſe a Miſdemeanor, for which it is ſaid, they may be puniſhed by the Court. Palm. 363.

In an Action of Waſte it was agreed; 1. That if ſix of the Jury are examined on a *Voir dire*, if they have ſeen the Place waſted, that it is ſufficient, and the Reſt of the Jury need not be examined upon a *Voir dire*, but only to the Principal. 2. It was agreed, if the Jury be ſworn that they know the Place, it is ſufficient, although they be not ſworn that they ſaw it; and although that the Place waſted be ſhewed to the Jury by the Plaintiff's Servants, yet if it be by Command of the Sheriff, it is as ſufficient as if the ſame had been ſhewn them by the Sheriff himſelf. Godb. 209. Sir *John Gage* verſus *Smith*; & *vide* Lutw. 1558. Leon. 259.

At the Trial of a Cauſe for want of a full Jury upon the principal Panel, ſome *Taleſmen* were ſworn, and had the View, but the *Diſtringas* was returnable as an original *Diſtringas*, and ſo many of the original Panel left out who were not at the View; of which the Defendant complained, and would have ſet aſide the Trial for Irregularity; but becauſe no *Venire* appeared to the Court, and the Matter ſtood upon Record as an original Trial, and the want of a *Venire* was helped by Verdict, and becauſe the Cauſe was tried by thoſe that were fitteſt, *viz.* thoſe who had the View, the Court would do nothing in it. 2 Salk. 665.

But it was ordered, that for the future, when in order to a View the laſt Juror is (*a*) withdrawn, the Plaintiff ſhall take out a new *Diſtringas*, *amoto* the laſt Man of the Panel, to diſtrain the other Twenty-three, with an *Apponas etiam decem Tales*. 2 Salk. 665. pl. 2.

(*a*) At the Aſſiſes, if a View is demanded, it muſt be after the Jury is ſworn, and then by Conſent a Juror may be withdrawn. 6 Mod. 211. —& *Holt* C. J. it may be without Conſent; and notwithſtanding ſuch View, a Juror may be challenged when he comes to be ſworn. 6 Mod. 211.

It is ſaid, that before the Court makes a Rule for a View, the *Venire facias* muſt be (*b*) returned; and then the Court may make a Rule, that ſo many of the Panel ſhall view the Premiſſes. 2 Salk. 665. pl 3. *per Holt* C. J.

(*b*) That a Jury is never ordered to view before their Appearance, unleſs in an Aſſiſe. Mod. 41.

A View is grantable in ſuch Caſes where the Title is in Queſtion; and in ſuch Caſes it may be granted on Motion, on a bare Suggeſtion, without any Affidavit. 2 Salk. 665. pl. 1.

And to this Purpoſe it is enacted by 4 & 5 *Annæ cap.* 16. "That "in any Actions brought in any of her Majeſty's Courts of Record in "*Weſtminſter*, View never granted without Affidavit, except in Waſte. Supplem. to *Barnes* 56†. In *Hilary* Term 30 Geo. 2. the Court of *K. B.* added a Clauſe to the uſual Rules for Views, purporting, that the Party praying a View conſented, that in caſe *no* View ſhould be had, or if a View ſhould be had by any of the Jurors whomſoever, (tho' not being ſix of the firſt twelve) yet the Trial ſhould proceed, and no Objection be made on Account thereof, or for want of a proper Return. Bur. Rep. 256.

† In *B. R.* The uſual Practice, is to grant a Rule for a View, on Motion of Courſe, ſigned by Council, without Affidavit.

" *Weſtminſter*, where it ſhall appear to the Courts in which ſuch Actions " are depending, that it will be proper and neceſſary that the Jurors who " are to try the Iſſues in any ſuch Actions ſhould have the View of the " Meſſuages, Lands or Place in Queſtion, in order to their better under- " ſtanding the Evidence that will be given on the Trial of ſuch Iſſues, in " every ſuch Caſe, the reſpective Courts in which ſuch Actions ſhall be de- " pending may order ſpecial Writs of *Diſtringas* or *Habeas Corpora* to iſſue,
*[Page 272 " by which the Sheriff, or ſuch other Officer, to whom the ſaid Writs " ſhall be directed, ſhall be commanded to have ſix out of the firſt twelve " of the Jurors named in ſuch Writs, or ſome greater Number of them, at " the Place in queſtion ſome convenient Time before the Trial, who then " and there ſhall have the Matters in queſtion ſhewn to them by two Per- " ſons in the ſaid Writs named, to be appointed by the Court, and the " ſaid Sheriff, or other Officer who is to execute the ſaid Writs, ſhall, by a " ſpecial Return on the ſame, certify that the View hath been had accord- " ing to the Command of the ſaid Writs."

And by the 3 *Geo.* 2. *cap.* 25. a Proviſion is made for a View, in the following Words: " That where a View ſhall be allowed in any Cauſe, " that in ſuch Caſe ſix of the Jurors named in ſuch Panel, or more, who " ſhall be mutually conſented to by the Parties or their Agents on both " Sides, or, if they cannot agree, ſhall be named by the proper Officer of " the reſpective Courts of King's Bench, Common Pleas, or Exchequer at " *Weſtminſter*, or the Grand Seſſions in *Wales*, and the Counties Palatine, " for the Cauſes in their reſpective Courts, or, if need be by a Judge of " the reſpective Courts where the Cauſe is depending, or by the Judge or " Judges before whom the Cauſe ſhall be brought on to Trial reſpectively, " ſhall have the View, and ſhall be firſt ſworn, or ſuch of them as appear " upon the Jury to try the ſaid Cauſe, before any Drawing as aforeſaid; " and ſo many only ſhall be drawn, to be added to the Viewers who appear, " as ſhall, after all Defaulters and Challenges allowed, make up the Num- " ber of twelve to be ſworn for the Trial of ſuch Cauſe."

(I) What Irregularities and Defects in convening, or in the Qualifications of the Jurors, are amendable, and aided after Verdict.

Vide Tit. *Amendment* and *Jeofail.*

HERE we may lay it down in general, that by the expreſs Words and Intent of the ſeveral Statutes of Jeofail and Amendments all Irregularities as to the Number, Qualifications and Returns of the Jurors are aided after Verdict, ſo that the *Venire* be of the ſame Place, and in the ſame Action, and between the ſame Parties.

Where the want of a *Venire, Diſtringas &c.* is aided, but not a vitious one, and where a vitious one ſhall be taken as none, *vide* Cro. Eliz. 483. Owen 59. Moor 465. Noy 57. Moor 684. pl. 535, 623. pl. 852, 696, pl. 967. Godb. 194. Leon. 329. Bulſ. 130. 3 Bulſ. 180. Brownl. 78, 97. Yelv. 69. Rol. Rep. 22. Jon. 304. Latch 116. Yelv. 109.

So if there be no *Venire facias*, or if there be ſuch a Fault in the *Venire* as makes it a perfect Nullity, ſo that it has no Relation to the Cauſe, yet if there be a good *Diſtringas*, that being one of the Jury Proceſs, the Omiſſion of the former is cured; for the Omiſſion of any judicial Writ is aided by the Statutes, and a *Venire*, that is a Nullity, and has no Relation to the Cauſe, is as if there had not been any, and ſo of *Diſtringas* where there is a proper *Venire*.

2 Rol. Abr. 201. Moor 599. pl. 826. S. P.

So if the Award of a *Venire facias* upon the Roll be well, and the Writ of *Venire facias* wrong, yet this ſhall be amended by the Roll, being

* being the (a) Warrant of the Writ, which is the Act of the Court, and the Default is only the Miſtake of the Clerk. * Page 273

(a) So where the Award upon the Roll was in a Cauſe againſt two Defendants, but the *Venire* againſt one, and amended. 3 Bulſ. 311.—& *Vide* Winch 73. Cro. Jac. 78.—But if by the Roll the *Venire* be awarded *de Vicineto* of the right Place, but the *Venire* itſelf is of a wrong, and thereupon a Jury is returned, and tries the Cauſe, it ſhall not be amended; for it appears, that the Trial was not had by ſuch a Jury as the Roll and Law require. Hob. 76. & *vide* Lit. Rep. 253.——So if there be no Place on the Roll to warrant the *Venire*. Latch 194.——Alſo in Criminal Caſes, to which the Statutes of Amendment do not extend, the *Venire*'s omitting any of the Parties is Error. 2 Hawk. P. C. 299.

So if the Writ of *Venire Facias* out of the King's Bench be *Venire Facias 12 Liberos & Legales Homines coram nobis apud Weſtmonaſterium ubicunque fuerimus in Anglia*; but the Roll is well, (the Words *apud Weſtmonaſterium* being omitted therein,) this being in *B. R.* the Writ ſhall be amended by the Roll; for this is but Matter of Form. Cro. Eliz. 467. Noy 57. Owen 59.

If the Return of the *Venire* be miſtaken, this may be amended by the Roll, and if the *Teſte* of the *Venire* be out of Term, or before Plea pleaded, it is no Error; for the *Teſte* of Judicial Writs being only Matter of Form, if miſtaken, ſhall not vitiate, ſince they have the proper Judges of the Fact by ſuch Proceſs. Yelv. 64. Moor 699. Cro. Car. 9.

Therefore if a *Venire Facias* be dated 7 *July*, and made returnable 6 *July*, a Day before the Date of the Writ, this after Verdict is amendable, becauſe a judicial Proceſs, and the Default of the Clerk. Cro. Eliz, 203, 467. Cro. Car. 38. Moor 465. pl. 657.

So if a *Venire Facias* be awarded upon the Roll, to be returned *Octabis Trinitatis*, and the Writ is made returnable ſix Days after, *ſcilicet*, a Day out of Term, but the *Diſtringas* is well without any Fault, and after the Jury impanelled find for the Plaintiff, this Writ of *Venire Facias* ſhall be amended by the Roll; for this was the Default of the Clerk only; for the Roll is the Warrant of the Writ. Cro. Car. 38. Lit. Rep. 54. Cro. Jac. 64. Cro. Eliz. 760. Moor 696. pl. 967, 711.

The Award of the *Venire* muſt be to a Day in the ſame Term, or to the next Term, but it muſt be in Term, otherwiſe it is erroneous; becauſe this is not ſuch (b) a Diſcontinuance as is aided by the Statute, ſince it is an Error in the Court by awarding the Proceſs, which makes it utterly uncertain when or where the Parties ſhould appear to receive Judgment, and it is an Act of the Court, which is erroneous, and not a Miſ-entry of the Clerk, which the Statutes do not intend to aid. Moor 465. pl. 657.

(b) *Venire* returnable on the 23d of *January*, and *Diſtringas* teſted on the 24th, held a Diſcontinuance, and that being in a criminal Caſe, not amendable. Bulſ. 141, 142. Yelv. 204. Cro. Jac. 283. 6 Mod. 281. Salk. 51. pl. 14. Ld. Raym. 1061. 2 Salk. 669. pl. 1. 6 Mod. 268. pl. 998.

If the Place be totally (c) miſawarded, this is not helped by any Statute, becauſe they have not the proper *Judices Facti*, unleſs they have them from the Place where the Fact ariſes; but if it is only miſawarded in Part, this is helped by the expreſs Words of (d) 21 *Jac.* 1. *cap.* 13. becauſe it is ſuppoſed that the Perſons that were near any Part of the Place might know the Fact in Iſſue between the Parties; and by the Statute of (e) 16 & 17

(c) Where Miſ-trials by the *Venue* not being awarded of a right Place were not aided by any of the Statutes of Amendment before 21 Jac. 1. *vide* Cro. Eliz. 468. Goulſ. 38, 47. Winch 69. 4 Leon. 84. Cro. Jac. 647. Moor 91. pl. 212. Lit. Rep. 365. Keilw. 212. 5 Co. 36. (d) For this *vide* Cro. Car. 17, 162, 284, 480. Jon. 395. Styl. 201. 206. Raym. 67.—That this Statute aids not unleſs the *Venue* ariſes from ſeveral Places, and one of thoſe Places is truly named. Sid. 20.——But if it ariſe from ſeveral Places, though in ſeveral Counties, and it is tried by one only, it is helped. 2 Lev. 122. *per Hale.*——By the Opinion of the greater Part of the Judges, where by particular Cuſtom a Trial was to be *de Vicineto* of the four Wards next adjoining, and the *Venire* is awarded *de Vicineto* of two of them only, it is helped by the Statute. 2 Sand. 258. But *Sanders dubitavit*, whether it ſhould extend to aid any Proceedings except ſuch which were according to the Courſe of the Common Law. (e) That this Statute does not extend to any Trial in an improper County. Mod. 37, 199. 2 Mod. 24. See Vaugh. 395 to 420. 2 Saund. 193. 2 Mod. 10. Raym. 206. Lev. 291. Ld. Raym. 331, 581, 695. 2 Ld. Raym. 766, 849, 869, 1212, 1214, 1408, 1418. 8 Mod. 378. 10 Mod. 30, 325. 12 Mod. 7, 130. Stra. 553, 630, 704. 2 Stra. 945. But for the Expoſition of this Statute as to this Point, *vide* Lev. 207. Sid. 326. 2 Lev. 122, 164. Sand. 247. Raym. 181, 392. Vent. 263, 272. 2 Keb. 496. 2 Jon. 82.

Car.

Car. 2. *cap.* 8. the Want of a right *Venue* is aided, ſo as the Trial was by a Jury of the proper County or Place where the Action is laid.

* Page 274 Yelv. 169. * If there be a Blank left for the County to the Sheriff whereof the Writ ſhould be awarded, yet it will be amended, becauſe it cannot be awarded to the Sheriff of any other County, and therefore it is the Omiſſion of the Officer in entering the Award of the Court; but if there were a local Plea into another County, ſo that there are two Counties mentioned in the Pleadings, there the Blank cannot be amended, becauſe there is originally no Award of the Court to whom the Proceſs ſhall go; but where the Plea carries the matter into another County, there the *Venire* muſt be from the laſt Place, becauſe the Declaration by ſuch Plea ſtands confeſſed.

Cro. Eliz. 261, 468.

Rol. Abr. 205. *Child* and *Sloper*. Cro. Car. 595 S. C. Yelv. 64. S. P. cited

After Iſſue joined, if upon the Roll a *Venire Facias* be awarded to the Sheriff of the County of *Somerſet*, &c. and upon this a *Venire Facias* is made in this Manner, *Georgius Dei Gratia Somerſet ſalutem*, &c. leaving out the Word *(Vicecomiti)*; and upon this the Sheriff of *Somerſet* returns a Jury, and upon this a Verdict, &c. this ſhall be amended by the Roll, becauſe this was the Fault of the Clerk merely, having the Roll before him when he made the Writ, by which he was directed to direct the Writ to the Sheriff of *Somerſet*.

If the Court on an inſufficient Suggeſtion awards the Proceſs to an improper Officer, yet this is aided after Verdict; for that only makes an Inſufficiency in the Return of the Jury, and inſufficient Returns are aided; for it was the Deſign of the (*a*) Statute, that, if the Cauſe was tried by a right Jury, it ſhould not be material what Officer got them together.

(*a*) But where before the Statute of 21 Jac. 1. c. 13. the Award of a *Venire* to a wrong Officer, and his Return thereupon, was Error, *vide* Brownl. 134. Cro. Eliz. 574, 586. Moor 356, pl. 482. Yelv. 15. 5 Co. 36. b.

Cro. Eliz. 181, 586, 674.

But if, on a Suggeſtion on the Roll, Proceſs be awarded to the Coroner, and the Sheriff returns either the Panel or *Tales*, it is ſaid to be erroneous, becauſe not collected by the proper Officer, and therefore they are not the *Judices Facti* of that Cauſe, and it appears on the Record that the Return is otherwiſe than the Court hath directed.

Salk. 265. pl. 9. *Andrews* ver *Lynton*. 2 Ld. Raym. 884.

But the lateſt Reſolution is, that the Returns of Miniſterial Officers are to be challenged at the Day of the Return, for if the Court then admits them to be their Officers, and the Parties do not except againſt them, they are concluded, ſince the proper *Judices Facti* are admitted by them to be returned.

Cro. Jac. 383 Hob. 70. *Lamb* and *Wiſeman*, adjudged.

If a *Venire* is awarded to the Coroners, and returned by two of them only, whereas at the Time of the Award and Return thereof there were two more, this is only a Miſreturn, and aided.

Hob. 70.

But it is ſaid, that if one Sheriff of (*b*) *London* makes a Return without the other, this is not helped, being no Return at all; for they make but one Officer, and the Court knows that one Sheriff there is two Perſons.

(*b*) In an Action, if the *Venire Facias* be *Vicecomiti Londen' ſalutem*, &c. *Præcipimus tibi quod*, &c. where it ſhould be *Præcipimus vobis*, after Verdict this ſhall be amended; for it is the Default of the Clerk. Owen 62. Cro. Eliz. 443. Rol. Abr. 200.

Hob. 113. Rol. Abr. 204. Cro. Eliz. 310.

If upon the Return of the *Habeas Corpora* the Surname of the Sheriff be omitted, as where his Name is *Bartholomæus Michel*, and it is returned *Bartholomæus Miles*, Sheriff, this ſhall be amended.

3 Bulſ. 220. Cro. Jac. 528 Noy 115. 5 Co. 41. Cro. Eliz. 587. Brownl. 43.

It was held, that if before the Statute of 21 *Jac.* 1. *cap.* 13. the Sheriff did not return the Writ of *Venire*, nor ſet his Name on the Back thereof, or omitted inſerting *quod Executio iſtius Brevis patet in quodam Panello huic Brevi annexo*, but it was *album Breve*, it could not be amended upon Examination of the Sheriff, being the (*c*) principal Proceſs; but this is now

(*c*) But even before the Statute 21 Jac. 1. c. 13. it was held, that the *Venire*, being well returned, tho' the Iſſue be tried on the *Habeas Corpora* or *Diſtringas*, which are not returned, or irregularly returned, in Manner aforeſaid, the *Venire* being the principal Proceſs, and right, the others ſhould be amended. Moor 868. pl. 1203. Hob. 130. Yelv. 110. Cro. Jac. 188, 443. Cro. Eliz. 466, 704. 2 Rol. Rep. 111 210.

now helped by that Statute, ſo that a Panel of the Jurors be returned and annexed to the Writ. *Page 275

If the Sheriff that returns his *Venire* be diſcharged before the *Teſte* of the *Venire*, it is Error, and ſhall be tried by the Record of his Diſcharge; becauſe if the legal Officer did not return the Writ, the proper *Judices Facti* did not try the Cauſe, and ſo the Verdict is ill. Cro. Car. 421.

But if he be Sheriff at the Time of the Award of the *Venire*, and after his Diſcharge he returns the Panel to the *Venire*, this is no (*a*) principal Cauſe of Challenge; for the Sheriff having returned the *Nomina Jurat'* to the Court above on the *Venire*, on which they have awarded a *Diſtringas* with a *Niſi Prius*, the Sufficiency of that Return is not to be controverted before the Judge of *Niſi Prius*, but above, ſince the Judges of *Niſi Prius* are bound down by a Record of a ſuperior Court, on whoſe Records it appears he is Sheriff. Cro. Eliz. 369. *Hore* and *Broom.*

(*a*) But this may be challenged for Favour, and the Illegality of the Officer will be admitted as ſtrong Evidence of a partial Array, ſince a Perſon who had nothing to do with the Return has intermeddled therewith; and accordingly the Array in this Caſe was challenged for Favour, and quaſhed.

The Jury muſt come in the ſame Action, and between the ſame Parties, otherwiſe they are not Judges in that Cauſe; therefore in Ejectment where the *Venire* was *de Placito Tranſgreſſionis*, omitting *& Ejection' firmæ*, the Court held the *Venire* to be ill, becauſe it was not in the ſame Action; for an Action of Treſpaſs and Ejectment are different, and there might be an Action of Treſpaſs between the ſame Parties, but if the *Diſtringas* had been right, they would have adjudged this *Venire* to be null, and the want of a *Venire* is aided by the Statute. Cro. Car. 32. Hutt. 81. Jon. 302. Godb. 194. Cro. Jac. 528. Cro. Eliz. 259.

If in an Action of Treſpaſs Iſſue is joined between the Plaintiff and two Defendants, and one dies, and the *Venire* is awarded between the Plaintiff and both Defendants, after ſuch Defendant's Death, and Verdict is taken for the Plaintiff, and the Death ſuggeſted on the Roll, and Judgment againſt the Survivor, the *Venire* being only a Judicial Proceſs, and purſuing the Award on the Roll, it plainly appears to be the ſame Cauſe, and that the Trial was had by proper Judges, and Judgment being given againſt the Defendant, who is charged with the whole Action, is good. Cro. Car. 426. Jon. 367. *Piſſin* verſus *Fenton*.

If the *Jurata* mentions the Iſſue to be *de Placito Trangreſſionis*, where the Action is Debt, and the Award of the *Venire* and *Diſtringas* Debt, this ſhall be amended; for the *Jurata* is an Award of the *Diſtringas*, in purſuance of the Award of the *Venire*, and the *Venire* being right, the (*b*) ſecondary Proceſs ought to be made accordingly, and there is a ſufficient Authority by the Writ of *Diſtringas* for the Judge of Aſſiſe to try the Cauſe. Cro. Car. 275.

(*b*) That the Award on the Roll being right, ſhall amend the *Venire*, and the *Venire* being right ſhall amend the *Diſtringas*, which is the proper Proceſs for convening the Jurors in the *King's Bench*; ſo of the *Habeas Corpora*, which is the *Common Pleas* Proceſs. Lit. Rep. 252, 253.—Alſo if a *Diſtringas* is awarded where it ſhould be a *Habeas Corpora*, this is aided. Savil. 37.

So if the Sheriff return *Nomina Jurat' inter Partes prædict' de Placito Tranſgreſſionis*, where the *Venire* is *de Placito Debit'*, this ſhall be amended; for *in Dorſo Brevis* he ſays, *Executio iſtius Brevis patet, &c.* which could not be, if it was not in the ſame Action. Cro. Car. 275. Rol. Abr. 202.

If the Day when, and Place where, the Aſſiſe was to be held, is not mentioned in the *Diſtringas*, it ſhall be amended by the Roll; for if there had been no *Diſtringas*, the Trial had been good, becauſe the *Jurata* is the Warrant to try the Cauſe, and that was right. 3 Mod. 78. *Jackſon* and *Warren*. Ld. Raym. 95, 511, 1144.

2 Barnes 3, 4, 9, 10. Rol. Rep. 201. 10 Mod. 88. 12 Mod. 107, 274.

In Ejectment againſt ſeven Defendants, who entered into the Common Rule, and pleaded to Iſſue, the Plea Roll, *Venire Diſtringas*, and *Jurata* were right, but the Iſſue on the *Niſi Prius* Roll was between the Plaintiff and five Defendants only; after Verdict for the Plaintiff this was amended; Salk. 48. pl. 5.

for

Page 276 for the Leſſor's Title was the Gift of the Action, and the only Thing inquirable of by the Jury.

(a) If a *Venire Facias* be & *habeas ibi hoc Breve*, without theſe Words, *Nomina Juratorum*, this will be aided after Verdict, being a Judicial Writ; though objected, that theſe Words were of Neceſſity and without which the Court could not know who are the Jurors, nor whom to demand to be ſworn. 3 Bulſ. 208. Rol. Abr. 200, 204. Cro. Eliz. 467. Moor 465, 657. Noy 57. 2 Brownl. 167.—So if the Word *duodecim* be left out of the *Venire Facias*, this ſhall be amended after Verdict. Rol. Abr. 204. (b) If a *Venire Facias* be *quorum quilibet quatuor Libris Terræ*, omitting the Word *habeat*, this ſhall be amended after Verdict. Rol. Abr. 204. So if the Words *quorum quilibet* are omitted out of the *Venire Facias*, it ſhall be amended after Verdict. Rol. Abr. 204.——So if the Words *qui nulla Affinitate attingunt* are left out of the *Venire Facias*, it ſhall be amended. Rol. Abr. 204.

If the (a) Number or (b) Qualifications of the Jury, as has been ſaid, be omitted, it may be amended; for it is but Form to award the particular Number and Qualifications in each Roll, which is directed by the Law in all Caſes.

(c) For the Diverſity, where the Chriſtian and where the Surname is miſtaken, *vide* Cro. Eliz. 57, 222. Cro. Car. 203. Cro. Jac. 116.

The *Nomina Juratorum* on the *Venire* are the proper Parties to try the Action; and if there be a Miſtake in the (c) Chriſtian Name, it is incurable; for the Statute does not extend to it, but it extends to cure Surnames and Additions; for there can be but one Name of Baptiſm, but there may be various Surnames and Additions; and therefore if it can be proved what Perſon the Sheriff meant by his Surname or Addition, it may be amended and ſet right.

Rol. Abr. 196, 197. 3 Bulſ. 18. Hob. 64. Brownl. 174.

Alſo if the Names if either Chriſtian or Surname be wrong in the Body of the *Diſtringas*, or in the Panel returned, or in the Panel of the Jury ſworn, yet if it can be proved to be the ſame Man that was intended to be returned in the *Venire*, having there his right Chriſtian Name, he is the proper *Judex Facti*, and it may amended by the Statute.

Rol. Abr. 196. & *vide* Dan. 330-1. Several Caſes to this Purpoſe.

As if *Tippett* be returned in the *Venire Facias*, and in the *Habeas Corpora* and *Diſtringas Juratores* he is named *Typper*, yet if his true Name be *Tippett* according to the *Venire Facias*, and *Tippet* is ſworn, and tries the Iſſue, it ſhall be amended.

Jon. 302. *Fines* and *North*. Cro. Jac. 278. S.C. adjudged.

If the Sheriff returns but twenty-three on the *Venire*, and twenty-four on the *Habeas Corpora*, and the twenty-fourth omitted on the *Venire* appears, and is ſworn, the Verdict is ill, becauſe he is not returned according to the Award of the Court, in purſuance of the *Venire*, and therefore has no Authority to try the Cauſe; for the Award to diſtrain one not ſummoned is void, and he is not returned of the *Tales de Circumſtantibus*, ſo that he is not a proper Juror by the Writ nor Statute.

Cro. Jac. 647. Cro. Car. 223, 278. 5 Co. 36. b. 37. a. Cro. Eliz. 294.

So if twenty-five are returned, and the twenty-fifth is ſworn, and tries the Cauſe, it is not helped.

But if the twenty-fourth Man had not been of the twelve that tried the Iſſue, it would be aided by the Statute; or if the Trial had been by eleven of the twenty-three, and one of the *Tales de Circumſtantibus*, it had been good.

Brownl. 274. Jon. 357. Sid. 66. Latch 57.

(K) What

(K) What Irregularities or Defects in convening, or in the Qualifications of the Jurors, are aided by Consent.

*Page 277

HERE we may lay it down as a general Rule, that all Defects in convening, or in the Qualifications of the Jurors, are aided by Consent of the Parties; for the Rule herein is, that *omnis Consensus tollit Errorem.* Co. Lit. 125. b. Dyer 367, b. pl. 40.

Therefore if a *Venire Facias* be awarded to the Coroners, where it ought to be to the Sheriff, or the Visne cometh out of a wrong Place, if it be *per Assensum Partium*, and so entered of Record, it will stand good. 5 Co. 36. b. Co. Lit. 125. b. 2 Rol. Rep. 21. Godb. 428. Noy 107.

One of the Jury, after he had been sworn, and after he had heard Part of the Evidence, fell sick, and another being sworn in his Place by Consent of Plaintiff and Defendant, it was held a good Verdict. Palm. 411.

(L) When and by whom to be paid.

JURORS in all Civil Causes are to be paid for their Trouble, and Attendance, and the (*a*) *Quantum* is to be proportioned according to the Distance of Place, Badness of the Weather, &c. but if they take any Money, or other Reward, for giving a Verdict, they are not only punishable at Common Law by Fine and Imprisonment, but to a *Decies tantum* given by the Statute of 38 *E.* 3. *cap.* 12. *i. e.* a Forfeiture of ten Times as much as he hath taken. Carth. 242.

(*a*) That in Strictness on a Trial at *Nisi Prius* in the same County, they are only intitled to 8 *d.* and to 5 *l.* on a Trial at Bar, where they come out of a foreign County. *Trials per Pais* 62, 216.

But if some of the Jurors appear, and the Trial goes off *pro Defectu Juratorum*, those who appeared are not to be paid; for no Body has received any Benefit from their Attendance, and consequently not obliged to make them any Recompence. 2 Lil. Regist. 125.

But where a Cause was appointed for Trial at the Bar of *B. R.* by a Jury of *Wilts*, and a *Venire* returned, and the Jury summoned, but before the Day the Parties agreed, and the Summons not being countermanded, several of the Jury appeared; and it was ordered on Motion, that the Attornies on both Sides should pay them. 2 Show. 248. pl. 252.

So if the Jury find a special Verdict, the Charges of the Jury shall be equally borne by both Parties. 2 Leon. 174-5. for what Costs shall be paid upon praying a special Jury, see 24 Geo. 2. c. 18. and for what Fees allowed to Jurymen, see s. 2. of the same Statute.

Page 278 (M) For what Misdemeanors punishable: And herein,

1. Where punishable by Attaint.

Glan. lib. 8. c. 9. 2 Inst. 130. Co. Lit. 394.

THE Jury when impanelled judged under the Penalty of an Attaint by the old Law, which was the only Curb they had over Juries; but this Method, from the Difficulty of attainting the Jury, and the Severity of the Punishment, has been seldom used of late; and the Practice of granting new Trials, where the Jury find against Evidence and the Direction of the Court, introduced in the Room thereof; but since the Attaint is only disused, and not taken away, we shall here set down the most considerable Matters relating thereto.

Rol. Abr. 285. Bro. Attaint 87. Dyer 53. pl. 14. Dyer 369. Godb. 271. Hob. 227.

But herein, first, we must observe, that the Judgment in Attaint being so severe, all Manner of Evidence was admitted in Support of the Verdict; but against the Verdict they admitted none that was not given at the former Trial; because the Jury might give in their Verdict, not only on the Evidence given in Court, but on their own Knowledge; and therefore (*a*) whatever otherwise they came to the Knowledge of, they might give in Evidence for the Support of their Verdict; but the Evidence not offered on the Trial can never be brought against them, because such Evidence might have altered their Judgment, had it been given; and the Want of that Light, which the Party neglected to offer, cannot convict them of a Falsity, which, if it had been offered, might have founded a different Verdict.

(*a*) But then the Plaintiff, in Attaint may have an Answer thereto, and disprove it as well as he can; but he cannot give other Evidence, nor inforce the first Evidence with more Matter than was given and disclosed before. Dyer 212. pl. 34.

Rol. Abr. 281, 282.

The Jury may be attainted two Ways; 1*st*, where they find contrary to Evidence. 2*dly*, When they find out of the Compass of the *Allegata*: But to attaint them for finding contrary to Evidence is not so easy, because they may have Evidence of their own Conuzance of the Matter before them, or they may find on (*b*) Distrust of the Witnesses, on their (*c*) own proper Knowledge.

(*b*) Where the Evidence of a Witness is false in an immaterial Part, the Jury need not give him Credit in any other Part. Cro. Eliz. 310. (*c*) If a Jury give a Verdict on their own Knowledge, they ought to tell the Court so; but they may be sworn as Witnesses; and the fair Way is to tell the Court before they are sworn, that they have Evidence to give. Salk. 405. pl. 3.

Rol. Abr. 282.

But if they find upon Evidence that does not prove the *Allegata*, there it is easy to subject them to an Attaint, because it is manifest that what is so found is on Evidence not corresponding to their Issue; and hence it is necessary that the Matters in Issue should be set forth with all convenient Certainty, that it may be seen how far and when the Jury are mistaken; as in Trespass, the Quantity and Value of the Thing demanded must be so conveniently described, that if the Jury find Damages beyond such Quantity and Value, it may be apparently excessive, and they subject to the Attaint; and so on special Contracts they must be set forth so precisely, that if Evidence be given of another Contract, and not that in the Allegations, and yet the Jury find for the Plaintiff, they may be subject to an Attaint.

Vaugh. 146. 1 Hawk. P.C. 191.— But by Hal. Hist. P. C. 310.

An Attaint does not lie in a Criminal Case, as it does in a Civil; and the Reason of the Difference, according to *Hawkins*, is, that in the last Case the King may have an Attaint; for although a Man convicted upon an Indictment can have no Attaint, because the Guilt is affirmed by two Inquests, the Grand Inquest that present the Offence on their Oaths, and the Petit Jury that agrees with them; yet where the Petit Jury acquits, they stand as a single Verdict; for they disaffirm what the Grand Inquest of twelve Men have upon their Oaths presented.

* Caſe a Man's Property only is brought into queſtion a ſecond Time, and not his Liberty or Life; alſo, ſays he, it may be generally preſumed that a Jury is likely to be equally influenced with the Fear of an Attaint from either of the contendingly Parties; whereas if any ſuch Examinations of their Proceedings were allowed in Criminal Cauſes, they might be often in great Danger of one Side, by incurring the Reſentment of a powerful Proſecutor, and provoking him to call their Conduct in queſtion, for their ſuppoſed Partiality; but they could have little to fear from an injured Criminal, who would ſeldom be in Circumſtances to make his Proſecution formidable. * Page 279

Where the King is ſole Party againſt the Subject, and the Jury find for the King, no Attaint lies; but it is otherwiſe where the Suit is *tam pro Domino Rege quam pro ſeipſo.* 4 Leon. 46. But for this *vide* Cro. Eliz. 309. 2 Jon. 14.

No Attaint lies upon an Inqueſt of Office; therefore if a Recovery be in a *Quare Impedit* by Default, and a Writ iſſues to the Sheriff to (*a*) inquire of the Damages and Plenarty, no Attaint lies upon this Inqueſt; for it is but an Inqueſt of Office. Co. Lit. 355. b. Vaugh. 153. 11 Co. 6. a. Rol. Abr. 280. and ſeveral Year-Books there cited. 10 Co. 119. S. P.

(*a*) Therefore where the Matter omitted to be inquired by the principal Jury is ſuch as goes to the very Point of the Iſſue, and upon which, if it be found by the Jury, an Attaint will lie againſt them by the Party, if they have given a falſe Verdict, there ſuch Matter cannot be ſupplied by a Writ of Inquiry, becauſe thereby the Plaintiff may loſe his Action of Attaint, which will not lie upon an Inqueſt of Office. Carth. 362. Ld. Raym. 59. 5 Mod. 76, 77, 118. Salk. 205. pl. 3. Skin. 595. pl. 8. 12 Mod. 85.

But if the Inquiry be by the ſame Inqueſt that inquired of the Iſſue in the *Quare Impedit*, an Attaint lies. Rol. Abr. 280. 10 Co. 119.

So in an Aſſiſe, if they are at Iſſue upon the Plea in Bar and that is found for the Plaintiff, and it is inquired over of the Seiſin and Diſſeiſin, if the Diſſeiſin be found by a falſe Virdict, an Attaint lies thereon. Fitz. Attaint 15. Rol. Abr. 28. 10 Co. 119.

In an Action againſt Tenant in Tail, if he makes default, and he in the Reverſion prays to be received, ſuppoſing him to be Tenant for Life, which is counter pleaded, upon which they are at Iſſue, and it is found againſt him in Reverſon, and the ſame Inqueſt taxes the Damages againſt the Leſſee, no Attaint lies upon this Verdict, becauſe the Judgment againſt the Leſſee is given upon the Default; and ſo this is but an Inqueſt of Office for the Damages. Rol. Abr. 280.

An Ataint lies upon a Verdict before the Sheriff in a Writ of Inquiry of Waſte, becauſe by the Statute the Sheriff is made Judge in this Caſe. Co. Lit. 355. a. Rol. Abr. 280.

No Attaint lies upon a Verdict given by twenty-four Jurors, nor does it lie upon a Verdict given in an Attaint for the Thing of which the Jury is attainted; but if they find any collateral Matter *præter* the Attaint, it lies thereupon, and they ſhall be attainted. 2 Rol. Abr. 280.

In a Writ of (*b*) Right, if the Grand Aſſize be taken upon the mere Right, no Attaint lies thereupon; but if the Iſſue be taken upon a collateral Matter, and not upon the mere Right, an Attaint lies thereof. 12 H. 6. 6.

(*b*) Whether an Attaint lay in a Plea real becauſe he might have falſified in an Action of an higher Nature, *vide* 2 Inſt. 237.

If a Deed with Witneſſes be pleaded, and the Inqueſt paſſes in the Affirmative, no Attaint lies thereof, becauſe the Witneſſes have adjudged this to be true; but otherwiſe it is if it paſſes in the Negative, and Diſaffirmance of the Deed; (*c*) for the Witneſſes ought to teſtify nothing but what they ſee or hear. Rol. Abr. 280. 2 Inſt. 662. Co. Lit. 6. b. S. P. becauſe Witneſſes

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cannot teſtify a Negative, but an Affirmative. (*c*) An Attaint does not lie for not finding a Divorce, becauſe that does not lie in their Conuzance, being a Record. Rol. Abr. 281.—If the Jury find a ſpecial Matter which is not Part of their Charge, nor pertinent to the Iſſue, no Attaint lies for this. 11 Co. 13.—Where it lies for finding falſly a Matter of Form only, the principal Matter being true. Keilw. 67.

*Page 280 * In an Aſſiſe, if the Jury find a Special Verdict, and refer it to the Court whether upon the Matter the Tenant be a Diſſeiſor, and upon the Matter the Court adjudge him to be a Diſſeiſor, though in Law he be no Diſſeiſor; yet no Attaint lies againſt the Jury, (a) becauſe it is not their Fault, but the Fault of the Court.

43 Aſſ. 41. Bro. Attaint 82. Cro. Eliz. 309. S. P. per Cur.

(a) But following the Direction of the Court will not bar an Attaint; for if the Judge declares the Law to the Jury erroneouſly, and they find accordingly, though this may excuſe them from the Forfeitures, yet however upon the Attaint the Judgment is to be reverſed, and a Man ſhall not loſe his Right by the Judge's Miſtake of the Law. Vaugh. 145.

Rol. Abr. 282. An Attaint lies before Execution ſued for the Danger of the Death of the Petit Jury in the mean Time; for after the Death of any of the Petit Jury, no Attaint lies.

9 H. 6. 2.

Rol. Abr. 284. An Attaint lies for exceſſive Damages, as alſo where the Jury give too little; but if the Jury give exceſſive Damages, and the Court abridge them,* and make them reaſonable, no Attaint lies againſt the Jury, though they have made a falſe Oath; for ſuch Abridgment is made upon the Prayer of the Party, and therefore he ſhall not have an Attaint alſo.

*Qu. If the Court hath any ſuch Power?

Rol. Abr. 284. So if the Court increaſes † the Damages, and makes them reaſonable, whereas before they were too ſmall, no Attaint lies.

† Qu. ut ſupra; unleſs in Caſe of *Maybem*, on View, where Conſequences have enſued after the Verdict, unforeſeen, or not provided for, in Point of Damages at the Trial.

Rol. Abr. 284. So if the Jury give exceſſive Damages, and after the Plaintiff, to whom they are given, releaſes Part of the Damages, by which the reſt of the Damages which remain are reaſonable enough, no Attaint lies; for hereby the Defendant's Cauſe of Grievance is taken away.

12 E. 4. 5. Bro. Attaint. In an Attaint, if the Plaintiff aſſigns the falſe Oath in exceſſive Damages, he ought to aſſign it in this Manner, *ſcilicet*, that the Goods for which the Damages were given were but of the Value of 40*s.* and that in the Damages given over this Sum they made a falſe Oath.

11 Co. 5. b. Sir *John Heydon*'s Caſe. Hob. 66. Cro. Jac. 351 10 Co. 119. Rol. Rep. 31. S. P. If in Treſpaſs againſt two one pleads Not guilty, and this is found againſt him, and exceſſive Damages given, and after the other Defendant comes and pleads Not guilty, and this is found againſt him alſo, he may have an Attaint upon the firſt Verdict, becauſe bound by the Damages given thereby; and though he is a Stranger to the Iſſue, yet he is privy in Charge.

Rol. Abr. 282. In a *Quare Impedit* againſt two, they make ſeveral Titles; and it is found for one Defendant, and that the other diſturbed him, the other may have an Attaint upon this, for by this he loſes the Preſentation.

Rol. Abr. 282.—The Reverſioner (by the Common Law) after the Death of the Tenant for Life. Dyer 1. pl. 5. 3 Co. 4.——And during the Life of the particular Tenant, *per* 9 Rich. 2. c. 3. He who is Party to the Recovery ſhall have an Attaint, although he was not Tenant at the Time of the firſt Writ brought, nor when the Judgment was given.

48 E. 3. 17. Godb. 378. If an Action of Joint-tenancy be pleaded with a Stranger, and the Stranger joins with the Tenant in the Maintenance thereof, and this is found againſt them, yet the Stranger ſhall not have an Attaint, becauſe he is not Party to the Writ.

11 H. 4. 27. 1 Rol. Abr. 283. So in an Action againſt *A.* and *B.* if it be found againſt them upon ſeveral Iſſues, *A.* ſhall not have an Attaint upon a falſe Verdict againſt *B.* becauſe he was not Party to this Iſſue.

11 H. 4. 30. 1 Rol. Abr. 283. So in Treſpaſs againſt two, if one pleads a Releaſe, upon which they are at Iſſue, and the other pleads the ſame Plea as Servant to him, if it be found againſt the Maſter, the Servant ſhall not have an Attaint thereupon, for he is not Party to the Iſſue.

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So in Waſte againſt two, if one makes default, and the other pleads, and it is found againſt him, the other who made default ſhall not have an Attaint thereupon, becauſe he is not Party to the Iſſue. Rol. Abr. 283.

*If a Villein be found free in a *Homine Replegiando* againſt the Lord, and after the Lord dies, the Heir ſhall have an Attaint; ſo if the Villein were found free by a falſe Verdict, in an Action of Treſpaſs brought by him againſt the Lord, and after the Lord dies, the Heir ſhall have an Attaint, becauſe hereby he loſes his Inheritance in the Villein; but he cannot have an Attaint for the Damages, but the Executors may, becauſe they belong to them. *Page 281 Rol. Abr. 283.

The Petit Jury can plead no Plea but ſuch as may excuſe them of the falſe Oath; and by the 23 *H.* 8. *cap.* 3. it is enacted, that after the Plaintiff hath aſſigned the falſe Oath, the Petit Jury, if they be the ſame Perſons, and the Writ, Proceſs, Return and Aſſignment good, ſhall have no Anſwer, but only that they made a true Oath; unleſs the Plaintiff, in an Attaint upon the ſame Verdict, hath before Nonſuit diſcontinued, or had Judgment againſt the Petit Jury. 12 H. 6. 6. Fitz. Attaint 61, 65. Keilw. 130. ſame Rule *arguendo.*

In an Attaint upon a Verdict in Treſpaſs, one of the Petit Jury pleaded an Award between the Plaintiff and Defendant, and whether this was a good Plea *dubitatur.* *Keilw.* 130. *Vide* 6 Co. 44. a. S. P. where it is ſaid to be a good Plea, yet Q. & *vide* Dyer 75. pl. 27.

In an Attaint brought by the Iſſue in Tail, upon a Verdict in a *Formedon* againſt his Anceſtor, the Releaſe of the Anceſtor is not any Bar, for the Attaint is intailed as well as the Land itſelf. Rol. Abr. 286. Co. Lit. 20. a. S. P.

By the 23 *H.* 8. *cap.* 3. all Attaints muſt be taken (*a*) in the King's Bench or Common Pleas, and not elſewhere; but a *Niſi Prius* may be granted.

(*a*) And therefore no Conuſance can be granted upon any Attaint, becauſe all Attaints are to be taken either before the King in his Bench, or before the Juſtices of the Common Pleas, and in no other Courts, &c. Co. Lit. 294. b.——Where a Verdict and Judgment given in the Exchequer was removed by *Certiorari* into the Common Pleas, and an Attaint. *Vide* Dyer 201. pl. 65. Moor 17. pl. 60. N. Bendl. pl. 132. Keilw. 210 & *vide* Dyer 81. pl. 65. Cro. Eliz. 645. in which Book, becauſe the Record was not removed *in Banco*, it was adjudged againſt the Plaintiff, and the Court would not grant him a Day to bring in the Record, and ſaid, the Plaintiff at his Peril, ought to have brought it in before; & *vide* Cro. Eliz. 371, 372.——How to be removed, *vide* Rol. Abr. 394.——But if an Attaint be brought on a Judgment *in Banco*, and thereupon the Plaintiff aſſigns the falſe Oath, and the Defendant pleads *Bonum & Legale fecerunt Sacramentum*, and thereupon they are at Iſſue, and after the firſt Record is removed by a Writ of Error, yet the Proceſs againſt the Grand Jury and the Party ſhall not be ſtayed, but the Court may proceed. Dyer 284. pl. 35.

Of the Judgment in attaint.

THE Judgment at Common Law was very (*b*) ſevere; and according to my Lord *Coke*, importeth eight great and grievous Puniſhments; 1. *Quod amittant Liberam Legem imperpetuum*; that is, he ſhall be ſo infamous as never to be received as a Witneſs, or to be of any Jury. 2. *Quod forisfaciant omnia bona & Catalla ſua.* 3. *Quod terræ & Tenementa in manus Domini Regis capiantur.* 4. *Quod uxores & Liberi extra Domus ſuas ejicerentur.* 5. *Quod Domus ſuæ proſtrentur.* 6. *Quod arbores ſuæ extirpentur.* 7. *Quod Prata ſua arentur.* 8. *Quod Corpora ſua Carceri mancipentur.* Co. Lit. 294. Rol. Abr. 286. (*b*) And was ſo ſevere that few or no Juries upon juſt Cauſe were convicted, 3 Inſt. 163.

But the Severity of this Puniſhment was mitigated by the Statute 23 *H.* 8. *cap.* 3. which preſcribes the Methods of Proceeding in Attaint, and inflicts certain Pecuniary Puniſhments on the Jurors, in Proportion to the Damages ſuſtained by the Party by the falſe Verdict, in which the (*c*) Party recovering it to be joined. *Vide* Co. Lit. 294.

(*c*) And by the Equity of the Statute it lies againſt the Executors of the Party for whom Judgment was given. Moor 17. pl. 60. N. Bendl. 132. Keilw. 201. a. And. 21. Dyer 201. l. 65.

If

Rol. Abr. 286. If a Man recover in an Attaint, he ſhall be (*d*) reſtored to all that he hath loſt by the Verdict, as well his Lands as the Meſne Profits; as alſo his Damage, if he loſt in a Perſonal Action.

(*d*) If during the Life of the Tenant for Life the Reverſioner recovers in an Attaint, the Tenant ſhall be reſtored to the Poſſeſſion and Meſne Profits, and the Reverſioner to his Arrearages of Rent; but if the Tenant be dead, or of Covin with the Demandant, the Reverſioner ſhall, *&c. per* 9 Rich. 2. c. 3.

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Rol. Abr. 286. * So if a Man brings Debt and is barred, and he brings an Attaint, and it is found for him, he ſhall recover his Debt.

41 Aſſ. 18. Rol. Abr. 286. So if the Iſſue in Tail recovers the Land in an Attaint upon a Recovery againſt his Anceſtor, he ſhall recover the Iſſues of the Land from the Death of the Anceſtor.

2. How otherwiſe puniſhable.

And herein we muſt conſider Jurors either in a Miniſterial Capacity, as Perſons bound to attend the Court, to do the Buſineſs for which they are returned till they are diſcharged; or in a Judicial Capacity, as Judges of the Fact to be tried.

8 Co. 38. b. 41. a. 2 Inſt 242. 2 Hal. Hiſt. P. C. 309. In the former Capacity they are liable to be puniſhed in ſeveral Inſtances; as for (*a*) refuſing to appear, withdrawing themſelves before they are ſworn, or refuſing to be ſworn; for which every Court of Record may, of common Right, impoſe ſuch a reaſonable Fine on any one returned on a Grand or Petit Jury, as ſhall ſeem convenient.

(*a*) By Stat. 29 Geo. 2. c. 19. Perſons ſummoned on Juries in Courts of Record, in Cities, Corporations and Franchiſes, and not attending may be fined.

Noy 49. 3 Bulſ. 173. Vaugh. 152. So if after they are ſworn they refuſe to give any Verdict at all.

Rol. Abr. 219. Cro. Eliz. 779. Hawk. P. C. 146. 2 Hal. Hiſt. P. C. 309. So if they endeavour to impoſe upon the Court; as where a Petit Jury offer a Verdict to the Court as agreed by their whole Number, where in Truth ſome of them have not agreed to it; or where they agree upon two Verdicts; and firſt, to offer one of them to the Court, and to ſtand to it; if the Court ſhall expreſs no Diſſatisfaction to it; but if the Court ſhall diſlike it, then to give the other.

S. P. and that in ſuch Caſe they ſhall be fined every one apart.

Dyer 78. pl. 41, 218. pl. 4. Cro. Jac. 21. Vaugh. 21. 2 Hawk. P. C. 146. So for miſbehaving themſelves after their Departure from the Bar; as where they do not all keep together till they have given their Verdict, or where any of them carry any Thing (*b*) eatable with them in their Pockets, or eat or drink, or otherwiſe refreſh themſelves, without Leave from the Court, before they have given their Verdict, though they were agreed on it, and were alſo all the Time in the Cuſtody of the Bailiff appointed to take care of them.

(*b*) Which, if it be at the Charge of him for whom they give a Verdict, avoids the Verdict; otherwiſe if they eat or drink at their own Charge, or the Charge of him againſt whom they give their Verdict. 2 Hal. Hiſt. P. C. 306.

Paſch. 27 Car 2. in *B. R.* Alſo where a Jury, after they departed from the Bar, being late on *Saturday* Night, ſeparated and went every one to his own Houſe without giving a private Verdict, or without conſulting upon the Evidence and gave a Verdict according to the Direction of the Court; but for this Miſdemeanor they were fined each forty Shillings, and a new Trial granted; and herein the Chief Juſtice ſaid, that by ſuch Trial both Parties may be prejudiced; for the Jurors going at large, without conſulting together, may well forget the Evidence; and it is the Right of the King's Subjects to have their Iſſues determined when the Evidence is freſh in the Memory of the Jurors; and

the

the ſuffering the Jurors to go to their Houſes after a privy Verdict is only by Connivance, but by the ſtrict Rules of Law ought not to be ſuffered.

Alſo where the Jury have been divided, or in doubt about the Evidence, and have agreed to determine the Matter by throwing Croſs or Pile, *&c.* and to give their Verdict as the Chance happened; this has been held ſuch a Miſdemeanor, for which they have been ordered to attend, and for which they are puniſhable, and for which a new Trial will be granted on the common Rule of *Juratores male ſe geſſerunt.* 2 Lev. 140, 205. 2 Jon. 83. 3 Keb. 805.

• Jurors are likewiſe puniſhable for ſending for or receiving Inſtructions from either of the Parties concerning the Matter in queſtion. • Page 283

So if a Juryman have a Piece of Evidence in his Pocket, and after the Jury ſworn and gone together he (*a*) ſheweth it to them, this is a Miſdemeanor finable in the Jury; but it avoids not the Verdict, though the Caſe appear upon Examination. 2 Hawk. P. C. 47. Cro. Eliz. 616. 2 Hal. Hiſt. P. C. 306.

(*a*) But it is no Offence in a Juror to exhort his Companions to join with him in ſuch Verdict as he thinks right. Hawk. P. C. 250.

As to the Puniſhment of Jurors in their Judicial Capacity, there are ſeveral Inſtances where Jurors acquitting great and notorious Offenders, contrary to clear and manifeſt Evidence, and contrary to the Judge's Directions, have been puniſhed in the Star-Chamber, and have alſo, not only in the King's Bench, but alſo by Juſtices of *Oyer* and *Terminer* and Gaol-Delivery, been fined and impriſoned, and bound over to their good Behaviour; but theſe Methods were thought to be contrary to the Opinions in the old Books, and contrary to the general Reaſon of the Law; and being fully conſidered in (*b*) *Buſhell's* Caſe, it was there ſettled, and hath been ever ſince agreed to, that Jurors are no way puniſhable, except by Attaint, for giving a Verdict contrary to a Judge's Directions, and againſt what may ſeem to others clear and manifeſt Evidence, for that they are the proper Judges of the Fact to be tried, and may be reaſonably influenced by Matters known only to themſelves, as their own Perſonal Knowledge of the Fact, or of the Credit of the Witneſſes, or of the Parties. 2 Hawk. P. C. 147-8. and ſeveral Authorities there cited. (*b*) Vaugh. 143. 2 Jon. 16, 17.

And herewith my Lord *Hale* ſeems to agree, and ſhews the Unreaſonableneſs of puniſhing a Jury for going contrary to the Direction of the Court, in Matters of Law, becauſe it is impoſſible any Matter of Law could come in queſtion till the Matter of Fact were ſettled and ſtated and agreed by the Jury, and of ſuch Matter of Fact they were the only competent Judges; alſo, ſays he, it were the moſt unhappy Caſe that could be to the Judge, if he, at his Peril, muſt take upon him the Guilt or Innocence of the Priſoner; and if the Judge's Opinion muſt rule the Matter of Fact, the Trial by the Jury would be uſeleſs. 2 Hal. Hiſt. P. C. 160, 161, 211, *&c.*

But it ſeems to admit, that the long Uſe of fining Jurors in the King's Bench in Criminal Cauſes, may give poſſibly a Juriſdiction to fine in theſe Caſes, yet that it can by no means be extended to other Courts of Seſſions, of Gaol-Delivery, *Oyer* and *Terminer*, or of the Peace, or other inferior Juriſdictions. 2 Hal. Hiſt. P. C. 313.

Alſo by *Hawkins*, if it ſhall plainly appear in any Caſe, that Jurors are perfectly ſatisfied of the Truth of a Fact, whereupon they declare to the Court, that they find it in ſuch a particular Manner; and the Court directly tell them, that upon the Fact ſo found, as they have agreed it to be, the Judgment of the Law is ſuch or ſuch, and therefore that they ought to give a Verdict accordingly, yet they obſtinately inſiſt upon a Verdict contrary to ſuch a Direction; it ſeems agreeable to the general Reaſon of the Law, that the Jurors are finable by the Court in ſuch a Caſe, unleſs an Attaint lies againſt them; for otherwiſe they would not be puniſhable for ſo palpable a Partiality in taking upon them to judge of Matters of Law, which they have nothing to do with, and are preſumed 2 Hawk. P. C. 148. for which is cited 2 Jon. 15, 16. Vaugh. 144-5. Palm. 363. & *vide* Kel. 50.

ſumed to be ignorant of, contrary to the expreſs Direction of one, who by the Law is appointed to direct them in ſuch Matters, and is to be preſumed of Ability to do it.

2 Hawk. P. C. 149. Alſo if a Judge, for the better Direction and Information of a Jury, ſhall aſk them their Opinions concerning ſuch a particular Fact, and they ſhall refuſe to anſwer him, and obſtinately inſiſt to deliver in their Verdict, as they think fit, contrary to his Direction, it ſeems queſtionable whether they may not be fined in ſuch a Caſe alſo, unleſs an Attaint lie *Page 284 * againſt them; for that it is the Duty of Jurors to take the Advice and Information of the Court, in order to be governed by it, as far as ſhall be conſiſtent with their Conſciences.

3. How Abuſes by others in relation to them are puniſhable; and therein of the Offence of Embracery.

Co. Lit. 369. Moor 815. 2 Hawk. P. C. 259. Embracery is defined in general to be an Attempt by either Party, or a Stranger, to corrupt or influence a Jury, or to incline them to favour one Side by Gift or Promiſes, Threats or Perſuaſions, or by inſtructing them in the Cauſe, or any other way, except by opening and enforcing the Evidence by Counſel at the Trial, whether the Jurors give any Verdict or not, and whether the Verdict be true or falſe.

2 Hawk. P. C. 259, 260. Alſo it is an Offence of this Kind for a Stranger barely to labour a Juror to appear and act according to his Conſcience, or for any Perſon to labour a Juror not to appear; but it is no Offence for the Party himſelf, or for any Perſon, who can juſtify an Act of Maintenance, to labour a Juror to appear and give a Verdict according to his Conſcience.

2 Hawk. P. C. 259, 260. Alſo it is an Offence to give Money to a Juror after the Verdict, unleſs it be openly and fairly given to all alike, in conſideration of the Expences of their Journey and Trouble of their Attendance.

2 Hawk. P. C. 260. So the bare giving of Money to another, to be diſtributed among Jurors, ſavours of Embracery, whether any of it be diſtributed or not; and it is an Offence of the like Kind for a Perſon, by indirect Means, to procure himſelf, or another, to be ſworn of a *Tales*, in order to ſerve one Side; alſo it is as criminal in a Juror, as in any other Perſon, to endeavour to prevail on his Companions to give a Verdict on one Side, by any other Arguments beſides the Evidence produced, and the general Obligations of Conſcience.

2 Hawk. P. C. 260. The Offence of Embracery is puniſhable at (*a*) Common Law by Indictment or Action; and if it were not known before the Trial, it will be a good Cauſe to ſet aſide the Verdict.

(*a*) How it is further reſtrained and puniſhed by Statute, *vide* 5 E. 3. c. 10. 34 E. 3. c. 8. 38 E. 3. c. 12. and 1 Hawk. P. C. 260, *&c.*

2 Hawk. P. C. 58, 9. Abuſes by others in relation to Juries, are puniſhable by Fine and Impriſonment; as if a Man aſſault or threaten a Juror for having given a Verdict againſt him, he may be indicted as a Diſturber of the Adminiſtration of Juſtice, and one who is guilty of a Contempt to the King's Courts.

Hil. 10 Ann. The *Queen* ver. *Wakefield*. Alſo the Court of King's Bench granted an Information againſt a Town-Clerk, for publiſhing an Order of the Court againſt Jurors who had found a Perſon guilty of Manſlaughter only, upon an Indictment of Murder, by which Order the ſaid Jurors were declared to be juſtly ſuſpected of Bribery.

Juſtices

* Juſtices of Peace.

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(A) Of the antient Officers, called Conſervators of the Peace. 285.
(B) Of the firſt Inſtitution, and general Statutes, which give Juſtices of Peace a Juriſdiction. 286.
(C) Of their Commiſſion, and Manner of appointing them. 288.
(D) Who are qualified for the Office. 289.
(E) Of their Authority and Juriſdiction purſuant to their Commiſſion, and the general Statutes relating to them. 291.

And herein,

1. What Juriſdiction they have in relation to Treaſon and Miſpriſion of Treaſon. 291.
2. What in relation to Felonies. 291.
3. What in relation to inferior Offences. 292.
4. How far they have Power to proceed on Indictments not taken before themſelves. 292.
5. By what Juſtice the Juriſdiction muſt be exerciſed; and therein how far a Juſtice of a County may act out of it, or within a Liberty. 293.

(A) Of the ancient Officers, called Conſervators of the Peace.

IT ſeems to be clearly agreed, that before the Statute 1 *E.* 3. *cap.* 16. there were no Juſtices of the Peace, and that they were firſt inſtituted by that Statute; yet by the Common Law there were certain Conſervators of the Peace, which were of two Sorts: 1. Thoſe who in reſpect of their Offices had Power to keep the Peace, but were not ſimply called by the Name of Conſervators of the Peace, but by the Name of ſuch Offices. 2. Thoſe who were conſtituted for this Purpoſe only, and were ſimply called by the Name of Conſervators or Wardens of the Peace. Lamb. book 1. c. 3. 2 Hal. Hiſt. P. C. 44. 2 Hawk. P. C. 32.

As to the firſt Sort, the King is undoubtedly the principal from whom all Authority of this Kind is originally derived; but it is ſaid, that he cannot take a Recognizance for the Peace, becauſe it is a Rule that no Recognizance can be taken by any one who is not a Juſtice either of Record or by Commiſſion; alſo the Lord Chancellor, or Lord Keeper of the Great Seal, the Lord High Steward of *England*, the Lord Marſhal, the Lord High Conſtable, and every Juſtice of the King's Bench, and the Maſter Dalt. chap. 1. Crompt. 6. Bro. Recognizance 14.

of the Rolls, and, as ſome ſay, the Lord Treaſurer, have a general Au-
*Page 286 * thority to keep the Peace throughout the Realm, and to award Proceſs, and to take Recognizances for it; but a Peer, as ſuch, ſeems to have no more Power in this Reſpect, than a mere private Perſon.

10 H. 6. 7. b. Lamb. book 1. chap. 3. Alſo all Courts of Record, as ſuch, have Power to keep the Peace within their own Precincts; and the Juſtices of Gaol-Delivery may take Surety of the Peace from a Perſon committed, for not finding ſuch Surety.

10 H. 7. 17. b. Bro. Peace 13. Cro. Car. 26. F. N. B. 81. Alſo every Sheriff is a principal Conſervator of the Peace within his County, and may *ex officio* award Proceſs, and take Surety for it; and, as ſome ſay, the Surety ſo taken is to be looked on as a Recognizance or Matter of Record, and not as a common Obligation, becauſe it is taken by virtue of the King's Commiſſion.

Vide Tit. *Coroner.* Alſo a Coroner is another principal Conſervator of the Peace, and may bind any one to the Peace who ſhall make an Affray in his Preſence; but he is ſaid to have no Authority to grant Proceſs for the Peace; and it ſeems, that the Security taken by him for the Peace is not to be looked on as Matter of Record, but as Matter *in Pais*, only except where it is taken by him as Judge in his own Court for an Affray in his Preſence.

Vide Tit. *Conſtable.* Alſo every High and Petit Conſtable are, by the Common Law, Conſervators of the Peace within their ſeveral Limits, and may take Order for the Keeping of the ſame.

The Conſervators of the Peace, ſimply ſo called, were either Ordinary or Extraordinary.

Bro. Peace 18. Preſcript. 79. 22 E. 4. 35. b. Lamb. book 1. chap. 3. Co. Lit. 114. *Doct. & Stud.* book 1. chap. 7. Crompt. 6. Lamb. book 1. chap. 3. The Ordinary were either by Tenure, *viz.* ſuch as held their Lands by this Service, or by Election; *viz.* ſuch as were choſen by the Freeholders of a County, in purſuance of the King's Writ for this Purpoſe; or by Preſcription, *viz.* ſuch as claimed ſuch a Power by an immemorial Uſage in themſelves and their Anceſtors, or Predeceſſors, or thoſe whoſe Eſtate they had; but the Power of none of thoſe Conſervators of the Peace ſeems to have been greater than that of Conſtables at this Day, unleſs it were inlarged by ſome ſpecial Grant or Preſcription.

The Extraordinary Conſervators of the Peace were Perſons ſpecially commiſſioned in Times of imminent Danger, either from Rebels or foreign Invaders, to take care of and defend ſuch a particular Diſtrict committed to their Charge, and to preſerve the Peace within the Limits of it; and theſe had Power to command the Sheriff, with his whole *Poſſe*, to aſſiſt them.

(B) Of the firſt Inſtitution, and general Statutes which give Juſtices of Peace a Juriſdiction.

(*a*) And therefore a Perſon cannot be a Juſtice of Peace by Preſcription. 4 Leon. 149

JUSTICES of Peace were (*a*) firſt inſtituted by the Statute 1 *E.* 3. *cap.* 16. which provides in the following Words: "That for the better "Keeping and Maintenance of the Peace, the King willeth, that in every "County good Men and lawful, which be no Maintainers of Evil, or "Barrators in the County, ſhall be aſſigned to keep the Peace."

——And have no Juriſdiction but what Statutes give them, being created within Time of Memory. Salk. 406. pl. 2.

*Page 287 * And by the 4 *E.* 3. *cap.* 2. it is further enacted, "That there ſhall be "aſſigned good and lawful Men in every County to keep the Peace, and at "the Time of the Aſſignments Mention ſhall be made that ſuch as ſhall be "indicted or taken by the ſaid Keepers of the Peace, ſhall not be let to

"Mainprize

" Mainprize by the Sheriffs, nor by none other Miniſters if they be not " mainpernable by the Law; and the Juſtices aſſigned to deliver the Gaols " ſhall have Power to deliver the ſame Gaols of thoſe that ſhall be indicted " before the Keepers of the Peace, and that the ſaid Keepers ſhall ſend " their Indictments before the Juſtices, *&c.*

And it is further enacted by 18 *E.* 3. *cap.* 2. " That two or three of the " beſt Reputation in the Counties ſhall be aſſigned (*a*) Keepers of the Peace " by the King's Commiſſion, and at what Time need ſhall be, the ſame, " with other wiſe and learned in the Law, ſhall be aſſigned by the King's " Commiſſion to hear and determine Felonies and Treſpaſſes done againſt " the Peace in the ſame Counties, and to inflict Puniſhment reaſonably ac- " cording to the Law and Reaſon and the Manner of the Deed."

(*a*) Although they are not named Keepers, but Juſtices of Peace in their Commiſſion, yet inaſmuch as by this Statute they are expreſly called Keepers of the Peace, and the Keeping thereof is the principal End of their Office, it has been adjudged that the Caption of an Indictment *coram* A. B. *&* C. D. *Cuſtodibus Pacis & Juſticiariis Domini Regis* is good, without expreſly naming them Juſtices of Peace. 2 Rol. Abr. 95.—Alſo it has been reſolved, that the Deſcription of Juſtices of Peace by the Name of *Juſticiarii Domini Regis, ad Pacem conſervandam, &c.* is good, without ſaying *ad Pacem Domini Regis*, for that it is neceſſarily implied. 2 Hawk. P. C. 38.

And it is further enacted by 34 *E.* 3. *cap.* 1. " That in every County of " *England* ſhall be aſſigned, for the Keeping of the Peace, one Lord, and " with him three or four of the moſt worthy in the County, with ſome " Learned in the Law, and they ſhall have Power to reſtrain the Offenders, " Rioters, and all other Barrators, and to purſue, arreſt, take and chaſtiſe " them according to their Treſpaſs or Offence, and to cauſe them to be " impriſoned and duly puniſhed according to the Law and Cuſtoms of " the Realm, and according to that which to them ſhall ſeem beſt to do, " by their Diſcretion and good Adviſement, and alſo to inform them; and " to inquire of all thoſe that have been Pillors and Robbers in the Parts " beyond the Sea, and be now come again, and go wandering, and will " not labour as they were wont in Times paſt; and to take and arreſt all " thoſe that they may find by Indictment or by Suſpicion, and to put them " in Priſon, and to take of all them that be not of good Fame, where they " ſhall be found, ſufficient Surety and Mainprize of their good Behaviour " towards the King and his People, and the other duly to puniſh, to the " intent that the People be not by ſuch Rioters or Rebels troubled nor " endamaged, nor the Peace blemiſhed, nor Merchants nor other paſſing " by the Highway of the Realm diſturbed, nor put in the Peril which may " happen of ſuch Offenders; and alſo to hear and determine at the King's " Suit all Manner of Felonies and Treſpaſſes done in the ſame County, ac- " cording to the Laws and Cuſtoms aforeſaid."

And it is enacted by 17 *Rich.* 2. *cap.* 10. " That in every Commiſſion " of the Peace through the Realm, where Need ſhall be, two Men of " Law of the ſame County where ſuch Commiſſion ſhall be made, ſhall be " aſſigned to go and proceed to the Deliverance of Thieves and Felons, as " often as they ſhall think it expedient."

And it is further enacted by 2 *H.* 5. *ſtat.* 1. *cap.* 4. " That the Juſtices " of Peace in every Shire named of the *Quorum*, except Lords, and the " Juſtices of either Bench, and the Chief Baron, and Serjeants at Law, and " the King's Attorney for the Time that they ſhall be occupied in the " King's Service) ſhall be reſiant in the ſame Shire, and ſhall make their " Seſſions four Times by the Year, *viz.* in the firſt Week after *Michaelmas*, " *Epiphany*, *Eaſter*, and the Tranſlation of *St. Thomas the Martyr*, and " oftner if need be, and that the ſame Juſtices hold their Seſſions through- " out *England* in the ſame Weeks every Year."

* Theſe ſeem to be the moſt general Statutes relating to the Authority of Juſtices of Peace, beſides which there are a very great Number of ſubſequent Statutes † which give them particular Powers, ſometimes to one Juſtice

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† See the laſt Edition of *Burn's Juſtice.*

tice, ſometimes to two, ſometimes in their Seſſions, ſometimes out of their Seſſions; of which in this Place I ſhall no otherwiſe take notice than by obſerving, that where by Statute a ſpecial Authority is given to Juſtices of Peace, it muſt be exactly purſued.

2 Salk. 475. pl. 14.

(C) Of their Commiſſion, and Manner of appointing them.

JUSTICES of the Peace can only be appointed by the King's Commiſſion, and ſuch Commiſſion muſt be in his Name; but it is not requiſite that there ſhould be a ſpecial Suit or Application to, or Warrant from the King for the granting thereof, which is only requiſite for ſuch as are of a particular Nature; as conſtituting the Mayor of ſuch a Town, and his Succeſſors, perpetual Juſtices of the Peace within their Liberties, &c. which Commiſſions are (a) neither revokable by the King, nor determinable by his Death, as the common Commiſſion for the Peace is, which is made of Courſe by the Lord Chancellor according to his Diſcretion.

Lamb. book 1. c. 5. Brook, Commiſſion, c. 5. Dalt. c. 3. Lev. 219.

(a) Nor can a Juſtice of Peace of a Corporation, created by Patent, reſign. Rol. Rep. 135.

The Form of the Commiſſion of the Peace, as it is at this Day, was, according to *Hawkins*, ſettled by the Judges about the 33 *Eliz.* and is in Subſtance as followeth.

2 Hawk. P. C. 35. 4 Inſt. 171. Lamb. book 1. c. 9.

Beginning with a Salutation from the King to the ſeveral Perſons named in it, it afterwards aſſigns them, and every one of them jointly and ſeverally, the King's Juſtices to keep the Peace in ſuch a County, and to cauſe to be kept all Statutes made for the good of the Peace and quiet Government of the People, as well within Liberties as without, and to puniſh all thoſe who ſhall offend againſt any of the ſaid Statutes, and to cauſe all thoſe to come before them, or ſome of them, who ſhall threaten any of the People as to their Perſons, or the Burning of their Houſes, in order to compel them to find Surety for the Peace or good Behaviour; and if they ſhall refuſe to find ſuch Surety, to cauſe them to be ſafey kept in Priſon till they ſhall find it.

2 Hawk. P. C. 35.

Then it goes on, and aſſigns them, and every two or more of them, (of which Number either ſuch or ſuch a particular Perſon among them is ſpecially required to be) Juſtices, to inquire by the Oath of good and lawful Men of the ſame County, of all Felonies, Witchcrafts, Inchantments, Sorceries, Magic Art, Treſpaſſes, Foreſtallers, Regrators, Ingroſſers, and Extortions whatſoever, and of all other Offences of which Juſtices of the Peace may lawfully inquire; alſo of all thoſe who ſhall go or ride armed, &c. or in Companies, to the Diſturbance of the Peace, and alſo of all Innholders, and others, who ſhall offend in the Abuſe of Weights or Meaſures, or ſelling of Victuals, &c. and alſo of all Sheriffs, Bailiffs, Stewards, Conſtables, Gaolers, and other Officers, who ſhall be faulty in the Execution of their Offices; and to inſpect all Indictments taken before them, or any of them, or other former Juſtices of the Peace for the ſame County, and to make and continue Proc ſs againſt all the Perſons ſo indicted, till they ſhall be taken, or render themſelves, or be outlawed, and to hear and determine all the Felonies and other Offences aforeſaid; provided, that if a Cauſe of Difficulty ſhall ariſe, they ſhall not proceed to give Judgment, except in the Preſence of ſome Juſtice of one of the Benches, or of Aſſize.

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And

And then it commands them to make Inquiries of the Premiſſes, and to hear and determine the ſame, at certain Days and Places, which they, or any ſuch two or more of them ſhall appoint; and then it goes on, and commands the Sheriff of the County to return before them, at certain Days and Places to be made known to him by them, ſuch and ſo many lawful Men of his Bailiwick, by whom the Truth of the Premiſſes may be beſt known and inquired; and then concludes, by aſſigning ſome one of them Keeper of the Rolls of the Peace in the ſame County, and commanding him to cauſe to be brought before himſelf and his Fellows, at the ſaid Days and Places, the Writs, Precepts, Proceſſes, and Indictments aforeſaid. 2 Hawk. P. C. 36.

My Lord *Hale* gives us the ſame Commiſſion, which at preſent, ſays he, conſiſts of two Clauſes of *Aſſignavimus*; by the firſt of which each of them is made a Juſtice or Conſervator of the Peace; by the ſecond *Aſſignavimus*, Power is given to them, or two of them, whereof one of the *Quorum*, to hear and determine Felonies, and other Matters; for the bare making them Juſtices of the Peace, without this Clauſe, doth not give them Power to hear and determine Indictments; he alſo takes Notice of a Proviſo in the ſaid Commiſſion, *viz.* that in caſe of Difficulty ariſing, then to reſpite Judgment till the Juſtices of Aſſize come into the County, *&c.* 2 Hal. Hiſt. P. C. 43. Stamf. P. C. B. 2. c. 5.

It ſeems agreed that Juſtices of the Peace may, by virtue of their Commiſſion, execute as well the Statutes made before the Reign of *Edw.* 3. for the better keeping of the Peace, ſuch as the Statutes of *Wincheſter* and *Weſtminſter*, *&c.* as thoſe made ſince that Time; and yet the Statutes which ordain Juſtices of the Peace, ſay nothing of the Execution of thoſe former Statutes; from whence, ſays *Hawkins*, it appears, that the King may, by Commiſſion, authoriſe whom he pleaſes to execute the Statute. Lamb. B. 1. c. 9. Dalt. c. 5. Crompt. 7, 8. 2 Hawk. P. C. 56.

(D) Who are qualified for the Office.

BY the Statute 2 *H.* 5. *Stat.* 2. *cap.* 1. it is enacted, "That Juſtices of "Peace ſhall be made in the Counties of *England* of moſt ſufficient "Perſons dwelling in the ſame Counties by the Advice of the Chancellor "and of the King's Council, without taking other Perſon dwelling in "foreign Counties to execute ſuch Office, except the Lords and the Juſtices "of Aſſizes to be named by the King and his Council, and except all the "King's chief Stewards of the Lands and Seignories of the Dutchy of "*Lancaſter* in the North Parts and in the South for the Time being."

By the 1 *Mar. Seſſ.* 2. *cap.* 8. it is enacted, "That no Perſon having or "uſing the Office of a Sheriff of any County, ſhall uſe or exerciſe the Of"fice of a Juſtice of Peace, by force of any Commiſſion, or otherwiſe, in "any County where he ſhall be Sheriff, during the Time only that he ſhall "exerciſe the ſaid Office of Sheriffwick; and that all Acts done by ſuch "Sheriff by Authority of any Commiſſion of the Peace, during the Time "aboveſaid, ſhall be void."

By the Statute 18 *H.* 6. *cap.* 11. it is enacted, "That no Juſtice of "Peace within the Realm of *England*, in any County ſhall be aſſigned or "deputed, if he have not Lands or Tenements to the Value of 20 *l. per* "*Annum*, except in Cities, Towns Corporate, *&c.* In an Indictment on this Statute, it muſt be ſhewn that he had a Commiſſion, and did ſome Act purſuant thereto, not having Lands, *&c.* Cro. Jac. 643, 644.

*And now by the 5 *Geo.* 2. *cap.* 8. it is enacted, That no Perſon ſhall "be capable of being a Juſtice of the Peace, or to act as a Juſtice of the "Peace, for any County within that Part of *Great Britain* called *England*, "or *Page 250 By 16 Geo. 2. c. 18. Power is given to the

Juſtices to act in Matters relating to their own Pariſhes. By 23 Geo. 2. c. 26. ſ. 11. and 24 Geo. 2. c. 55. they may indorſe Warrants againſt Perſons that have eſcaped into their Juriſdiction.

" or the Principality of *Wales*, who ſhall not have an Eſtate of Freehold or Copyhold, to and for his own Uſe and Benefit, in Poſſeſſion for Life, or for ſome greater Eſtate either in Law or Equity, or an Eſtate for Years determinable upon one or more Life or Lives, or for a certain Term, originally created for twenty-one Years, or more, in Lands, Tenements or Hereditaments, lying in that Part of *Great Britain* called *England*, or Principality of *Wales*, of the clear yearly Value of one hundred Pounds, over and above what will ſatisfy and diſcharge all Incumbrances that may affect the ſame."

By 24 Geo. 2. c. 44. and 30 Geo. 2. c. 24. ſ. 23. a Month's Notice is to be given of an intended Action againſt a Juſtice of Peace. By 24 Geo. 2. c. 44. ſ. 2. a Juſtice of Peace may tender Amends in Bar of an Action. By ſ. 6. of the ſame Statute, Action not to be brought againſt a Conſtable acting under a Warrant, unleſs he refuſes a Copy of it. By ſ. 7. of ſame Act, double Coſts to be given againſt a Juſtice for wilful and malicious Acts. For their Clerks Fees ſee 26 Geo. 2. c. 14.

And it is further enacted, " That no Attorney, Solicitor, or Proctor in " any Court whatſoever, ſhall be capable to continue or be a Juſtice of the " Peace within any County for that Part of *Great Britain* called *England*, " or the Principality of *Wales*, during ſuch Time as he ſhall continue in " the Buſineſs and Practice of an Attorney, Solicitor or Proctor.

And it is further enacted, " That if any Perſon, who ſhall not be qualified according to the Directions of this Act, ſhall accept or take upon " himſelf the Office of a Juſtice of the Peace, or ſhall do any Act as ſuch, " the Perſon ſo offending ſhall for every ſuch Offence forfeit and pay the " Sum of one hundred Pounds; one Moiety whereof ſhall be to the King's " Majeſty, his Heirs and Succeſſors, and the other Moiety to ſuch Perſon " or Perſons as will ſue for the ſame, by Action of Debt, Bill, Plaint, " or Information in any of his Majeſty's Courts of Record at *Weſtminſter*, " in which no Eſſoin, Protection, Wager of Law, nor more than one Imparlance, ſhall be allowed.

" Provided, That this Act ſhall not extend to any City or Town being " a County of itſelf, or to any other City, Town, Cinque Port, or Liberty, " having Juſtices of the Peace within their reſpective Limits and Precincts " by Charter, Commiſſion, or otherwiſe; but that in every ſuch City, " Town, Liberty and Place, ſuch Perſons may be capable to be Juſtices " of the Peace, and in ſuch Manner only as they might have been if this " Act had never been made.

" Provided alſo, That nothing in this Act contained ſhall extend to incapacitate any Peer or Lord of Parliament, or the eldeſt Son or Heir " Apparent of any Peer or Lord of Parliament, or of any Perſon qualified " to ſerve as Knight of a Shire by an Act intitled, *An Act to ſecure the Freedom of Parliaments, by the further qualifying Members to ſit in the Houſe of Commons*, to be a Juſtice of Peace for any County, or to act as ſuch.

" Provided alſo, That nothing in this Act contained ſhall extend, or be " conſtrued to extend, to incapacitate or exclude the Officers of the Board " of Green Cloth from being Juſtices of the Peace within the Verge of his " Majeſty's Palaces, or to incapacitate or exclude the Commiſſioners and " principal Officers of the Navy, or the two Under Secretaries in each of " the Offices of Principal Secretary of State, from being Juſtices of the " Peace, in and for ſuch Maritime Counties and Places where they uſually " have been Juſtices of the Peace.

" Provided alſo, that this Act ſhall not extend to any of the Heads of " Colleges or Halls in either of the two Univerſities of *Oxford* and *Cambridge*, but that they may be made Juſtices of the Peace of and in the " ſeveral Counties of *Oxford*, *Berks* and *Cambridge*, and the Cities and " Towns within the ſame, and execute the Office thereof as fully and " freely, in all Reſpects, as heretofore they have lawfully uſed to execute " the ſame, as if this Act had never been made."

(E) Of their Authority and Jurisdiction pursuant to their Commission, and the general Statutes relating to them: And herein,

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1. What jurisdiction they have in relation to Treason and Misprision of Treason.

IT seems to be clearly agreed, that Justices of the Peace have not Jurisdiction to (*a*) hear and determine Treason, *Præmunire*, or Misprision of Treason. Dalt. c. 90. Hal. Hist. P. C. 305, 350, 372.

2 Hal. Hist. P. C. 44. 2 Hawk. P. C. 39. (*a*) In Hal. Hist. P. C. 372. it is laid down as the Opinion of Chief Justice *Roll*, that Justices of the Peace may take an Indictment of Treason, though they cannot determine it.—But in another Place, *viz.* Hal. Hist. P. C. 305. my Lord *Hale* says expresly, that they cannot take an Indictment of it.

But as these Offences are against the Peace of the King and of the Realm, any Justice of the Peace may, either upon his own Knowledge, or the Complaint of others, cause any Person to be apprehended for any such Offence, and such Justice may take the Examination of the Person so apprehended, and the (*b*) Information of all those who can give material Evidence against him, and put the same in Writing, and also bind over such who are able to give any such Evidence to the King's Bench or Gaol-Delivery, and certify his Proceedings to the same Court to which he shall bind over such Informers; and this Doctrine seems to be established by constant Practice, especially since the Statutes of 1 & 2 *Ph.* & *Mar. cap.* 13. and 2 & 3 *Ph.* & *Mar. cap.* 10. which directing Justices of Peace to proceed in this Manner against Persons brought before them for Felony, seem to give them a discretionary Power of proceeding in like Manner against Persons accused of the above-mentioned Offences. *Vide* the Authorities *supra*.

(*b*) And these Informations taken upon Oath, as they ought to be, and sworn to by the Justice, or his Clerk, that took them, to be truly taken, may be read in Evidence against the Prisoner, if the Informant be dead, or not able to travel, and sworn so to be; also, says my Lord *Hale*, by the Opinion of some, if he were bound over, and appear not, they may be read; but this, he says, is questionable. 2 Hal. Hist. P. C. 305. But for this *vide* 2 Hawk. P. C. 429.

Also by some Acts of Parliament, Justices of Peace may take Indictments of particular Treasons; but those Presentments they must certify into the King's Bench or Gaol-Delivery, as the Case shall require; as upon the Statute of 5 *Eliz. cap.* 1. for maintaining the Authority of the See of *Rome*; 13 *Eliz. cap.* 2. for bringing in Bulls for Absolution, *Agnus Dei*, &c. 23 *Eliz. cap.* 1. for withdrawing and reconciling, or being withdrawn from the King's Allegiance. 2 Hal. Hist. P. C. 44. Leon. 239.

So by the Statute of 3 *H.* 5. *cap.* 7. as to Treason for clipping, &c. Power was given to the Justices of Peace to inquire and make Process thereupon, and anciently that Clause was put into their Commission, but now omitted; for by the Statute of 1 *Mar. cap.* 1. the Act of 3 *H.* 5. *cap.* 6. is repealed, and consequently the Act 3 *H.* 5. *cap.* 7. that gave Power to Justices of Peace to inquire touching it. 2 Hal. Hist. P. C. 45.

2. What in relation to Felonies.

It seems to have been a Matter of some Doubt, whether Justices of Peace, as such, have Power to hear and determine Felonies, &c. and this Doubt seems to have arisen from the general Words of 34 *E.* 3. *cap.* 1. Cro. Jac. 32. Yelv. 46. 2 Rol. Rep. 151. Dyer 69. pl. 29. 2 Hawk. P. C. 38.

*Page 292 *cap.* 1. which is expreſs, that the Perſons aſſigned to keep the Peace ſhall have Power, among other Things, to hear and determine Felonies, *&c.*

Stamf. P. C. 53. Crompt. 120. 2 Hal. Hiſt. P. C. 43. 2 Hawk. P. C. 38.

But it ſeems to be now ſettled, that Juſtices of Peace have no Power to hear and determine Felonies, unleſs they be authoriſed ſo to do by the expreſs Words of their Commiſſion; and that their Juriſdiction to hear and determine Murder, Manſlaughter, and other Felonies and Treſpaſſes, is by force of the ſecond *Aſſignavimus* in their Commiſſion, which gives them, or two of them, whereof one of the *Quorum*, Power to hear and determine Felonies, *&c.*

Dominus Rex verſus *Carter*, Trin. 7 Geo. 1. in *B. R.*

And hence it hath been lately adjudged, that the Caption of an Indictment of Treſpaſs before Juſtices of the Peace, without adding *necnon ad diverſas Felonias, &c. aſſignat'*, is naught.

But though Juſtices of Peace, by force of their Commiſſion, have Authority to hear and determine Murder and Manſlaughter, yet they ſeldom exerciſe a Juriſdiction herein, or in any other Offences in which Clergy is taken away; and this, ſays my Lord *Hale*, is for two Reaſons:

2 Hal. Hiſt. P. C. 46.

1. By Reaſon of the Monition and Clauſe in their Commiſſion, *viz.* in Caſes of Difficulty to expect the Preſence of the Juſtices of Aſſize.

2. By reaſon of the Direction of the Statute of 1 & 2 *Ph. & Mar. cap.* 13. which directs Juſtices of the Peace, in caſe of Manſlaughter and other Felonies, to take the Examination of the Priſoner, and the Information of the Fact, and put the ſame in Writing, and then to bail the Priſoner, if there be Cauſe, and to certify the ſame, with the Bail, at the next Gaol-Delivery; and therefore, in Caſes of great Moment, they bind over the Proſecutors, and bail the Party, if bailable, to the next Gaol-Delivery; but in ſmaller Matters, as Petty Larceny, and ſome Caſes, they bind over to the Seſſions; but this is but in point of Diſcretion and Convenience, not becauſe they have not Juriſdiction of the Crime.

3. What in relation to inferior Offences.

6 Mod. 128.

The Juriſdiction herein given to Juſtices of Peace by particular Statutes is ſo various, and extends to ſuch a Multiplicity of Caſes, that it were endleſs to endeavour to enumerate them; alſo they have, as Juſtices of the Peace, a very ample Juriſdiction in all Matters concerning the Peace.

Lev. 139. Sid. 271. (*a*) Latch 173. Poph. 208. Cro. Jac. 32. Yelv. 46. Salk. 406. pl. 2. Crompt. 120. Lamb. B. 1. c. 12.

And therefore it hath been held, that not only Aſſaults and Batteries, but Libels, Barretry, and common (*a*) Night-walking, and haunting Bawdy-Houſes, and ſuch like Offences, which have a direct Tendency to cauſe Breaches of the Peace, are cognizable by Juſtices of the Peace, as Treſpaſſes within the proper and natural Meaning of the Word.

But neither Perjury nor Forgery at Common Law, nor any other ſuch like Offences, which do not directly tend to cauſe a perſonal Wrong or open Violence, are cognizable by them, unleſs it be by the expreſs Words of their Commiſſion, or ſome Statute.

4. How far they have Power to proceed on Indictments not taken before themſelves.

2 Hal. Hiſt. P. C. 46. 2 Hawk. P. C. 37.

Juſtices of the Peace may proceed upon Indictments taken before their Predeceſſors, which depends upon the Statutes 11 *H.* 6. *cap.* 6. and 1 *E.* 6. *cap.* 7. *par.* 6. the former of which, reciting the Inconveniences that Pleas and Proceſſes upon Indictments before Juſtices of the Peace had often been diſcontinued by making of new Commiſſions of the Peace, to the great Loſs of the King, *&c.* ordains that ſuch Pleas, Suits, and Proceſſes before Juſtices of the Peace ſhall not be diſcontinued by new Commiſſions

of

* of the Peace, but ſtand in Force, and that the new Juſtices, after they have the Records of the ſame Pleas and Proceſſes before them, may continue, and finally hear and determine the ſame; and this is confirmed by the 1 *E.* 6. *cap.* 7. * Page 293

But Juſtices of Peace have no Power to proceed on Indictments taken before a Coroner, or before Juſtices of Oyer or Gaol-Delivery, or to deliver Perſons ſuſpected by Proclamation. 2 Hal. Hiſt. P. C. 46.

But if an Indictment be taken before the Sheriff in his Torn, by the Statute of 1 *E.* 4. *cap.* 2. thoſe Indictments are to be delivered to the Juſtices of Peace at their next Seſſion, and they may proceed on thoſe Preſentments. 2 Hal. Hiſt. P. C. 46.

5. By what Juſtice the Juriſdiction muſt be exerciſed; and therein how far a Juſtice of a County may act out of it, or within a Liberty.

Every ſingle Juſtice has regularly a Juriſdiction through the whole County, which he alone may exerciſe for the Preſervation of the Peace; and this Juriſdiction he has by virtue of his Commiſſion, which conſtitutes him a Juſtice of Peace; but the Power of hearing and determining Offences is by the Commiſſion given to two, or more, (*a*) *Quorum unus &c.* and therefore if two Juſtices, *Quorum unus*, be impowered to do a Thing, it muſt appear that one was of the *Quorum* †. 2 Hal. Hiſt. P. C. 44. 5 Mod. 322. Comb. 200.

(*a*) Cannot be a Seſſion without a Juſtice of the *Quorum*. 3 Mod. 14, 152. 2 Ld. Raym. 1238. —— † Orders of Juſtices are not to be vacated, for not expreſſing one of them to be of the *Quorum*. 26 Geo. 2. c. 27.

So if a Thing be required to be done by two Juſtices, they muſt both be preſent at the Execution of it; as if two Juſtices adjudge a Perſon the Father of a Baſtard Child, and the Examination is ſaid to be by one of them, this is naught; for the Examination being a Judicial Act ought to be by both, and it is not ſufficient that one of them examined, and made a Report to the other; but if they are both preſent, and one alone examines, or aſks Queſtions, it is well enough: So where two Juſtices are enabled to bail a Perſon, they ought both to be preſent to do it, and not one of them firſt to ſign the Recognizance, and then ſend it to another. 6 Mod. 180. 2 Salk. 477. pl. 22. 488. pl. 50. Ld. Raym. 55. 2 Ld. Raym. 1157, 1198.

A ſingle Juſtice cannot bail a Perſon, that is committed by Order of the Seſſions; for he that bails muſt have as high a Power as he who commits. Keb. 857, 897. *Vide* Tit. *Bail.*

But whatſoever Power is given to a Juſtice, or to two Juſtices of the Peace, by any Statute, is given to the Seſſions of the Peace, which conſiſts of a Collection of Juſtices. 2 Keb. 78.

It has been held, that where a Statute ſays the next Juſtice, it muſt be the next; but where it ſays the Juſtices of Peace in or near the Place, there any Juſtice of Peace in the County will ſerve. 2 Keb. 559.

Juſtices of the Peace are to execute their Authority as Juſtices of the Peace within the County wherein they are Juſtices, and cannot regularly do a Judicial Act out of ſuch County. 2 Hal. Hiſt. P. C. 50. 2 Hawk. P. C. 37.

Therefore if a Juſtice of Peace live or be out of the County wherein he is Juſtice, he cannot by his Warrant fetch a Perſon out of the County whereof he is Juſtice, to come before him in the County where he is. 13 E. 4. 8. b. Plow. 37. a. *Platt's* Caſe.

And as Juſtices of the Peace have no coercive Power out of their County, they cannot make an Order of Baſtardy, or ſuch like Orders, out of their County. 2 Hawk. P. C. 37.

But

Cro. Car. 211. Jon. 239. But a Juſtice of Peace may do a Miniſterial Act out of the County, ſuch as examine a Party robbed, whether he knows the Felons according to the Statute or not.

* Page 294 2 Hawk. P. C. 37. 2 Hal. Hiſt. P. C. 51. * Alſo by the better Opinion, Recognizances and Informations voluntarily taken before them in any Place are good; for thoſe, ſays my Lord Chief Juſtice *Hale*, are Acts of voluntary Juriſdiction, and may be done out of the County, as well as a Biſhop may grant Adminiſtration, Inſtitution, or Orders out of his Dioceſe.

2 Hal. Hiſt. P. C. 51. But a Juſtice of Peace cannot impriſon a Perſon for not giving a Recognizance, or commit a Perſon for a Crime, for theſe are Acts of compulſory Juriſdiction, which he cannot exerciſe out of his proper County.

2 Hal. Hiſt. P. C. 51. If *A.* commit a Felony in the County of *B.* where he lives, and goes into the County of *C.* and is there taken, a Juſtice of the Peace of the County of *C.* may take his Examination and Informations in the County of *C.* though the Felony were committed in the County of *B.* but my Lord *Hale* ſays, that upon his Arraignment in the County of *B.* he would never allow theſe Examinations to be given in Evidence, becauſe though he may commit and examine, and give an Oath to the Informers, yea and bind them over to give Evidence, or commit them, yet that is but for Neceſſity of preſerving the Peace, for he hath really no Juriſdiction in the Caſe.

Hal. Hiſt. P. C. 580. If *A.* commit a Felony in the County of *B.* and upon a Warrant iſſued againſt him by a Juſtice of Peace in the County of *B.* he is purſued and flies into the County of *C.* and there is taken, he muſt not, by virtue of that Warrant, be carried to a Juſtice of Peace of the County of *B.* where he committed the Felony, but to a Juſtice of Peace in the County of *C.* where he was taken †.

† Juſtices of Peace may indorſe Warrants againſt Perſons that have eſcaped into their Juriſdiction. 23 Geo. 2. c. 26. ſ. 11. 24 Geo. 2. c. 55.

Hal. Hiſt. P. C. 581. But if *A.* were taken by the Warrant in the County of *B.* and break away into the County of *C.* and be there taken upon freſh Suit by them that firſt took him, he may be either brought to a Juſtice of the County of *C.* where he was laſt taken, or before the Juſtice of the County of *B.* by whoſe Warrant he was firſt taken, for in Suppoſition of Law he was always in Cuſtody.

2 Hal Hiſt. P. C. 115. But if he eſcape before Arreſt into another County, if it be a Warrant barely for a Miſdemeanor, it ſeems the Officer cannot purſue him into another County, becauſe out of the Juriſdiction of the Juſtice that granted the Warrant; but in caſe of Felony, Affray, or dangerous Wounding, the Officer may purſue him, and raiſe Hue and Cry upon him into any County; but if he take him in a foreign County, he is to bring him to the Gaol or Juſtice of that County where he is taken, for he doth not take him purely by the Warrant of the Juſtice, but by the Authority which the Law gives him, and the Juſtice's Warrant is a ſufficient Cauſe of Suſpicion and Purſuit.

2 Hal. Hiſt. P. C. 581. If *A.* be a Juſtice of Peace in two adjacent Counties, though by ſeveral Commiſſions, as the Recorder of *London* is, he, whilſt he lives in one County, may ſend his Warrant to apprehend Malefactors in another, and ſend them to *Newgate*, which is the common Gaol both for *London* and *Middleſex*.

4 Co. 46. a. *Wigg*'s Caſe 2 Hal. Hiſt. P. C 52. The Juſtices of the Peace have Juriſdiction of Felonies ariſing within the Verge.

2 Hawk. P. C. 37. 2 Hal. Hiſt. P. C. 49. Juſtices of the Peace for a County have, by their Commiſſion, an expreſs Authority as well within Liberties as without, and may execute their Office within a Town which has a ſpecial Commiſſion of the Peace for its own Limits, unleſs ſuch Commiſſion have a Clauſe that no other Juſtices, except

except thoſe named in it, ſhall any way concern themſelves in the Keeping of the Peace within the Liberties of ſuch Town.

Alſo it ſeems, that though ſuch Commiſſion have a ſpecial excluſive Clauſe, of which the Juſtices have Notice, yet their Acts within a Liberty are not void, though perhaps they may be puniſhed for proceeding in Defiance of ſuch reſtrictive Clauſe, as for a Contempt of the King's Prohibition. 2 Hal. Hiſt. P. C. 47. 2 Hawk. P. C. 37.

* By the 9 *Geo.* 1. *cap.* 7. *ſect.* 3. it is enacted, "That if any Juſtice * Page 295
" of Peace ſhall dwell in any City, or other Precinct, that is a County
" of itſelf, ſituate within the County at large, for which he ſhall be ap-
" pointed Juſtice of Peace, although not within the ſame County, it ſhall
" and may be lawful for any ſuch Juſtice of Peace to grant Warrants,
" take Examinations, and make Orders, for any Matters which any one
" or more Juſtice or Juſtices of the Peace may act in, at his own
" Dwelling-houſe, although ſuch Dwelling-houſe be out of the County where
" he is authorized to act as a Juſtice of Peace, and in ſome City, or
" other Precinct adjoining, that is a County of itſelf; and that all ſuch
" Warrants, Orders, and other Act or Acts of any ſuch Juſtice of Peace,
" and the Act or Acts of any Conſtable, Tythingman, Headborough,
" Overſeer of the Poor, Surveyor of the Highways, or other Officer, in
" Obedience to any ſuch Warrant or Order, ſhall be valid, good and
" effectual in the Law, although it happen to be out of the Limits of the
" proper Precinct or Authority; provided always, that nothing in this
" Act contained ſhall extend to give Power to the Juſtices of Peace for
" the Counties at large, to hold their general Quarter-Seſſions of the
" Peace in Cities or Towns, which are Counties of themſelves, nor to im-
" power Juſtices of Peace, Sheriffs, Bailiffs, Conſtables, Headboroughs,
" Tythingmen, Borſholders, or any other Peace-Officers of the Counties
" at large, to act or intermeddle in any Matters or Things ariſing within
" Cities or Towns, which are Counties of themſelves, and that all ſuch
" Actions and Doings ſhall be of the ſame Force and Effect in Law, and
" none other, as if this Act had never been made."

[Two, or more Juſtices, tho' not of the Quorum, impowered to carry certain Acts into Execution. 7 *Geo.* 3. *cap.* 21.]

(*a*) Leaſes and Terms for Years.

A Leaſe for Years is a Contract between Leſſor and Leſſee, for the Poſſeſſion and Profits of Lands, *&c.* on the one Side, and a Recompence for Rent, or other Income, on the other.

This is eſteemed in Law a middle Kind of Intereſt between an Eſtate for Life and a Tenancy at Will; for thoſe who held large Diſtricts and Tracts of Lands, being unacquainted with the Arts of Huſbandry and Tillage, found it their Intereſt to leaſe out their Demeſnes, which for want of Care and Cultivation lay Waſte, and afforded them little or no *Spelm. Rem.* 2.

(*a*) That able Writer Mr. Juſtice *Blackſtone* for the Learning relative to Leaſes, which he ſays is very curious and diffuſive, refers the Student to this Book, where (he obſerves) the Subject is treated in a perſpicuous and maſterly Manner, being ſuppoſed to be extracted from a Manuſcript of Sir *Geoffrey Gilbert*. 2 Black. Com. 322, 323, in Notes.

no Profit; and this Way of Letting for Years was thought beſt to anſwer the Deſign and Intentions of the Lord, as well as the Expectations of the Tenant; for if they had let them for Life, this had given the Tenants too great a Power over the Lord, becauſe then they would have had a Property in the Freehold, and by ſuffering Diſſeiſins, or feigned Recoveries to be had againſt themſelves, might have ſhaken, or endangered the Inheritance of the Owner; and on the other Side, if they had leaſed their Land only at Will, few would have been willing to beſtow
Page 296 any great Pains or Induſtry upon ſo precarious a Poſſeſſion, which the arbitrary Will and Pleaſure of a peeviſh Lord might have defeated.

Originally Leaſes for Years were but of little Regard, the Tenant having only *utile*, not *directum Dominium*, and was ſaid *Tenere nomine alieno*; and as he had only the Perception of the Profits, whoever recovered the Freehold reduced likewiſe the Poſſeſſion, whether ſuch Recovery were true or feigned; and the Leſſee had no other Remedy but an Action of Covenant againſt the Leſſor; and this, at leaſt, was thought a juſt Conſtruction, that he who had deveſted himſelf of the Profits of his Lands for a Time, by giving them to another, ſhould be obliged to maintain that Gift, to be liable to make Satisfaction if he did not; and this was the more reaſonable, becauſe the Leſſee was equally bound to anſwer and make good the Rent during the Term; and if he did not, the Law allowed the Leſſor to maintain an Action of Covenant as well as of Debt againſt him, for with-holding thereof; and as they made this Conſtruction for the Leſſor upon the Words *Yielding* and *Paying*, which were no expreſs Covenant in themſelves, it was but reaſonable they ſhould make the like Conſtruction for the Leſſee upon the Word *Dimiſit*, which in itſelf no more imported an expreſs Covenant on his Part; but by making this Conſtruction mutual, they did Juſtice to both, and by making of it at all, they plainly ſhewed their Opinions of the Leaſe to be no other than a Contract or Agreement between the Parties, and not ſuch an Act as transferred any Property to the Leſſee; and this is one Reaſon why Leaſes for Years are conſidered as Chattels, and go to (*a*) Executors.

Vide Tit. *Covenant*, and Salk. 137. pl. 1.

(*a*) Therefore if a Leaſe be made to a Biſhop, Abbot, Parſon, or any other ſole Corporation, and his Succeſſors, for ſuch a Number of Years, yet it ſhall go to the Executors or Adminiſtrators of the Leſſee, and not to his Succeſſors, becauſe a Term for Years being looked npon as a Chattel, the Executors or Adminiſtrators are the only Perſons the Law allows to ſucceed thereto; and this Succeſſion to the Chattel cannot be altered or controuled by any Limitation of the Party; but yet in ſuch Caſe it ſeems, that the Executors or Adminiſtrators of the Leſſee ſhall hold it in the Right of, and as Truſtees for the Succeſſors; for the Book ſays, they ſhall have it in *Auter droit*. Co. Lit. 9. a. 46. b. 90. a.——But this Rule as to the Succeſſion of Chattels, hath two Exceptions. 1. In caſe of the King, who by his Prerogative may take any Chattels in Succeſſion, and conſequently a Leaſe made to him and his Succeſſors for Years is good, and ſhall go accordingly, and not to his Executors or Adminiſtrators. Co. Lit. 90. a. 11 Co. 92. a.——The ſecond Exception is in caſe of the Chamberlain of *London*, who, by Cuſtom of the City, confirmed by divers Acts of Parliament, may take Chattels in Succeſſion for the Benefit of Orphans; but *Quære*, if this Cuſtom extends to Leaſes for Years, for the Books, only mention Recognizances, Obligations, &c. which are given or entered into to the Chamberlain and his Succeſſors, by way of Security for Orphans Portions; *Quære* therefore if a Leaſe may be made to the Chamberlain and his Succeſſors for Years. Cro. Eliz. 464. 4 Inſt. 249. 4 Co. 65. *Fulwood's* Caſe.

Another Reaſon was, becauſe at firſt theſe Leaſes were made but for a ſmall Number of Years, (for my Lord *Coke* tells us, that by the ancient Law of *England*, no Man could have made a Leaſe for above forty Years at the moſt,) and the Reaſon thereof ſeems to be, becauſe they were only made to ſerve the Occaſions and Exigencies of the Lord in cultivating and improving his Demeſnes, not to borrow Money on or raiſe Portions for Daughters, or ſuch other Uſes as are now made thereof; therefore there was no need to extend them to any great Length of Time, ſince they might be renewed as often as Occaſion required; beſides, the Leſſees, if they were evicted, being only to recover Damages, it would have been fruitleſs

Co. Lit. 45. b. Mirror 164, 293. Vent. 53.

fruitleſs to prolong Leaſes for the Term of 1000 Years, when the Perſons who are to poſſeſs under ſuch Leaſes had no Remedy for their Damages but by Recourſe to the Repreſentatives of the original Leſſor.

Alſo another Reaſon might be, becauſe theſe Leaſes for Years were under the Power of the Freeholder to deſtroy by a Recovery; for the Perſon coming in by the Recovery, was ſuppoſed to come in by Title Paramount, and ſo was not bound or obliged by them, and by Conſequence few could be willing to take Leaſes for any longer Term, which they might ſo eaſily be defeated of. *Vide* Title *Fines* and *Recoveries*. * Page 297

But though in the Reign of *H.* 7. it was reſolved, that the Leſſees ſhould not only recover Damages as a Recompence for the Poſſeſſion loſt, but ſhould alſo recover the Poſſeſſion itſelf; and the Statute 21 *H.* 8. *cap.* 15. gives the Termor Power to falſify all manner of Recoveries had againſt the Tenant of the Freehold, upon feigned and untrue Titles; from whence Men began to limit long Leaſes, becauſe by ſuch Purchaſes they eſcaped the Wardſhip, Relief, and other Burdens that were annexed to the ancient Tenures, yet no Alteration was made in the Succeſſion to them, the Law having been formerly ſettled as to that Point; and if they had not carried the Succeſſion in the Manner they formerly did, they had loſt the End of ſuch Limitation. Bro. Tit. *Leaſes* 26. F.N.B. 198, 230. Vaugh. 127. 4 Co. 80. Lev. 46. 2 Mod. 18.

And though at this Day Terms for Years are multiplied to a much longer Duration than they were formerly, and there is now ample Remedy to recover the Term itſelf, yet the Succeſſion continues the ſame; for beſides the Reaſons already given, it would be inconvenient to have had one Rule of Property for ſhort Terms, and another for thoſe that were longer, being all of the ſame Nature, and ſtill no more than Leaſes for Years; beſides the Difficulty of fixing the juſt Bounds to any preciſe determinate Number of Years, ſince one or two Years, more or leſs, would have made very little Difference in Reaſon, were the Bounds affixed to Leaſes of never ſo long a Continuance, and long or ſhort are only Terms of Compariſon; as a Leaſe for forty Years is long with reſpect to one of eight or ten Years, and yet ſhort with reſpect to another of a hundred Years; therefore that there might be an Uniformity in the Law, all Leaſes for Years are held to be of leſs Value than Eſtates for Life, as being originally of much ſhorter Duration, and alſo becauſe they were under the Power of the Tenant of the Freehold to deſtroy, and therefore are conſidered only as Chattels, and caſt upon the Executors.

We ſhall conſider this Head under the following Diviſions.

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(B) **Of the Perſons by whom Leaſes may be made; and herein, firſt, of Leaſes by Infants.** 304.

(C) **Of Leaſes made by Husband and Wife.** 305.

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(D) **Of Leaſes by Tenant in Tail.** 310.

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(Q) How

(Q) How far, and by what Means, Leaſes for Years in Truſt to attend an Inheritance may be barred or deſtroyed. 448.
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(A) Of what Things Leaſes may be made for Years.

AFTER ſuch Time as Leaſes for Years began to be looked upon as fixed and permanent Intereſts, and that the Leſſees were ſufficiently provided to defend themſelves, and their Poſſeſſions, againſt the Acts and Incroachments as well of the Leſſor as of Strangers, Men found it their Intereſt to improve and encourage this Sort of Property, and therefore extended it to all Sorts of Intereſts and Poſſeſſions whatſoever, being led thereto by that known Rule, that whatſoever may be granted or parted with for ever, may be granted or parted with for a Time; and therefore not only Lands and Houſes have been lett for Years, but alſo Goods and Chattels, though the Intereſt of the Leſſee therein differs from the Intereſt he hath in Lands or Houſes ſo lett for Years: For if one leaſe for Years a Stock of live Cattle, ſuch Leaſe is good, and the Leſſee hath only the Uſe and Profits of them during the Term; but yet the Leſſor hath not any Reverſion in them to grant over to another, either during the Term or after, till the Leſſee hath re-delivered them to him as he would have of Lands in caſe of ſuch Leaſe for Years, for the Leſſor hath only a Poſſibility of Property in caſe they all outlive the Term; for if any of them die during the Term, the Leſſor cannot have them again after the Term; and during the Term he hath nothing to do with them, and conſequently of ſuch as die, the Property reſts abſolutely in the Leſſee; ſo whether they live or die, yet all the young ones coming of them, as Lambs, Calves, *&c.* belong abſolutely to the Leſſee as Profits ariſing and

Godb. 112. Leon. 42. Owen 139. 5 Co. 16, 17. Dyer 56. a. 110. a. 212. b. Bro. Tit. *Leaſes* 23. 2 Bulſ. 7.

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ſevered from the Principal, ſince otherwiſe the Leſſee would pay his Rent for nothing; and therefore this differs from a Leaſe of other dead Goods and Chattels; for there if any Thing be added for the Repairing, Mending or Improving thereof, the Leſſor ſhall have the Improvements and Additions, together with the Principal, after the Leaſe ended, becauſe they cannot be ſevered without deſtroying or ſpoiling the Principal; neither is the Succeſſion of young ones, in caſe any of the old ones die, to be reſembled to a Corporation Aggregate, whereof when any die, thoſe that ſucceed ſhall be ſaid Part of the ſame Corporation, for the Corporation, in its public Capacity, never dies; but this being a Leaſe of ſuch and ſuch individual Cattle, when any of them die, the Poſſibility of reverting Property, which was left in the Leſſor, is determined and at an End; but the Leſſee in ſuch Caſe cannot kill, deſtroy, ſell, or give them away, during the Term, without being ſubject to an Action of Treſpaſs, as it ſhould

Lit. ſ. 71. Co. Lit. 57. a. ſeem; but in caſe of a Leaſe of a Houſe, together with Goods, it is uſual to make a Schedule thereof, and affix it to the Leaſe, and to have a Covenant from the Leſſee to re deliver them at the End of the Term, and without ſuch Covenant the Leſſor could have no other Remedy, but Trover or Detinue for them after the Leaſe ended.

Bro. Tit. *Leaſes* 40. If one hath a Corody for Life, he may let it to another, or to the Grantor himſelf; ſo may the Grantee of Houſe-Boot, or Hay-Boot; but in caſe ſuch Leaſe be to the Leſſor himſelf, rendering Rent, he can only have them by way of Retainer, being to ariſe out of his own Proviſion, or his own Land.

Hard. 357. But as to Lands, or other Things of Inheritance, as they may be granted or departed with for ever, ſo they may for a Time, and conſequently may be leaſed for Years in all Caſes where no Inconvenience or Injury to the Public is like to enſue; for then Mens private Intereſts muſt give way to the Public, and what might otherwiſe in its own Nature be good and allowable, muſt upon that Account be diſallowed and ſtand condemned; wherefore it having been ſettled, that all Leaſes for

9 Co. 97. Rol. Abr. 847. 2 Rol Abr. 153. Sir *George Reynolds's* Caſe. Cro. Car. 587. Jon. 563. Hob. 153. 3 Mod. 145. Years were but Chattels, and as ſuch ſhould go to Executors or Adminiſtrators: The firſt Caſe wherein we find any Objection to a Leaſe for Years is, that of the Office of Marſhal of the King's Bench Priſon, for that being an Office of great Truſt, concerning the Adminiſtration of Juſtice in the Keeping of Priſoners, if it ſhould be granted for Years, might be injurious to the Public, by being in Suſpence till Probate of the Will or Adminiſtration taken out; and if the Officer ſhould die indebted, ſo that none would prove his Will, or take out Adminiſtration, then there would be no Officer at all, and Executors or Adminiſtrators would be in by Act of Law, without Allowance of the Court; alſo it might be a Queſtion, if ſuch Office ſhould not be forfeited by Outlawry, or be Aſſets in the Executor's Hands; and many other Inconveniencies would follow, if ſuch Grant for Years were allowed; for the ſame Reaſons it was held likewiſe, that the Offices of *Cuſtos Brevium*, Chirographer, Clerk of the Pipe, of the King's Silver, or of the Crown, Remembrancer or Chamberlain of the Exchequer, Prothonotaries, and other Offices in the ſeveral Courts of Juſtice, cannot be granted for Years; and though the Offices of Sheriff and Coroner were granted for Years till reſtrained by 14 *E.* 3. *cap* 7. yet it was never debated what Inconveniences might enſue by allowing thereof; and theſe Reaſons held equally good

* Page 302 * againſt granting the Office of Warden of the *Fleet*, or any other (*a*) Gaolerſhip.

(*a*) In 2 Cha. Ca. 30. it is ſaid by my Lord Chancellor, that he thought the Caſe of a Gaolerſhip not grantable for Years too eaſily ſlipt over.

And

And although it hath been reſolved, that the Office of the Marſhal of the *King's Bench* Priſon cannot be granted for Years, yet it hath been held that a Leaſe thereof for Years during the Life of the Grantee is good; for hereby the Danger of the Office's going to Executors is avoided, which the Book ſays is the ſole Reaſon why the Office is not abſolutely grantable for Years.

6 Mod. 57. *Sutton*'s Caſe. But ſee Hob. 153. Ld. Raym. 159, 163. 2 Ld. Raym. 1005, 1038.

1245. 12 Mod. 516. 11 Mod. 42. pl. 1. 2 Salk. 587. pl. 2.

Alſo it appears that the Dean and Chapter of *Weſtminſter* made a Leaſe for Years of the Gatehouſe Priſon, and the Leſſee had committed ſeveral Offences which amounted to a Forfeiture, for which the Office was ſeized, but no (*b*) Objection made to its being let for Years.

Raym. 216. 2 Lev. 71. 3 Keb. 32. The *King* ver. Lady *Broughton*.

(*b*) *Note*; There ſeems a Difference between Sir *George Reynolds*'s Caſe and this, becauſe in Sir *George Reynolds*'s Caſe the Grant for Years was from the Crown, in whom all Offices, in relation to the Adminiſtration of Juſtice, are originally and inherently lodged; and therefore for the Crown to grant out ſuch Office for Years may be liable to the Objections before mentioned; but in this Caſe the Dean and Chapter are the immediate Grantees of the Crown, and they have the Office to them and their Succeſſors for ever in Fee, and are perpetual Gaolers themſelves, and anſwerable to the Crown, notwithſtanding any ſuperior Leaſe to another; and therefore they always take Security of ſuch Under-Leſſee for their own Indemnity.

But ſuch Offices as do not concern the Adminiſtration of Juſtice, but only require Skill and Diligence, may be granted for Years, becauſe they may be executed by Deputy, without any Inconvenience to the Public: Therefore where a Grant for Years was made of the Office of Garbler of Spices in *London*, it was adjudged to be a good Grant, or at leaſt a good Appointment for Years, within the Intent of the Statute, 1 *Jac.* 1. *cap.* 19.

Hard. 46. *Jones* and *Clerk*.

The Office of Printer was granted for Years, 6 *Car.* 1. and held a good Grant, being but an Employment: So the Office of Poſt-maſter was granted to the Lord *Stanhope* for Years, and held good.

Hard. 352.

The Office of Regiſter of Policies of Aſſurance in *London* concerning Merchants was granted by the King for Years, and adjudged to be a good Grant, becauſe it did not concern the Adminiſtration of Juſtice in any Court, but required only the Skill of writing after a Copy: So the Office of making and ſealing *Subpœnas* granted for Years, and allowed to be good; and there ſeveral Precedents are cited of Offices granted for Years; as, firſt, Offices in which the Safety of the Realm was concerned, as the Office of the Warden of a Haven or Port by *H.* 6. of Gunpowder 1 *Car.* 1. of making Gunpowder by *Car.* 2. Alſo Offices concerning the Trade of the Realm have been granted for Years; as 1 *H.* 7. of the Exchange of Money; 18 *H.* 8. of Gager; 17 *Rich.* 2. of Aulnager, though a Seal belongs to it, with which the Officer is intruſted; of the Letter-Office, 3 *Car.* 1. Alſo Offices in Courts of Juſtice have been granted for Years; as the Office of Surveyor of the Green Wax, of the Sixpenny Writs in Chancery and *Subpœnas*, of Comptroller and Cuſtomer, and of making out Proceſs in *C. B.* All theſe, and ſeveral others, have been granted for Years; but no Diſpute having been made of the Validity of them, how far ſome of them would hold at this Day, may be a Queſtion.

Hard. 351, 354, 357. Dyer 303. Hob. 146. 3 Keb. 80.

But where one made a Grant for Years of the Stewardſhip of a Court-Leet and Court-Baron, this was held void as to the Court-Leet, being a judicial Office, but good as to the Court-Baron, being only miniſterial, and the Suitors Judges thereof; but the Grant appearing afterwards to be for Years determinable upon the Death of the Leſſee, it was held good for both, becauſe there was no Danger of its coming to Executors or Adminiſtrators.

2 Lev. 245 2 Jon. 126. *Howard* and *Wood*.

* One Mrs. *Dennis* was found by Office to be an Ideot *a Nativitate*; the King grants the Cuſtody of Body and Eſtate to Sir *Alexander Frazier*, his Executors and Adminiſtrators, during the Ideocy; Sir *Alexander* dies, and then

* Page 303 2 Chan Ca. *Prodgers* ver. Lady *Frazier*

Vern. 9. 137. S. C. then the King grants the Cuſtody to Mr. *Prodgers*; and whether he or the Executrix of Sir *Alexander* had the better Title, was the Queſtion. It was ſaid to be a Truſt in the King, and therefore not grantable to Executors or Adminiſtrators, and that if the Grantee die inteſtate, there would be none to take care of the Ideot. On the other Side it was ſaid, that the King had not only a Truſt, but an Intereſt, and might have diſpoſed of the Profits to his own Uſe, or grant them over as he thought fit, in caſe of an Ideot, though it was otherwiſe in caſe of a Lunatick; and that it being a Chattel ſhould naturally go to Executors; and to this Opinion my Lord Chancellor inclined, but directed the Validity of the Patent to be tried at Law; and (*a*) in *B. R.* the Grant to Sir *Alexander* was held good; for the King has the ſame Intereſt in an Ideot that he had in his Ward, which always went to the Executor of his Grantee though it was otherwiſe in the Caſe of a Lunatick.

(*a*) 3 Mod. 43. 9 Mod. 98. 2 Stra. 915, 1104, 1208. Vern. 192, 414.

Prec. Chan. 203. Will. Rep. 701. pl. 204. 2 Will. Rep. 103, (628,) 265, 544. pl. 176, (638,) 118. 3 Will. Rep. 108, 111, 389.

2 Rol. Rep. 274. Godb. 413. The Office of Park-keeper was granted for Years, and no Objection made to it; for this does not concern the Adminiſtration of Juſtice, but only requires Diligence and Care.

Co. Lit. 16. b. 9. Co. 97. b. Dignities or Honours cannot be granted for Years; as to be Earl, Duke, Baron, *&c.* becauſe then they muſt go to the Executors or Adminiſtrators, whilſt the Eſtate that ſhould ſupport them would go to the Heir, and ſo introduce Confuſion and Abſurdity.

By the 23 *H.* 6. *cap.* 10. it is provided, "That no Sheriff ſhall let to "Farm in any Manner his County, nor any of his Bailiwicks, Hundreds "or Wapentakes;" which proves that before this Statute it was not unuſual to let them to Farm.

By the 12 *Car.* 2. *cap.* 23. *ſect.* 27. the Lord Treaſurer or Commiſſioners of the Treaſury for the Time being have Power to let to Farm all or any the Rates or Duties of Exciſe upon Beer, Ale, Cyder, and other Liquors therein mentioned, ſo as the ſame exceed not the Term of three Years; without which Clauſe the Treaſurer or Commiſſioners of the Treaſury could not have made ſuch Leaſe, though perhaps the King himſelf might, having the abſolute Intereſt and Ownerſhip therein.

By the 12 *Car.* 2. *cap.* 25. *ſect.* 3. Power is given to the King's Agents for granting of Wine Licences to any Perſon or Perſons for any Time or Term not exceeding twenty-one Years, if ſuch Perſon or Perſons ſhall ſo long live, upon ſuch Rent as ſhall be agreed on, to be paid Half-yearly; and ſuch Licence not to be granted to any but thoſe who perſonally uſe the Trade of ſelling by Retail, or to the Landlord of ſuch Houſe, nor ſhall the ſame be aſſignable, or of any Benefit but only to the firſt Taker.

By the 12 *Car.* 2. *cap.* 25. *ſect.* 16. it is provided, that his Majeſty, his Heirs and Succeſſors, may grant the Office of Poſtmaſter-General, with all Profits, Fees, *&c.* to any Perſon or Perſons for Life, or Term of Years not exceeding twenty-one Years, under ſuch Rents and Covenants as ſhall be thought beſt for the Good of the Kingdom.

By the 22 *&* 23 *Car.* 2. *cap.* 14. *ſect.* 6. Power was given to the Maſter and Chaplains of the *Savoy*, to encourage the Rebuilding thereof, to demiſe any of the Lodgings for any Term not exceeding forty Years, under ſuch Rents as they could procure, without renewing.

*(B) Of the Persons who may make Leases; and herein, first, of Leases made by Infants. *Page 304

AS to Leases made by Infants, or such as are under the Age of twenty-one Years, what seems most considerable is, whether any, and what Leases for Years ma'e by such are absolutely and *ipso facto* void, or only voidable by them; about which the Opinions of the Books seem a little unsettled.

Some Opinions are, that all Leases for Years made by Infants (*a*) without Reservation of Rent, are absolutely void, and not merely voidable. Moor 105. 2 Leon. 218. Hutton 102. Mod. 263.

Rol. Rep. 441. (*a*) So if a Trifle only had been reserved, as a Pepper Corn. See Fitzgib. 301. 10 Mod. 421, 424, 436, 533. 12 Mod 162.——But that a Lease made by an Infant to try his Title is good, though no Rent be reserved. Moor 105. 2 Leon. 216. Noy 130.

Other Opinions there are, that Leases for Years in general by Infants are only voidable, and not void, without taking notice whether any Rent were reserved on such Leases, or not; and some even seem to hold, that though no Rent at all be reserved, yet the Leases are not thereby absolutely void, but only voidable by the Infants when they come of Age, and that they may confirm the same at their full Age by accepting of Fealty, which is at least incident to every Lease. Lit. s. 547. Co. Lit. 45. b. 308. a. Lev. 6. Moor 78.

Also most of the Books agree, that if a Rent were reserved on such Lease for Years, then it would be only voidable by the Infant at full Age, without saying how it would be if no Rent at all were reserved, unless by Implication that it would be void in such Case. Bro. Tit. *Leases* 50. Moor 663. Rol. Abr. 729, 730.

3 Mod. 307. And see 10 Mod. 29, 85, 67, 139, 277. Perk. s. 139. March 141. Fitzgib. 275, 276, 277, &c. Lit. s. 259. Will. Rep. 389. pl. 103, 558. pl. 162, 559, 734. pl. 734. 2 Will. Rep. 244. 3 Will. Rep. 208, 206. pl. 51.

But all the Books agree, that if an Infant make a Lease for Years, he cannot plead *Non est factum*, but must avoid it by pleading the special Matter of his Infancy; which seems to favour the Opinion of those who hold that the Lease is not absolutely void; for if the Lease were absolutely void, there does not seem to be any good Reason why he might not plead *Non est factum*, as a Feme Covert certainly may do in such Case, whose Lease is absolutely void, so that no Acceptance of Rent after her Husband's Death can make it good. 5 Co. 119. 2 Inst. 483. Moor, pl. 132. Cro. Eliz. 127, 857 Poph. 178. 10 Co. 43. *Vide* Head of *Infancy and Age.*

An Infant Copyholder without Licence of the Lord made a Lease for Years by Parol, rendering Rent, and at full Age was admitted, and accepted the Rent, and then ousted the Lessee; and in this Case, though it was agreed, that a Lease for Years, rendering Rent, by an Infant, of Freehold Lands was only voidable, yet it was urged that in Case of a Copyhold it would be otherwise, because the Lease not being warranted by the Custom would be a Disseisin to the Lord, and consequently a Forfeiture of his Copyhold, which being a great Mischief to the Infant, the Court ought rather to help him, by adjudging such Lease to be absolutely void; but notwithstanding this, it was adjudged that the Lease was a good Lease till avoided, and that a Lease for Years by a Copyholder without Licence is not a Disseisin; and admitting it should be a Forfeiture in this Case, yet if the Lord enters for it, the Infant may re-enter upon him, and so is at no Mischief, and therefore having accepted the Rent at full Age, hath made it good and unavoidable. Latch 199. Godb. 364. *Ashfield* and *Ashfield*. Noy 92. and Jon. 157. S. C. which last Book says, that it was held to be no Forfeiture as to the Lord, but that admitting it were, yet it was a good Lease as to all Strangers, and that for this Reason principally it was adjudged such Acceptance made it good.

If an Infant takes a Lease for Years of Lands, rendering Rent, which Cro. Jac. 320. *Kettley* and *Elliot*. Godb. 120. 2 Bulst. 69. Rol. Abr. 731. S. C. adjudged.

is

is in Arrear for ſeveral Years, then the Infant comes of Age, and ſtill
* Page 305 * continues the Occupation of the Land, this makes the Leaſe good and unavoidable and by conſequence makes him chargeable with all the Arrears incurred during his Minority; for though at full Age he might have departed from his Bargain, and thereby have avoided Payment of the Arrears which the Leſſor ſuffered to incur during his Minority, yet his Continuance of Poſſeſſion after his full Age ratifies and affirms the Contract *ab Initio*, and ſo gives Remedy for the Arrears of Rent incurred from the Time of the Contract made.

Dalf. 64. *Curium.* But if an Infant poſſeſſed of a Term for Years ſells it for Money, and after he comes of full Age receives Part of the Money for it, he ſhall avoid the Grant notwithſtanding; for the Contract, as ſaid, being void in the Commencement, it cannot be made good by any ſubſequent Act.

Co. Lit. 45. b. By Cuſtom in ſome Places an Infant ſeiſed of Lands in Socage may at the Age of fifteen Years make a Leaſe for Years, which ſhall bind him after he comes of Age; for the Cuſtom makes fifteen his full Age for that Purpoſe.

4 Leon. 4. An Infant made a Leaſe for Years, and at full Age ſaid to the Leſſee, *God give you Joy of it*; this was held by *Mead* a good Affirmation of the Leaſe; for this is a uſual Compliment to expreſs one's Aſſent and Approbation of what is done.

Plow. 212. Dyer 209. Caſe of the Duchy of *Lancaſter.* If the King within Age makes a Leaſe for Years, this is binding preſently, and cannot be avoided by him, either during his Minority or when he comes of Age; for the Politick Rules of Government have thought it neceſſary that he, who is to govern and manage the whole Kingdom, ſhould never be conſidered as a Minor, incapable of governing himſelf and his own Affairs.

(C) Of Leaſes made by Husband and Wife: And herein,

1. Of Leaſes made by Huſband and Wife by the Common Law.

Bro. Tit. *Acceptance* 10. Tit. *Leaſes* 24. Cro. Jac. 332. *Jordan* and *Wilkes.* 2 And. 42. Co. Lit. 45. b. Plow. 137. IT is clearly agreed, that if a Huſband ſeized of Lands in Right of his Wife, make a Leaſe thereof by Indenture or Deed Poll, reſerving Rent, that this is a good Leaſe for the whole Term, unleſs the Wife by ſome Act after the Huſband's Death ſhews her Diſſent thereto; for if ſhe accepts Rent which becomes due after his Death, the Leaſe is thereby become abſolute and unvoidable; the Reaſon whereof is, that the Wife after her Intermarriage being by Law diſabled to contract for or make any Diſpoſition of her own Poſſeſſions, as having ſubjected herſelf and her whole Will to the Will and Power of her Huſband, the Law thereupon transfers the Power of dealing and contracting for her Poſſeſſions to the Huſband, becauſe no other can intermeddle therewith, and without ſuch Power in the Huſband they would be obliged to keep them in their own Manurance or Occupation, which might be greatly to the Prejudice of both; but to prevent the Huſband's abuſing ſuch Power, and leſt he ſhould make Leaſes to the Prejudice of his Wife's Inheritance, the Law has left her at Liberty after his Death either to affirm and make good ſuch Leaſe, or to defeat and avoid it, as ſhe finds moſt ſubſervient to her own Intereſt.

So if the Wife join in ſuch Leaſe for Years by Indenture, if not made
Cro. Jac. 563 Cro. Car. 165 purſuant to the 32 *H.* 8. *cap.* 28. †. ſhe is after her Huſband's Death at liberty

406. Cro. Jac. 617.. Yelv. 1. Cro. Eliz. 769. Rol. Abr. 350.——† *Vide poſt* 309, 310.

liberty * either to affirm it by Acceptance of Rent, or to diſſent to and avoid it by bringing of Treſpaſs, *&c.* in the ſame Manner as if ſhe had been no Party thereto; for her joining during the Coverture, when ſhe was not *ſui Juris*, but under the Power of the Huſband, will not bind her after his Death; and if ſhe chuſes to avoid ſuch Leaſe, notwithſtanding her joining therein, then it is ſo abſolutely defeated *ab initio* as to her, that ſhe may plead *Non demiſit*, becauſe as to any Intereſt that paſſed from her ſhe did not demiſe, nor in Truth had any Power to contract, but the whole Intereſt paſſed from the Huſband, and the Leſſee is in merely by virtue of the Huſband's Contract; and yet, becauſe the Leſſee by his Acceptance of ſuch Leaſe admitted them both to have Power to join therein, he muſt accordingly during the Coverture declare of the Leaſe by them both, as an eſſential Part of the Deſcription of the Leaſe whereby he makes Title.

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But the Indenture or Deed Poll, whereby ſuch Leaſe was made, being no eſſential Part either of the Deſcription or Leaſe itſelf, becauſe the Huſband during the Coverture might have made it by Parol only; therefore it is neither neceſſary nor uſual for the Leſſee in his Declaration to make any Mention thereof.

2 Co. 61. 3 Co. 21. Plow. 431. a. Leon. 192. Cro. Eliz. 438, 482. Sav. 109, 110, 112. Cro. Car. 527.

So alſo if the Wife's Part in ſuch Leaſe were merely void, and her joining therein would have no Effect to help the Deſcription of the Leaſe, then the Leſſee ought in his Declaration upon ſuch Leaſe to leave out the Wife, otherwiſe his inſerting of her as one of the Leſſors will vitiate his Declaration; therefore where the Huſband and Wife ſealed a Leaſe for Years of the Wife's Lands, and at the ſame Time executed a Letter of Attorney to a third Perſon to deliver ſuch Leaſe as their Deed to the Leſſee, which he did accordingly, and then the Leſſee brought an Ejectment, and declared of this by Baron and Feme; to which Not guilty being pleaded, this ſpecial Matter was found; and the Court, after Argument, gave Judgment that the Plaintiff had failed in his Declaration, becauſe, as this Caſe was, it was only the Leaſe of the Huſband; for the Delivery of the Deed being eſſential to make it a complete Deed, this ought to have been done by the Wife herſelf in Perſon; for ſh not being *ſui Juris*, could not by ſuch Letter of Attorney delegate any Power or Authority whatſoever to another, but ſuch Delegation was merely null and void; and by conſequence the Attorney's delivering it in her Name was to no Purpoſe, but it was only the Leaſe of the Huſband, as being only effectually delivered by him; and therefore the Plaintiff ought to have declared accordingly; for upon the Matter it was no Leaſe by the Huſband and Wife, and then the Plaintiff declaring upon it as ſuch, hath failed in his Deſcription of the Leaſe whereon he was to recover.

Yelv. 1. *Wilſon* and *Rich.* Cro. Car. 155 *Hopkins's* Caſe; and the S. C. 2 Bulſ. 13. obſurely put, ſeem *cont.*

Accordingly in another Caſe, where in Ejectment the Plantiff declared on a Leaſe by the Huſband only, and Not guilty pleaded, the like ſpecial Matter was found as in the former Caſe, and Exception taken to the Declaration, becauſe the Wife was omited; yet the Court held the Declaration good, and diſallowed the Exception, becauſe her Manner of joining in the Leaſe was merely void, as if ſhe had not been named therein, and then the Plaintiff in his Deſcription of ſuch Leaſe did well to omit her.

Cro. Jac. 617 *Gardiner* and *Norman.*

But now if the Huſband and Wife join in a Leaſe for Years by Parol of the Wife's Lands, rendering Rent, or if the Huſband ſolely make ſuch Parol Leaſe, rendering Rent, this determines abſolutely by his Death, ſo that no Acceptance of Rent, or other Act done by the Wife, will prevent its Avoidance; the Reaſon whereof given in the Books is, that her Aſſent ought to appear to be given at the Time when the Leaſe was made, which without ſome Deed or Inſtrument in Writing it cannot do; but this ſeems a very indifferent Reaſon, when in the Caſe of a Leaſe for Years

Cro. Eliz. 656. *Walſall* and *Heath.* Cro. Jac. 563 Dyer 91, 146 Leon. 192, 204.

Page 307 Years by the Husband, solely by Deed, her Assent appears not at all, but rather the contrary; and yet she may affirm such Lease, if she thinks fit, after his Death, as well as if she had joined therein; therefore a better Reason for this Distinction seems to be, that the Inheritance and Right of the Estate continuing still in the Wife, notwithstanding the Intermarriage, if the Husband does nothing to discontinue, or devest that Estate, all Charges of his thereout fall off with his Death, which determines his Power and Interest over the Estate; but a Lease for Years being an immediate Contract for or Disposition of the Land itself, if the same appears in Writing duly executed, so that there can be no Variation or Deviation therefrom attempted by the Lessee after the Husband's Death; the Law so far gives Countenance to such Lease, for the Encouragement of Farmers and Husbandmen, that the same shall continue in Force till the Wife's actual Dissent or Disagreement thereto; but because there can be no such Certainty of the Terms of a Parol Lease, when nothing appears in Writing to manifest them; therefore they, like other Charges of the Husband, fall off and drop with his Estate or Interest therein.

Hutt. 102. Cro. Eliz. 112. *Jackson* and *Mordant.*

If the Husband and Wife make a Lease for Years of the Wife's Land, without Reservation of any Rent, yet it hath been adjudged, that this is a good Lease by them both during the Coverture, and that the Wife, after the Husband's Death, may affirm the same by Acceptance of Fealty, or bringing an Action of Waste; so that the Reservation of Rent is not essential to the Existence or Continuance of such Lease after the Husband's Death, but only a Writing attesting the same, and the Wife's Allowance and Approbation thereof; for as the Husband made such Lease at first, without any Reservation of Rent; so the Wife, if she thinks fit, may continue the Lessee in Possession, after his Death, upon the same Terms.

2 Rol. Rep. 344, 361. Cro. Car. 7. *Savern* and *Smith.* Cro. Eliz. 149. *Head* and *Chaloner.* 4 Co. 27.

The Husband being seised of Copyhold Lands in Right of his Wife in Fee, makes thereof a Lease for Years, not warranted by the Custom, which is a Forfeiture of her Estate; yet this shall not bind the Wife, or her Heirs, after the Husband's Death, but that they may enter and avoid the Lease, and thereby purge the Forfeiture; and the Diversity seems between this Act, which is at an End when the Lease is expired or defeated by the Entry of the Lord, or the Wife, after her Husband's Death, and such as are a continuing Detriment to the Inheritance; as wilful Waste by the Husband, or such Acts as tend to the Destruction of the Manor, as Non-payment of Rent, Denial of Suit or Service; such Forfeitures as these bind the Inheritance of the Wife after her Husband's Death; but in the other Cases the Husband cannot forfeit by his Lease more than he can grant, which is but for his own Life.

Cro. Eliz. 475. *Coningsbyver. Ruskey.*

If the Husband, seised of a Copyhold Manor in Right of his Wife, lets Copyhold Land, Parcel thereof for Years, by Indenture, and dies, this shall not destroy the Custom of demising by Copy, because the Wife may enter and avoid that Lease, the Husband having no Power by his own Act or Disposition to bind the Inheritance of the Wife.

Cro. Eliz. 216. Leon. 247. 2 Co. 77. *Harvey* and *Thomas.*

† See the last Case in fo. 306.

A Man seised of Lands, in Right of his Wife, makes a Lease for Years thereof by a Parol, and then he and his Wife levy a Fine to a Stranger, and die; it was adjudged, that the Conuzee of the Fine should avoid this Lease; for being made by Parol only, it was absolutely void as to the Wife, so that no Acceptance, or Act of hers, after his Death, could make it good †; and then the Conuzee, who came in wholly by the Wife, shall take Advantage thereof as the Wife herself should have done, for the Husband's joining in the Fine was only for Conformity; for the whole Estate and Inheritance passed from the Wife, and nothing from the Husband; and of void Acts, or when they begin to be so, Strangers may have the Benefit.

But

* But where the Husband and Wife by Indenture made a Lease for Ninty-nine Years of the Wife's Lands, though without Reservation of Rent, and after joined in levying a Fine of the Reversion to a Stranger; the better Opinion was, that the Conuzee should hold subject to this Lease, for being by Indenture, it was not absolutely void, but only voidable by the Wife after her Husband's Death; and then when she joins in a Fine of the Reversion, before her Time of Election for Avoidance thereof comes, this destroys her own Power of Election, because now she has nothing more to do with the Estate; and it cannot transfer a like Power of Election to the Conuzee, because that was a Thing merely in Action, and peculiar to the Wife, in regard of her Coverture, and consequently the Lease is become absolute, and the Conuzee shall hold subject thereto. * Page 308 3 Leon. 153, 154. Cro. Eliz. 152. *Cadee* and *Oliver*.

A. and *B.* Joint-tenants for their Lives, *A.* takes *C.* to Husband, and they, by Indenture, let their Moiety for twenty-one Years, reserving Rent; then the Wife dies, and *B.* the surviving Joint-tenant, would have avoided this Lease, as the Wife might have done if she had survived her Husband; but it was adjudged, that the Lease being only voidable, and not void, *quoad* the Wife, by her Death this Power of avoiding it is gone, and cannot be transferred to the surviving Joint-tenant, who claims not under, but paramount her; and then the Lease is become unavoidable during the Life of the other Joint-tenant, for the Lease being good at first, the Wife's Disagreement to make it void, was more necessary than her Agreement was to make it good. Cro. Jac. 417. Rol. Rep. 401. 3 Bulst. 272. Hob. 204. Rol. Abr. 592. 3 Mod. 300. *Quære*, if the Husband in this Case has any, and what Remedy for the Rent incurred after the Wife's Death, for the Reversion to which it was incident goes to the surviving Joint-tenant, but he being in of that by Title Paramount, the Lease has nothing to do with the Rent, and the Husband, for want of a Reversion, can neither distrain nor avow for the same. But *Quære*, if he may not maintain an Action of Debt or Covenant in Law, or express Covenant for Payment of the Rent, if there were any; *& vide* Bro. Tit. *Leases* 4. *Det.* 7. Dyer 28. b. 29. a. Rol. Rep. 442.

Husband and Wife, Joint-tenants for sixty Years, if they, or either of them, so long live, the Husband by Indenture lets the Land for fifty Years, to commence immediately after his Decease, and dies, the Wife survives; and if this was a good Lease to bind the Wife, was the Question. It was objected, that it could not bind the Wife, because it was not to commence till after the Husband's Death; that he might have outlived the whole Term; and therefore it was as if he had granted the Term to commence after his Death; which being but a Grant of bare Possibility, had been clearly void. 2. It was objected, that the Husband dying before the Lease took effect, the Interest in the whole Term vested in the Wife by Survivorship, and then the Husband's Disposition, which took not effect till his Death, came too late to prevent it; but notwithstanding it was adjudged to be a good Lease, and not like the Case put of a Grant of his Term after his Death, for there nothing passed till his Death but a bare Possibility only; but here a good Term is created in Interest presently, to take effect in Possession after his Death. 3. That the Husband having an Interest to dispose of, he might in his Life-time, have disposed of the whole Term, and it would have bound his Wife; then here when he hath, by an Act executed in his Life-time, disposed of an Interest in Part of the Term; this, by the same Reason, must be good, and binding upon his Wife. Cro. Eliz. 287. Moor, pl. 514. *Grule* and *Locroft*. Co. 155. S. C.

Husband and Wife made a Lease for Years, by Indenture, of the Wife's Land, reserving Rent; the Lessee enters; the Husband, before any Day of Payment, dies; the Wife takes a second Husband, and he at the Day accepts the Rent, and dies; and it was held, that the Wife could not now avoid the Lease, for by her second Marriage she transferred her Power of avoiding it to her Husband, and his Acceptance of the Rent binds her, as her own before such Marrige would have done; for he by the Marriage succeeded into the Power and Place of his Wife, and Dyer 159. Rol. Abr. 475. Rol. Rep. 132.

Page 309 what ſhe might have done, either as to Affirming or Avoiding ſuch Leaſe, before Marriage, the ſame may the Huſband do after the Marriage.

Plow. 293. *Oſborn* and *Jay*. Co. Lit. 351. a. Rol. Abr. 343. A Woman, Guardian in Socage, marries and joins with her Huſband, by Indenture, in making a Leaſe for Years of the Ward's Lands, yet after her Huſband's Death ſhe may avoid the ſame; for though the Huſband has abſolute Power to diſpoſe of all Chattels, either Real or Perſonal, whereof he is poſſeſſed in Right of his Wife, and the Wardſhip of the Body and Land, in this Caſe, is but a Chattel; yet the Wife being poſſeſſed of it in Right of the Infant, and accountable to him for the Profits when he comes of Age, the Huſband's Diſpoſition ſhall not bind her after his Death, but that ſhe may avoid it in Right of the Infant, whoſe Guardian ſhe ſtill continues to be; and her own joining in the Leaſe was not material, becauſe ſhe was then under Coverture, and had no diſpoſing Power at all.

3 Bulſ. 274. Rol. Rep. 403. As the Wife's Acceptance of Rent or Fealty, *&c.* will make good and unavoidable Leaſes for Years, made by her and her Huſband, or by her Huſband ſolely, if it be by Indenture or Deed Poll; ſo if the Wife die before her Huſband, the ſame Election and Power of affirming or avoiding ſuch Leaſe deſcends to her Iſſue or Heir; for ſuch Leaſes are good, till thoſe who ſucceed to the Eſtate defeat and avoid them by their Diſagreement thereto.

Yelv. 78. *Jeffery* and *Guy*. Therefore where a Woman Tenant in Tail, having Iſſue by a former Huſband after his Death married a ſecond Huſband, and they, by Indenture, joined in a Leaſe for Years of the Wife's Lands, rendering Rent, and then the Wife died without Iſſue by the ſecond Huſband, ſo that he was not intitled to be Tenant by the Curteſy, yet it was held, that till the Iſſue by the firſt Huſband entered, this Leaſe remained good; and therefore the Huſband there recovered in an Action of Covenant againſt the Leſſee, upon Iſſue found for him, that there was no Entry made by the Wife's Iſſue, becauſe till then the Leaſe was ſtill ſubſiſting, and conſequently the Leſſee bound by his Covenants in ſuch Leaſe.

9 H. 6. 43. Bro. Tit. *Avowry* 123. Vaugh. 46. So where a Man ſeiſed of Land in Right of his Wife, makes a Leaſe for Years, rendering Rent, and then his Wife dies without Iſſue by him, whereby he is not Tenant by the Curteſy, but his Eſtate determined; yet he may avow for the Rent till the Heir hath made his actual Entry, becauſe the Leaſe was at firſt good, and drawn out of the Seiſin of the Wife; and therefore, till the Entry of the Heir, remains good between the Leſſor and Leſſee, ſo that the Leſſee may maintain an Action of Covenant, and the Leſſor diſtrain and avow for the Rent, till the Heir hath entered.

Of Leaſes made by Huſband and Wife purſuant to 32 *H.* 8. *c.* 28.

32 H. 8. c. 28. This Statute hath made an Alteration in the Common Law, and enabled all Huſbands, ſeiſed of Lands in Right of their Wives, to make Leaſes for Twenty-one Years, or three Lives, obſerving the Directions therein mentioned; and ſuch Leaſes to bind the Wives and their Heirs, ſo that they cannot now, after the Huſband's Death, avoid ſuch Leaſes as they might have done at the Common Law; but if the Directions in that Statute are not obſerved, then the Common Law takes place, and the Wives and their Heirs are at liberty to avoid ſuch Leaſes in the ſame Manner as they have done before.

But as to the ſeveral Qualifications requiſite to make ſuch Leaſes good and binding, they being treated of at large under the Head of Leaſes by Eccleſiaſtical Perſons, Letter (E, 32,) we ſhall here only inſert one Caſe for the better Underſtanding of the Statute.

Huſband

• Husband and Wife, the Husband purchased Land to him and his Wife, and their Heirs, and afterwards he, without his Wife, lets this Land for sixty Years, (*a*) if they should so long live, rendering 280 *l. per Ann.* Rent at the two usual Feasts, during the Term, then the Husband dies; and if this Lease should bind the Wife, by the 32 *H.* 8. *cap.* 28. was the Question; and it was held by three Justices that it should; for the Words of the Act are, *That all Leases to be made by any Person or Persons having any Estate of Inheritance in Fee-simple or Fee-tail, in the Right of their Wives, or jointly with their Wives, of an Estate of Inheritance, made before the Coverture or after, shall be good, provided that the Wife be made a Party to every such Lease to be made by her Husband of any Manor*, &c. *being the Inheritance of the Wife; and that every such Lease be made by Indenture in the Name of the Husband and Wife, and she to seal the same, and that the Rent be reserved to the Husband and Wife, and to the Heirs of the Wife, according to her Estate of Inheritance therein*; so that the Wife is appointed to join only when she hath the sole Inheritance by the Appointment of the Rent, to be reserved to the Heirs of the Wife, and not when she hath a joint Estate, as in this Case; and then clearly, by the Body of the Act, the Lease by the Husband solely is good, and the Proviso does not extend to it. *Page 310 Cro. Jac. 22. Smith ver. Trinder. (*a*) Note; there was no Question made upon these Words, if, &c. as to the Continuance of the Lease, which, as it seems, determined the Lease by the Death of either of them. Cro. Jac. 378. 5 Co 9.

(D) Of Leases by Tenant in Tail: And herein,

1. What Leases Tenant in Tail might have made by the Common Law.

IF Tenant in Tail after the Statute *de donis* had made a Lease for Years, and died, this Lease was not absolutely determined by his Death, but the Issue in Tail was at Liberty either to affirm or avoid it as he thought fit; and the Reason why such Leases for Years were not held to be absolutely determined by the Death of the Tenant in Tail, who made them, was, either because they were drawn out of an Estate of Inheritance, which by Possibility might continue for ever, and therefore was capable of enduring such a Lease for Years thereof; or because being executed by the Entry of the Lessee, there ought to be an Act of equal Notoriety to defeat and undo it; which if the Issue in Tail thought fit to waive, the Lessee then continued his Possession in virtue of the first Contract and Entry; and this was but a reasonable Liberty given to the Issue in Tail, because it might well be supposed that his Ancestor was not qualified to keep all his Possessions in his own Manurance and Occupation, but must necessarily let them out to Farmers and Husbandmen, who by their Skill and Understanding in the Arts of Agriculture and Husbandry, would be best able to preserve and improve the Soil; and by their yielding an annual Rent or Income to the Lessor or Tenant in Tail himself, would enable him equally to provide for the Necessities and Exigencies of himself and his Family; and since the Issue in Tail, who was to succeed to the Inheritance and Possessions of his Ancestor, might be supposed equally ignorant of the Way and Manner of improving and managing them to the best Advantage, and would therefore be under the like Necessity of letting them out to others, and yet, perhaps, not be able to get so good a Rent or Income for them; therefore to prevent the Charge and Trouble of renewing such Leases, or the Difficulty of finding out new Tenants upon every Death, the Law thought fit not Co. Lit. 45. b.

to

• Page 311 * to intermeddle one way or another therewith, but left it to the Choice of the Iſſue in Tail, whether he would continue them or not. Another Reaſon why the Law would not condemn ſuch Leaſes as abſolutely void by the Death of the Tenant in Tail, might be the Diſcouragement that would thereby ariſe to Farmers and Huſbandmen, who would not be eaſily induced to take Leaſes, or beſtow any great Pains or Labour upon Poſſeſſions, which they were to hold by ſo precarious a Title as the Life of the Tenant in Tail only; and therefore, for theſe and other Reaſons, ſuch Leaſes for Years were not looked upon to be abſolutely void and determined by the Death of the Tenant in Tail who made them; but the Iſſue in Tail ſucceſſively, as each came into the Eſtate, was at liberty either to continue or avoid them, as they found convenient; and by this Liberty the Iſſue in Tail was ſufficiently ſecured againſt any Injury or Inconvenience ariſing from the Contracts or Leaſes of his Anceſtor, and the Statute *de donis* in no Danger of being impeached, ſince it was in the Iſſue's own Choice to conſider thereof, and to govern himſelf accordingly, either in the Affirmance or Avoidance of ſuch Leaſes, as he found moſt for his Advantage; therefore (*a*) Acceptance of the Rent, or Fealty, or bringing an Action for Recovery thereof, or an Action of Waſte, were ſuch Acts as amounted to a Confirmation of the Leaſe, becauſe theſe plainly manifeſted his Intent to continue the Leſſee in Poſſeſſion upon the Terms of his Leaſe; and by conſequence ſuch Iſſue could never afterwards avoid it during his own Life.

(*a*) 7 Co. 35. 36. Count of *Bedford's* Caſe. Bro. Tit. *Acceptance* 10. Dyer 46. a. 51. b. 95. pl. 4.

If Tenant in Tail makes a Leaſe to *A.* for twenty Years, and the Leſſee makes a Leaſe to *B.* for ten Years, and then the Tenant in Tail dies, and the Iſſue accepts the Rent of *B.* this is no Affirmation of the Leaſe, becauſe *B.* was under no Obligation of paying his Rent to him, and is anſwerable for it over again to *A.* and therefore his Payment to the Iſſue in Tail was voluntary, and in his own Wrong, and the Iſſue's Acceptance thereof not concluſive more than if he had received it of a mere Stranger: And by conſequence the Iſſue in Tail, notwithſtanding ſuch Acceptance, may enter and avoid the Leaſe; but if the Iſſue had accepted the Rent from *A.* this had amounted to a Confirmation of the Leaſe made to *A.* and by conſequence he could not after avoid the Leaſe to *B.* which was derived thereout; but if *A.* had aſſigned five Acres of the Land in Leaſe to *B.* for the Reſidue of twenty Years, and the Iſſue in Tail had accepted the Rent from *B.* this would amount to a Confirmation of the intire Leaſe to *A.* becauſe the Rent iſſuing out of the Whole, and out of every Part of the Land, *B.* as to thoſe five Acres, ſucceeded in the Place of *A.* by having his whole Intereſt therein; and then the Iſſue in Tail, by Acceptance of the Rent from one, whoſe Part, as to him was equally chargeable with the whole Rent, hath given his Conſent, that the whole Eſtate chargeable therewith ſhall continue, though he choſe to take his Rent out of Part only; for otherwiſe he would do Injuſtice to *A.* who would be liable to make Recompence to *B.* for the Overplus of the Rent, and yet have no Recompence himſelf, if the Iſſue might defeat the Reſidue of the Leaſe remaining in his Hands.

Bro. Tit. *Acceptance* 13.

Tenant in Tail, before 27 *H.* 8. *cap.* 10. of Uſes, made a Feoffment in Fee to the Uſe of himſelf and his Heirs: And after he and his Feoffees made a Leaſe for Years, rendering Rent, and after the Statute made, Tenant in Tail dies ſeiſed, and his Iſſue aliens the Land by Fine before Entry upon the Leſſee, or Receipt of the Rent; and the great Queſtion was, if he might after avoid this Leaſe; and by the better Opinion of the Juſtices of both Benches, *præter Sanders*, the Alienee could not avoid it, whether he received the Rent or not, for the Leaſe was not abſolutely void by the Death of the Tenant in Tail, but only voidable by the Iſſue by his Entry; then when the Iſſue, before ſuch Entry, conveys over the Land

Dyer 51. b. 7 Co. 37. a. Rol. Rep. 260, 403. 3 Leon. 154. 2 Bulſ. 44. 4 Mod. 5.

to

* to a Stranger, the Leaſe being not then avoided, continues ſtill a Charge upon the Eſtate, and the Stranger cannot enter to avoid it, becauſe a Right of Entry can no more be transferred to a Stranger than a Right of Action, and by conſequence the Conuzee muſt hold ſubject thereto, having no Means to avoid it. *Page 312

If Tenant in Tail enfeoffs his eldeſt Son within Age, and he after full Age makes a Leaſe for Years, and then the Father dies, whereby he is remitted to the Eſtate-tail, yet he ſhall not avoid the Leaſe; ſo if the Son had diſſeiſed his Father, and had made a Leaſe for Years, and then the Father had died, by which the Diſſeiſin was purged, yet the Leaſe would continue good and unavoidable, becauſe in theſe Caſes the Eſtate, out of which the Leaſe was derived, is not defeated, but only the Nature of it altered and changed; and the Leaſe for Years being an immediate Diſpoſition of the Land itſelf, ſo long as that continues in the ſame Perſon that made the Leaſe, ſo long there is an Eſtate capable of enduring the Leaſe, and conſequently the Leſſor ſhall not avoid it; but if the Son after ſuch Feoffment or Diſſeiſin had at full Age granted a Rent-Charge, Common of Paſture, *&c.* and then the Father had died, this Remitter and Alteration of the Nature of the Eſtate would diſcharge the Land of thoſe Charges, becauſe being granted at firſt out of a defeaſible Eſtate, they were of courſe liable to be defeated with that Eſtate, and when that Eſtate is defeated and gone, ſuch collateral Charges drop and fall off with it; but the Leaſe for Years, in the other Caſe, carries the very Poſſeſſion of the Land itſelf, and then the Alteration that is made by the Remitter can only work upon the Reverſion which was left in the Leſſor, not upon the Poſſeſſion of the Leſſee, which was divided and taken out of the Eſtate before that Remitter took effect; and the Leaſe being made when he was at full Age, prevents the Operation of the Remitter as to that Leaſe, which was his own Act. Co. Lit. 349. a. Moor 315. Dyer 51. b.

Tenant in Tail made a Feoffment in Fee to the Uſe of himſelf and his Heirs, and after made a Leaſe for Years, rendering Rent, and died; the Iſſue accepted the Rent, and it was held, that this did not affirm the Leaſe, becauſe the Iſſue was remitted to the Eſtate-tail by Deſcent, and ſo the Leaſe utterly void, being made by the Father, then Tenant in Fee-ſimple; and the Difference between this Caſe and the Caſe next but one above-mentioned, ſeems to be, that the Leaſe there being before 27 *H.* 8. *cap.* 10. the Poſſeſſion paſſed from the Feoffees, and not from the Tenant in Tail himſelf, and then when that Statute came, it could not execute the Poſſeſſion to the Uſe, as to the Reverſion which was left in the Feoffees; and ſo the Poſſeſſion of the Leſſee continued untouched by that Statute, and drawn out of the legal Poſſeſſion of the Feoffees, and then the bare Remitter of the Iſſue, as to the Reverſion, could not defeat the Poſſeſſion of the Leſſee, which was not drawn out of any Eſtate his Anceſtor had then in Poſſeſſion, but he muſt avoid it by Entry upon the Aid and Conſtruction of the Statute *de donis*; but in this the Leaſe for Years is drawn out of the Fee-ſimple and Eſtate, which the Tenant in Tail had in Poſſeſſion himſelf; and then the Remitter, which is wrought by the Deſcent, defeating that Eſtate, avoids the Leaſe likewiſe. Moor, pl. 1143.

If Tenant in Tail makes a Leaſe for ten Years to begin ten Years hence, and dies, and the Iſſue within the ten Years enters and makes a Feoffment in Fee, the Feoffee, at the End of the ten Years, ſhall have Election either to affirm and make good ſuch Leaſe, or to avoid it; for upon the Death of Tenant in Tail the Poſſeſſion was become vacant, and none had a Right to enter but the Iſſue in Tail, for the Time of the Leſſee's Entry was not yet come; and then, when the Iſſue enters generally, his primary Right was, in reſpect of the Inheritance, deſcended to him as Iſſue in Tail, and he had no Occaſion to direct his Entry at that Time Dyer 279. a. Plow. 436.

*Page 313 * Time to any other Purpoſe; and therefore his Entry ſhall be intended, in reſpect of the Eſtate-tail deſcended to him; and when after ſuch Entry he makes a Feoffment in Fee to a Stranger, this transfers the Poſſeſſion juſt in the ſame Plight as the Iſſue in Tail himſelf had it, without any Thing done to determine his Election one Way or another; and then the ſame Power of Election paſſes incorporated in the Feoffment; and the Feoffee, when the Time for making uſe thereof is come, may uſe it either to determine the Leaſe by ouſting the Leſſee, or to affirm or make it good by Acceptance of Rent from him.

Dyer 279. a. Plow. 436. If Tenant in Tail makes a Leaſe for Years, to begin after his Death, rendering Rent, and dies, and the Iſſue accepts the Rent, yet *Manwood* was of Opinion, that he might notwithſtanding enter, and avoid the Leaſe; and the Reaſon he gave was, becauſe the Leaſe did not take effect in Poſſeſſion during his Life; *ſed* Catnly *hoc negavit*; and it ſeems with good Reaſon; for ſince the Eſtate-tail is an Eſtate of Inheritance, capable of enduring ſuch a Leaſe, where the Difference is between letting it to begin preſently and letting it to begin after his Death, or, as it is in the next preceding Caſe, to begin ten Years hence, when he himſelf dies in the mean Time, does not at all appear; for the Leaſe binds from the Time of the making in one Caſe, as well as in the other, though the Time of their Commencement in Poſſeſſion be different; and ſince the Iſſue in Tail is no more bound by the one than the other, it ſeems hard and inconſiſtent to take from him his Power of Election to continue the one Leaſe, and yet allow it him in the other; therefore it ſhould ſeem the Leaſe in either Caſe is (a) abſolutely void, but that the Iſſue hath Election to continue or avoid it, as he himſelf thinks fit, and by conſequence his Acceptance of the Rent hath determined his Election to continue the Leaſe, and then he can never enter after to avoid it.

(a) But *quære*; for in Carth. 258. in the Caſe of *Symonds* and *Cudmore*, it is ſaid to be agreed and reſolved by the Court, that if Tenant in Tail makes a Leaſe of any of the Lands intailed to commence after his Death, this is void *ab initio*; and ſo is Cro Jac. 458.

7 Co. 42. Co. Lit. 34 b. a. Co. 147. Moor 325. If a Tenant in Tail makes a Leaſe for Life, by which he gains a new Reverſion in Fee during the Life of Tenant for Life, and after he grants a Rent-charge, or makes a Leaſe for Years, and then the Tenant for Life dies, whereby he is become again Tenant in Tail, and the Reverſion in Fee, out of which the Rent-charge or Leaſe for Years were to take effect, defeated, yet ſhall the Leaſe or Rent continue good againſt himſelf, becauſe though they were granted out of a defeaſible Poſſeſſion, yet they were granted likewiſe by him who had the true and antient Right in him, and ſuch Grant or Leaſe would have bound both, if the defeaſible Poſſeſſion had been in one Hand, and the antient Right in another, and both had joined therein; ſo by the ſame Reaſon, when ſuch defeaſible Poſſeſſion and antient Right are conjoined in one Perſon, and he makes ſuch Leaſe or Grant, though the one fails, yet the other will be called in to ſupport them; ſo if ſuch Tenant in Tail had made a Feoffment in Fee upon condition to the Uſe of himſelf and his Heirs, and then had made ſuch Leaſe, or granted ſuch Rent-charge, and after the Condition were broken, yet the Leaſe or Grant would ſtill continue good againſt him during his own Life, becauſe made by one who had all the Right, both antient and new, in him at the Time of making or granting thereof.

Vent. 357. *Anonymous.* *A.* Tenant in Tail, Remainder to *B.* in Tail, *A.* makes a Leaſe for the Life of the Leſſee not warranted by the Statute of 32 *H.* 8. *cap.* 28. and dies, leaving *B.* in Remainder his Heir, *B.* by Indenture makes a Leaſe for 99 Years, to commence after the Death of the Tenant for Life, rendering Rent, then the Tenant for Life ſurrenders to *B.* upon Condition and dies, *B.* ſuffers a common Recovery with ſingle Voucher, and dies, the Leſſee for Years enters, and the Heir of *B.* diſtrains for the Rent; and if this Diſtreſs was lawful, was the Queſtion. For the Leſſee it was argued,

that

* that it was not; for either *B.* was remitted by the Surrender, or he was not; if he was remitted, then the Leaſe for 99 Years, which was derived out of the new Reverſion in Fee, and deſcended to him from *A.* was by ſuch Remitter determined; the Reverſion out of which it was derived being vaniſhed and gone; and then he could not diſtrain for Rent where no Leaſe was in Being; or if he was not remitted, the Acceptance of the Surrender being his own Act, and but upon Condition, then he was ſtill in of the defeaſible Eſtate deſcended to him from *A.* and by conſequence his Recovery with ſingle Voucher could not bind his Intail, nor the Remainder over; and then when he died without Iſſue, (as to make it a Caſe it ſhould ſeem he muſt) both his defeaſible Eſtate by the Death of the Tenant for Life, and his own Eſtate-Tail were determined and gone; and conſequently, admitting the Leaſe continued, (which it did not) yet his Heir was not intitled to the Rent, but thoſe in Remainder; but it was adjudged in *C. B.* that the Diſtreſs was lawful; for the Leaſe for Life made by *A.* could be a Diſcontinuance no longer than during the Life of the Leſſee; then when *B.* after the Death of *A.* made a Leaſe for 99 Years by Indenture, he having then the Right of the Intail in him, cloathed with a defeaſible Fee-ſimple, this Leaſe when the Diſcontinuance was at end, (as it was by the Surrender of the Tenant for Life, or at leaſt by his Death) is good againſt himſelf by Eſtoppel, if not in point of Intereſt, and then, he being Tenant in Tail, the Recovery with ſingle Voucher binds that Eſtate-tail and Remainder, and by conſequence his Heir has a good Title to the Rent, and his Diſtreſs well taken for it. *Note*; A Writ of Error was brought of this Judgment in *B. R.* and the Caſe is argued, but no Judgment appears, nor are the Reaſons before-mentioned taken notice of in the Report; but yet they ſeem eaſily deducible from the Report, and are the chief Reaſons (as it ſhould ſeem) upon which the Judgment in *C. B.* could be founded. *Page 314.

A. Tenant for Life, Remainder to *B.* in Tail, *B.* lets to *C.* for Years, to commence after the Death of *A.* then *B.* ſuffers a Recovery to *D.* and dies, the Leaſe for Years holds good againſt *D.* In this Caſe it muſt be intended that the Recovery was ſuffered after the Death of *A.* for during his Life *B.* was not Tenant to a *Præcipe*; then admitting the Recovery to be after the Death of *A.* this was after ſuch Time as the Leaſe took effect againſt *B.* ſo as to be abſolutely binding upon him; and when he afterwards ſuffers a Recovery, this bars the Eſtate-Tail, in reſpect of which only the Leaſe was voidable, and by conſequence the Recoverer, who has not that Eſtate-Tail, muſt hold ſubject to the Leaſe, and can no ways avoid it. Dyer 51. b. in Margin.

So Tenant in Tail, with Power to make Leaſes, &c. made a Leaſe for twenty-one Years not purſuant to his Power, and then levied a Fine, and died, leaving Iſſue; and if the Conuzee ſhould avoid this Leaſe, as the Iſſue might have done, if the Fine had not been levied, was the Queſtion; for the Leaſe did not take effect during the Life of the Tenant in Tail; and it was agreed, that (*a*) if Tenant in Tail grant a Rent, or acknowledge a Statute, or make a Leaſe for Years to begin after his Death, that theſe are void as to the Iſſue, and not merely voidable; but if Tenant in Tail makes a Leaſe for Years without Reſervation of any Rent, this is not void, but only voidable, becauſe the Iſſue may affirm it by Acceptance of Fealty; and by all, Lev. 167. Sid. 260. Raym. 132. Keb 778. *Ozey* and *Thomaſius*. 4 Mod 6. S. C. cited, and there ſaid by Juſtice *Dolben*, that it was neither well ſtated nor well

reported in the Books; for upon the Roll it was thus: A Man ſeized in Fee made a Leaſe for 99 Years, if three Perſons ſo long lived; then he ſettled the Reverſion upon himſelf in Tail, with Power to make Leaſes for 21 Years, and then he made ſuch a Leaſe, and died; the Son, who was the Iſſue in Tail, and not the Father, (as it is reported in the Books) levied a Fine, and ſold the Reverſion; the firſt Leaſe determined, and the Court thought the Conuzee might avoid the ſecond Leaſe, becauſe it never was in the Election of the Tenant in Tail, or his Iſſue, to avoid it, they having conveyed away their Eſtates before this ſecond Leaſe was to commence; for if Tenant in Tail makes a Leaſe to commence *in præſenti*, and conveys away his Eſtate by Fine, the Conuzee might hold it charged with ſuch Leaſe; *ſecus* where it is to commence *in futuro*, becauſe it cannot be avoided before its Commencement; but no Judgment was given.

(*a*) *Vide* Cro. Jac. 455. *Griffin* and *Stanhope*.

Page 315 * all, except *Twiſden*, the Leaſe in the principal Caſe was held not to be abſolutely void upon the Death of the Tenant in Tail, but only voidable, becauſe it was an immediate Diſpoſition of the Land itſelf, and therefore differed from the Caſes of collateral Charges granted thereout; and they held it to be for the Benefit of the Iſſue to have ſuch Leaſes only voidable; and ſo indeed it is, as appears by all the Caſes and Reaſons before mentioned; then this Leaſe not being abſolutely void, but only voidable, when the Tenant in Tail levies a Fine, by which he binds the Eſtate-Tail, and bars the Iſſue before the Time of Election for Avoidance thereof is come; this does not make the Leaſe indefeaſible, but transfers the Eſtate chargeable with the future Leaſe juſt in the ſame Manner it was in the Hands of the Tenant in Tail, without any Act done either to affirm or avoid it; and then the Conuſee, when the Leaſe is to commence in Poſſeſſion, muſt have the ſame Election of avoiding or affirming it, as the Iſſue in Tail would have had; for if the Leaſe was voidable, and the Levying the Fine before its Commencement had no Influence upon it one way or other, then it muſt continue voidable ſtill, and it muſt continue ſo only as to the Conuzee; for the Tenant in Tail, or his Iſſue, have nothing to do therewith, and by conſequence, if it does not continue voidable as to the Conuzee, then he may uſe his Power either to affirm or avoid it, as he ſees moſt convenient; and a Diverſity was taken between a voidable Leaſe by Tenant in Tail, which is to commence *in præſenti*, and ſuch voidable Leaſe as is to commence *in futuro*; for *(b)* if Tenant in Tail makes a Leaſe for Years to begin preſently, which is not warranted by 32 *H* 8. *cap.* 28. and conſequently is voidable by his Iſſue, if he in the mean Time conveys over the Land by Fine, the Conuzee ſhall hold ſubject to that Leaſe, and ſhall never after avoid it, becauſe the Leſſee was then actually in Poſſeſſion of his Leaſe, and ſo that Poſſeſſion divided and taken out from the Inheritance which the Conuzee purchaſed; and then the Right of Entry, which would have come to the Iſſue, and was neceſſary to the Avoidance thereof, cannot by the Fine be transferred to the Conuzee, who is a Stranger; and the Iſſue is bound by the Fine from making any uſe of that Right of Entry, and by conſequence the Leſſee ſhall take Advantage thereof, and hold his Leaſe without Avoidance from either; but where ſuch voidable Leaſe is to commence *in futuro*, and before the Commencement of it the Tenant in Tail levies a Fine to a Stranger, there the Election to avoid or continue it paſſes incorporated in the Fine, and it cannot be ſaid to be either a Right of Entry or a Right of Action; for the Leſſee not being yet in Poſſeſſion, no Entry is needful or can be made to avoid his Leaſe, and the Fine has no Effect upon it one Way or other, but leaves it juſt as it was; and by conſequence being voidable after the Fine as much as it was before, the Conuzee only can uſe the Power of avoiding or continuing it, ſince the Iſſue is bound by the Fine, and has nothing to do with it, and it muſt continue the ſame after the Fine as it was before, becauſe the Time for its Commencement was not then come; and it could not be either affirmed or avoided before it had a Beginning, and ſo it ſhould ſeem to be; and for the ſame Reaſons, where Tenant in Tail makes a Leaſe for Years, to begin expreſly after his Death, this is not abſolutely (*c*) void by his Death, but only voidable, notwithſtanding the Opinion at the Beginning of the Caſe.

(*b*) For which *vide* 2 Lev. 27, 28. Mod. 109. *Benſon* verſus *Bacon and Hudſon*.

(*c*) But *quære* & *vide ſupra*.

Tenant in Tail of a Manor before 27 *H*. 8. *cap.* 10. made a Feoffment in Fee to his own Uſe, and died, and in the Time of the Iſſue the Statute of Uſes is made, and after the Iſſue makes a Leaſe for Years of a Tenement, Parcel of the Manor, rendering Rent, and dies, whereby his Iſſue was remitted by the Deſcent of the Fee and Freehold in Law, without Entry, though the firſt Iſſue was not remitted, by reaſon of the Statute of Uſes, which executed the Poſſeſſion in the ſame Manner as he had the Uſe (and that was in Fee) before Entry, and his Iſſue makes a Feoffment in Fee of the

Rol. Rep. 260. *Bridgman* and *Charlton*.

the *Manor, and Livery in another Part, not in the Tenement, leaſed in the Name of the Whole; and if this was a Diſcontinuance of this Tenement, was the Queſtion. *Coventry* was of Opinion it was not, becauſe the Iſſue who made the Leaſe granted it out of the Fee and Right of the Tail, which was in himſelf at the Time of the Leaſe made; and therefore by the Remitter of his Iſſue the Leaſe was not void before Entry, but only voidable; for he might have made it good by Acceptance of the Rent from the Leſſee; and by conſequence if this was a Leaſe continuing at the Time of the Feoffment of the Manor, this Tenement could not paſs by the Livery made in another Part of the Manor, but at laſt the whole Court held, that this Tenement paſſed by the Feoffment, becauſe by the Remitter of the Iſſue the Leaſe for Years was abſolutely defeated and gone, and the Leſſee become Tenant at Sufferance; and if the Iſſue had accepted the Rent, this would not have made the Leaſe good, becauſe the Reverſion and Inheritance, out of which it was derived, was by the Remitter vaniſhed and gone; and then the Continuance in Poſſeſſion of the Tenant at Sufferance at the Time of the Feoffment of the Manor is no Impediment to the Operation of the Livery upon that Tenement, and that the Remitter deſtroyed the Leaſe in this Caſe. *Page 316

Tenant in Tail, Reverſion in the Crown, makes a Leaſe for Years, rendering Rent, and dies, leaving *B.* his Son and Heir in Tail, who accepts the Rent, and hath Iſſue *C.* then *B.* commits Treaſon, and is attainted thereof, and by Act of Parliament all his Lands and Poſſeſſions are forfeited, and given to the King; and if the King was concluded by this Acceptance of the Rent by the Iſſue, ſo that he ſhall be adjudged in by him, and could not avoid the Leaſe ſo long as there was any Iſſue in Tail, was the Queſtion; and it was adjudged, that by the Attainder the Eſtate-Tail was determined, and the King in, in point of Reverter, and then all Leaſes, Charges, &c. of the Tenant in Tail are determined as if he were dead without Iſſue; the Reaſon whereof, given in the Books, is, that if it ſhould be otherwiſe, the King would have two Fees in him, which the Law will not allow; and this may be a good Reaſon; but it is ſuch a one as wants another Reaſon to explain it; for the ſame Books agree, that if Tenant in Tail with the Reverſion in the King had made a Leaſe for Years, and after had levied a Fine to the King, that the King in that Caſe ſhould not avoid the Leaſe for Years, no more than he ſhould if the Remainder in Fee had been in a Stranger, or in the Tenant in Tail himſelf, and yet in theſe Caſes the King hath two Fees in him, and the Law allows them to conſiſt well together; therefore the Reaſon of the Difference between the Caſes ſeems to be, that where the Reverſion is in the Crown, the Crown by conſequence muſt be the Donor, and give out the Eſtate-Tail: Now all Donations created a Tenure between the Donor and Donee, to which Homage, Fealty and other Duties and Services were incident and annexed, as the Conditions whereby the Tenant was to hold and continue the Enjoyment of his Land. Now Treaſon was the greateſt Violation poſſible of theſe Duties of Fidelity, Obedience and Service, whereto the Tenant was obliged, as the very Terms and Conditions upon which the King at firſt was prevailed upon to give him the Land, and which he, when he accepted thereof, undertook to obſerve, by the Solemnity of an Oath; ſo that when the Donee commits Treaſon, he breaks the Condition whereby he holds his Eſtate, and the King is in for that Condition broken, and by conſequence his Title by Virtue of that Condition is paramount all Leaſes, Grants or Charges of the Tenant in Tail: for they being derived out of his conditional Eſtate can ſubſiſt no longer than that does, and by his Attainder of Treaſon the Condition is broken, and that Eſtate forfeited and gone to the King in Reverſion who gave it; and by conſequence all derivative Leaſes or Charges thereout are determined likewiſe; but now when the King has only the

Dyer 107. b. 115. a. 332. b. Plow. 560. Hob. 324, 346. Cro. Eliz. 519. Yelv. 150. Rol. Rep. 260. Godb 324. 2 Rol. Rep. 491. Co. Lit. 45. b.

*Page 317 * Remainder in Fee, there is no immediate Tenure of the King, nor is the Tenant obliged to any particular Duties or Services of Homage or Fealty to the King, as annexed to his Donation, more than any other of his Subjects; for he had not his Eſtate of the Gift of the King, but of his own immediate Donor; and then though the Law has given the Forfeiture of all Eſtates for Treaſon to the King, of whomſoever held, yet this is a poſitive Law, introduced but lately, and the King in ſuch Caſe is in under or by way of Conveyance of the Eſtate-Tail, and his Title thereto begins but from the Time of the Treaſon committed, and by conſequence he ſhall hold ſubject to all Leaſes or Charges made by the Tenant in Tail before that Treaſon committed, as the Tenant in Tail himſelf ſhould have done; and in the principal Caſe, where the Iſſue in Tail by Acceptance of the Rent had made good the Leaſe of his Anceſtor, as againſt himſelf, if the Remainder in Fee had been in the Crown, and the Iſſue in Tail had been after attainted of Treaſon, though the King ſhould have the Forfeiture, yet he ſhould hold it ſubject to the Leaſe, which the Iſſue by ſuch Acceptance had made good againſt himſelf; and it ſhould ſeem likewiſe, that the King being a Stranger, and coming in under the Eſtate-Tail, ſhall be bound by that Leaſe, not only during the Life of the Iſſue who accepted the Rent, but alſo as long as there were any Iſſue of the Body of the Donee; for the King being a Stranger cannot have the Right of the ſucceeding Iſſue to avoid it; and whether the Right of Entry or Action, which ſuch ſucceeding Iſſue would have to avoid the Leaſe, be transferred to the King, depends upon the Words and Conſtruction of the Act of Parliament which gives the Forfeiture in ſuch Caſe; ſo in the Caſe of the Fine, where the Tenant in Tail makes a Leaſe for Years, and after conveys the Lands by Fine to the King, though the King in that Caſe was the immediate Donor, and had the Reverſion in him at the Time of the Fine levied, yet he ſhould be bound by ſuch Leaſe, becauſe the Fine was only a Conveyance of Record, and paſſes the Eſtate to the King, as it would do to any other Perſon, and conſequently the King ſhall take ſubject to that Leaſe, as any other Perſon muſt do; and in the pricipal Caſe, *where the Reverſion was in the Crown*, though the Leaſe for Years had been in every Thing warranted by 32 *H.* 8. *cap.* 28. and the Iſſue in Tail after the Death of his Anceſtor had accepted the Rent, and then been attainted of Treaſon, yet the King ſhould hold diſcharged thereof; becauſe by the Attainder the Eſtate-Tail was forfeited, determined, and gone, as if the Tenant in Tail had died without Iſſue, and the King was in of his old or immediate Reverſion.

8 Co. 34. Moor 133. Co. Lit 44. a. Cro. Eliz. 602. Bro. Tit. *Acceptance* 19.

If Tenant in Tail makes a Leaſe for Years, and dies without Iſſue, the Leaſe is abſolutely determined by his Death, though it were in all Things purſuant to the 32 *H.* 8. *cap* 28. ſo that no Acceptance of the Rent by him in the Remainder or Reverſion can make it good; for the Eſtate, out of which it was derived, being determined, that likewiſe muſt fall off with it; and the Intent of the Statute was only to enable the Tenant in Tail by ſuch Leaſes to bind his *Iſſue*, which in no Caſe before he could do, not to bind or any ways affect thoſe in *Remainder* or *Reverſion* after the Eſtate-Tail determined.

(*a*) As 8 Co. 34. a. Cro. Eliz. 602. Co. Lit. 333. a. Noy 60. Sav. 77. (*b*) Vaugh. 383.

So if Tenant in Tail makes a Leaſe for three Lives according to 32 *H.* 8. *cap.* 28. this is no Diſcontinuance, but determines with the Eſtate-Tail; and where *Cro. Car.* 156. *Salwin* and *Clerk* holds that it is a Diſcontinuance, all the other (*a*) Books are againſt it; and (*b*) *Vaughan* ſays, that Caſe is all falſe, and miſreported, and that ſuch Leaſe being warranted by the Statute cannot be a Diſcontinuance; becauſe the Parliament, to which every Man is Party, allows of ſuch Leaſes; which if they were tortious, as all Diſcontinuances are, the Parliament would never have allowed; and therefore if a Warranty was annexed to ſuch Leaſe, yet it would make no Diſcontinuance, becauſe that determines with the Eſtate likewiſe.

But

* But if ſuch Leaſe for three Lives were not warranted by 32 *H.* 8. *cap.* 28. then it would be a Diſcontinuance, becauſe it was a greater Eſtate than the Tenant in Tail had Power to make, and paſſed by Livery, which took out the Eſtate from the Tenant in Tail, and turned it into a Reverſion in Fee, determinable upon three Lives, ſo if ſuch Leaſe for three Lives, not warranted by that Statute, were made of Parcel of the Demeſnes of a Manor, and then the Tenant in Tail ſhould leaſe for Life, or convey the Manor in Fee to another, and the Leſſee attorn, yet the Reverſion thereof would not paſs, becauſe the firſt Leaſe was a Diſcontinuance of that Pacel, ſo as the Reverſion thereof for the Time was no Parcel of the Manor. * Page 318 3 Co. 50. 9 Co. 140. b. 2 Rol. Abr. 59. *Walter* and *Jackſon.*

Tenant in Tail, the Remainder in Fee, the Tenant in Tail makes a Leaſe for Lives, according to 32 *H.* 8. *cap.* 28. and after dies without Iſſue, and before any Entry he in the Remainder grants over his Remainder by Fine; and if the Conuzee of the Fine might enter upon the Leſſee and avoid his Leaſe, was the Queſtion. *Fenner* argued that he could not, becauſe where a Freehold is given by Livery, it cannot be defeated without Entry; and cited a Caſe where a Man made a Leaſe for Life, Remainder in Fee, the Tenant for Life granted over his Eſtate; then a *Formedon* was brought againſt the Grantee or Aſſignee, and the Tenant for Life died, pending the Suit; and it was held by all the Juſtices, (except *Littleton* and divers Serjeants,) that the Writ ſhould not abate, unleſs he in the Remainder had entered; ſo here, and then when before Entry, he in the Remainder grants over his Remainder, the Grantee ſhall have it but as a Remainder, for ſo is his Grant, and ſo the Eſtate of the Tenant for Life, which was not voidable, is made good; and of this Opinion were *Wyndham* and *Periam*; but *Mead* and *Dyer* held, that by the Death of Tenant in Tail without Iſſue, the Leaſe made by him, though for Life, was abſolutely void, and not merely voidable, becauſe by his Death without Iſſue, the Eſtate, out of which the Eſtate for Life was derived, is determined and gone; and ſo muſt the Eſtate for Life be alſo, for *ceſſante cauſa ceſſat & effectus*; and this ſeems the better Opinion and moſt conſonant to the Caſes before put; for the Death of the Tenant in Tail, without Iſſue, was, in Law, as much a Determination of the Leaſe for Life, as if it had been expreſly ſo limited; and then, when that Time comes, the Operation of the Livery, and the End for which it was made ceaſes, and then there needs no Entry to avoid that which by Effluxion of Time and Operation of Law is already ſpent and run out; and therefore the Conuzee of the Fines comes immediately to the Poſſeſſion both in Law and Right, and the Leſſee's Continuance of Poſſeſſion after is a Wrong and Treſpaſs to him, and cannot be by Force of the Leaſe which is run out and expired, and by conſequence muſt have determined the Operation of the Livery with it. Godb. 9. pl. 12.

But if Tenant in Tail makes a voidable Leaſe for Years or Life, and dies, and the Iſſue, before Entry on the Leſſee levies a Fine to a Stranger, the Conuzee ſhall not avoid the Leaſe, becauſe ſuch Leaſe being only voidable by Entry, when the Iſſue before Entry conveys over the Land by Fine, the Power of Entry, which was the only Means of avoiding ſuch Leaſe, is by the Fine deſtroyed and gone; for a Right of Entry cannot be transferred to a Stranger, any more than a Right of Action; ſo if the Tenant in Tail himſelf, after ſuch Leaſe, had levied a Fine to a Stranger, or even to the Reverſioner, and died, yet they could not avoid the Leaſe ever after, becauſe if they could, it muſt be by reaſon of the Right of Entry transferred by the Fine, which would have come to the Iſſue if no ſuch Fine had been levied; and the Law abſolutely condemns all Alienations of Right only, whether it be Right of Entry or of Action, and conſequently in theſe Caſes, by ſuch Alienation, the Leaſe is become abſolute and unavoidable. Jon. 61, 62, 2 Rol. Rep. 4.

A Wo-

*Page 319 Dyer 46. b. in Margent. 51. b. in Margent. 363. b. Co. Lit. 326. a. 338. a. b. & vide Moor 30.

*A Woman, Tenant in Tail, makes a Leaſe for Years, not warranted by 32 *H.* 8. *cap.* 28. and after takes Huſband, and they have Iſſue, and then the Wife dies, the Iſſue cannot avoid this Leaſe during the Life of the Huſband, becauſe he is Tenant by the Curteſy of the Freehold and Reverſion expectant thereupon; and though he ſhould ſurrender his Eſtate by the Curteſy to the Iſſue, yet this would not help him to avoid the Leaſe till his Death, becauſe his Eſtate, as Tenant by the Curteſy, is a Continuance of his Wife's Eſtate, and ſo long as that laſts, the Iſſue's Time for avoiding the Leaſe is not come, and notwithſtanding the Surrender, yet as to the Leſſee, who is a Stranger, the Eſtate by the Curteſy has ſtill an Exiſtence and Continuance, as if no Surrender had been made; for he being a Stranger ſhall not ſuffer by ſuch voluntary Act of the Tenant by the Curteſy; and *(a) Walſh* was of Opinion, that the Power of avoiding ſuch voidable Leaſes runs ſo in Privity to the Iſſue in Tail, that if ſuch Iſſue ſhould marry, and his Wife after the Death of the Anceſtor in Tail, be endowed to the Reverſion of the Lands in Leaſe, that ſhe ſhould not avoid the Leaſe, as her Huſband, the Iſſue in Tail, might have done; becauſe tho' ſhe be in, in Conſequence of the Eſtate-Tail, yet ſhe is not privy to her Huſband as to that Purpoſe; alſo it was further held in the principal Caſe, that if the Woman, Tenant in Tail, had before Marriage acknowledged a Statute, and then married, and died, that this Statute ſhould be extendible in the Hands of the Tenant by the Curteſy, and of the Iſſue too, if he came in by Surrender of the Tenant by the Curteſy during his Life; but if after ſuch Statute the Woman had made a Leaſe for Years, rendering Rent, and then married, and died leaving Iſſue, the Statute ſhould not be extended upon the Leſſee; for as the Statute was abſolutely void and determined as to the Iſſue, and the Leaſe voidable by him likewiſe, the Statute ſhall never be ſet up againſt the Leſſee, though the Iſſue in Tail thinks fit to wave his Power of avoiding the Leaſe; for then that would take away from him the Rent, which might be the chief Inducement that prevailed on him to affirm ſuch Leaſe; or if ſuch Leaſe were in all Reſpects warranted by 32 *H.* 8. *cap.* 28. and ſo not voidable by the Iſſue; yet ſince the Statute fell off, and became void by the Death of the Tenant in Tail, as to the Iſſue it ſhall never take place againſt the Leſſee, becauſe that would take from the Iſſue the Rent, which 32 *H.* 8. *cap.* 28. never intended to permit, but on the contrary, made the Iſſue's Enjoyment of the Rent the principal Reaſon of their inveſting the Anceſtor with Power by ſuch Leaſe to bind the Iſſue.

(a) In 2 Bendl. 65. but Q.

2 Rol. Rep. 499. Mod. 110.

But if Tenant in Tail grants a Rent-Charge, and after makes a Leaſe for Years, or Lives, warranted by 32 *H.* 8. *cap.* 28. the Leſſee ſhall hold the Land charged during the Leaſe, not only in the Life-time of the Leſſor, but alſo after his Death; by *Jones* and *Yelverton*: For this Rent-Charge meddles not with the Poſſeſſion, as the Statute in the other Caſes does; and therefore the Leſſee, in reſpect of the Poſſeſſion which he hath, ſhall be liable to pay the Rent reſerved to the Iſſue; whereas in the other Caſe, if the Statute ſhould prevail, this would deprive the Iſſue from diſtraining for the Rent, by deveſting the Leſſee of the Poſſeſſion whereon the Diſtreſs ought to be made.

2. What Leaſes Tenant in Tail may now make to bind his Iſſue, ſince the 32 *H.* 8. *cap.* 28.

Co. Lit. 44. b

Here we ſhall premiſe, that the Statute 32 *H.* 8. *cap.* 28. is an enabling Statute, and was made purpoſely to give the Tenant in Tail (amongſt others) Power, by obſerving the Directions therein ſpecified, to bind his Iſſue; ſo that they ſhall not now, after his Death, avoid ſuch Leaſes as they

* they might have done before by the Common Law, which was found to be very inconvenient, and a great Diſcouragement to Farmers and Leſſees, who after they had paid great Fines, and been at great Coſts and Charges in building, and otherwiſe improving the Lands and Tenements ſo leaſed to them, were, after the Death of their Leſſors, cruelly expulſed and put out (as the Statute ſpeaks) by the Heirs of the Leſſors, by reaſon of private Gifts in Tail, &c. to their great Impoveriſhment and Undoing; therefore to prevent ſuch Miſchiefs for the future, that Statute provides, that all Leaſes to be made of any Manors, Lands, Tenements, or other Hereditaments, by Writing indented, under Seal for Term of Years, or for Term of Life, by any Perſon or Perſons being of full Age of Twenty-one Years, having any Eſtate of Inheritance, either in Fee-ſimple or Fee-tail, &c. ſhall be good and effectual againſt the Leſſors and their Heirs, &c. provided that the ſaid Act ſhall not extend to any Leaſes to be made of any Manors, Lands, &c. being in the Hands of any Farmer or Farmers, by virtue of an old Leaſe, unleſs the ſame old Leaſe be expired, ſurrendered or ended, within one Year next after the making of the ſaid new Leaſe; nor to any Grant to be made of any Reverſion of any Manors, Lands, &c. nor to any Leaſe of any Manors, Lands, &c. which have not been moſt commonly letten to Farm, &c. by the Space of twenty Years next before; nor to any Leaſe to be made without Impeachment of Waſte, or which ſhall exceed the Number of Twenty-one Years, or three Lives, from the Day of the Making thereof; and that upon every ſuch Leaſe there be reſerved yearly, during the ſame Leaſe, due and payable to the Leſſors and their Heirs, &c. to whom the ſame Lands, &c. after the Death of the Leſſors, would have come if no ſuch Leaſe had been made, ſo much yearly Farm or Rent, or more, as had been moſt accuſtomably yielden or paid for the Manors, Lands, &c. ſo letten within twenty Years next before ſuch Leaſe thereof made, &c. * Page 320

Theſe are the ſeveral Qualifications requiſite to all Leaſes to be made by Tenant in Tail to bind his Iſſue within the Statute, the particular Branches thereof being conſidered under the next Head, Letter (D), I ſhall here only mention ſome ſcattered Caſes, not ſo eaſily reducible to the Method there uſed.

Tenant in Tail, to him and the Heirs Male of his Body, had Iſſue two Sons by divers Venters, and died, the eldeſt Son entered and made a Leaſe for Twenty-one Years, reſerving Rent generally to him and his Heirs and Aſſigns, and died without Iſſue, leaving two Siſters, his Heirs at Law; and if by this Reſervation the Rent belonged to the ſecond Brother, to whom the Reverſion deſcended as Heir Male of the Body of the Father, was the Queſtion; for if not, then the Leaſe could not bind him within 32 *H.* 8. *cap.* 28. and it was ſtrongly urged, that the Rent could not go to him, becauſe he was neither Heir General nor Special to the Leſſor, that the Reſervation being to the Heirs of the Leſſor could not go to the Brother of the Half Blood; but notwithſtanding it was adjudged to be a good Leaſe, and that the Rent ſhould go along with the Reverſion; for the Words of the Statute are, that the Rent ſhall be reſerved to the Leſſor and his Heirs, or *to thoſe to whom the Lands would go if no ſuch Leaſe had been made*; and Judges are to expound Statutes, ſo as not to fruſtrate the Deſign and Intent of them; and here the Intent was, that *the Rent ſhould go along with the Reverſion*; and ſo it may here, for Rent naturally follows the Reverſion, and the ſecond Brother is Heir to the Intail and Reverſion, though not to the Leſſor, and Heirs *dicuntur ab Hæreditate*, and therefore ſhall be taken *ſecundum ſubjectam materiam & ut res magis valeat*, to comply with the Intent of the Statute; and they cited (*a*) *Auſten's* Caſe as a Caſe in point, and ſo Judgment was given accordingly. Hard. 89. *Cotber* and *Merrick*. (*a*) Dyer 1:5.

Two

*Page 321 Latch 45. *Thompſon's* Caſe.

* Two Coparceners Tenants in Tail, the Huſband of one of them, after her Death, being Tenant by the Curteſy, joins with the other in a Leaſe for Years, rendering Rent to them and their Heirs; this was held no good Leaſe within 32 *H.* 8. *cap.* 28. becauſe it is not reſerved to the Donee and his Heirs, but to the Tenant by the Curteſy, jointly with the other, for Rent goes ſtrictly as it is reſerved by the Leſſor, and not otherwiſe; and perhaps as this Reſervation is, if the Tenant by the Curteſy ſhould ſurvive, the whole Rent would go to him by Survivorſhip, and ſo the Iſſue of the other Coparcener have no Recompence for his Part of the Lands leaſed; or if the Rent ſhould not ſurvive, in regard of their ſeveral Intereſts in the Lands leaſed, yet ſince Heirs, in caſe of the Coparcener who joined, muſt be intended Heirs of the Body, to bring it within 32 *H.* 8. *cap.* 28. So muſt it likewiſe be in the Caſe of the Tenant by the Curteſy, and that may not happen to be the Iſſue inheritable by force of the Gift, becauſe he may have Iſſue a Son by a former Venter, who would be Heir of his Body; and therefore this ſeems to differ from the former Caſe, becauſe the ſame Word *Heirs* being applied to both indifferently, cannot be intended to mean one Sort of Heirs in one Caſe, and another in the other; and the Tenant by the Curteſy can have no Heirs of his Body inheritable as Heirs of his Body to the Intail, for he had no Eſtate-tail in him; and therefore Heirs of his Body, if it ſhould be ſo conſtrued, cannot be reſtrained or governed by the ſame Reaſoning as will prevail in the Caſe of the Coparcener.

Palm. 484. Latch 257. *Stacy* ver. *Clerk.*

So if Tenant by the Curteſy, and the Heir in Reverſion in Tail join in a Leaſe for Years, rendering Rent to them and their Heirs; this Leaſe is not warranted by 32 *H.* 8. *cap.* 28. by reaſon of ſuch general Reſervation, which will carry a Moiety of the Rent, at leaſt, to the Heirs general of the Tenant by the Curteſy, and ſo may cut off the Iſſue in Tail from that Recompence the Statute intended them as the Conſideration of their Anceſtors being allowed by ſuch Leaſes to bind them.

Godb. 102. pl. 119.

Lands were given to Baron and Feme, and to the Heirs of their two Bodies; the Baron dies, leaving Iſſue by his Wife, who makes a Leaſe for Years according to 32 *H.* 8. *cap.* 28. and if this Leaſe was good by that Statute, was the Queſtion. The Objection againſt it was, that the Statute ſays, the Leaſe ſhall be good againſt the Leſſor and his Heirs, and the Iſſue does not claim as Heir to the Wife only, but as Heir to them both; but *Wyndham* and *Rhodes*, Juſtices, agreed clearly that the Leaſe ſhould bind the Iſſue within the Intent of that Statute, for between Baron and Feme there are no Moieties, and the Wife ſurviving is perfect and abſolute Tenant in Tail, and conſequently make all ſuch Leaſes as that Statute impowers Tenants in Tail to make.

Dyer 123. 304. a. pl. 53. 2 Rol. Rep. 403, 407. Ley 78.

Tenant in Tail makes a Leaſe for Years, rendering 20*s.* Rent, and after releaſes all the Rent except 12*d.* and dies, and his Iſſue accepts the 12*d.* and the Queſtion was, if thereby he were concluded to diſtrain for the other 19*s.* reſerved upon the Leaſe; and *Sanders* and *Catlyn* were of Opinion that he was concluded, but *Whiddon* and *Dyer contra*; and put this Caſe, that if the Leſſor after ſuch Leaſe, ſhould grant to the Leſſee that he ſhould hold his Leaſe without Impeachment of Waſte, yet the Iſſue may maintain an Action of Waſte againſt him, of which there ſeems no Doubt; or that the Iſſue, if he had not accepted the 12*d.* might have diſtrained for the Whole 20*s.* for if ſuch Releaſe, either of Rent or Waſte, ſhould prevail, the Statute 32 *H.* 8. *cap* 28. would be totally eluded; but it ſhould ſeem, the Iſſue's own Acceptance of the Rent hath concluded him, for his own Time, to diſtrain for any more.

Hard. 90, 93.

If Tenant in Tail makes a Leaſe for Years, reſerving the uſual Rent to his Iſſue, without any Reſervation to himſelf, this is not purſuant to the Words of the Statute; yet *Fleming*, Chief Juſtice, held it to be a good

Reſer-

* Reſervation, and the Leaſe not voidable, for this Reaſon, within 32 *H.* 8. *cap.* 28. becauſe the Iſſue, for whom the Statute chiefly intended to provide, ſuſtains no Prejudice. * Page 322

An Eſtate is made to Huſband and Wife, and the Heirs of the Body of the Huſband, the Huſband makes a Leaſe for forty Years, rendering Rent, and dies, the Iſſue accepts the Rent, yet this ſhall not bind him, becauſe his Time for Acceptance thereof was not come, the Whole being veſted in the Wife for her Life by Survivorſhip. 3 Co. 64. b.

Tenant in Tail makes a Leaſe for *twenty* Years, rendering the uſual Rent, *Habendum* from *Michaelmas* next enſuing; this ſeems a good Leaſe, tho' it did not begin from the making of the Leaſe, according to the Proviſo 32 *H.* 8. *cap.* 28. for the Intent of the Statute was only that the Leaſe ſhould not exceed the Number of Twenty-one Years from the Making, which this Leaſe did not; and in the Margent a Caſe is of (*a*) *Thompſon* and *Trafford* 35 *Eliz.* in *B. R.* was cited to be adjudged, *per totam Curiam*, that it was a good Leaſe, and well warranted by the Statute; though my Lord *Coke* lays it down for one of his (*b*) Rules, that Leaſes upon that Statute are not good, if they do not commence from the Day of the Making, which perhaps may be reconciled upon the ſame Diverſity, where they are under Twenty-one Years, and where not ſo; that from the Time of the ſealing and executing the Leaſe, till the Expiration thereof, there does not intervene more than Twenty-one Years; for if the Commencement of the Leaſe be at ſuch a Diſtance, that between the Time of the ſealing and executing thereof, and the Expiration, there do not intervene above Twenty-one Years, then ſuch Leaſe ſeems to be without any Aid from this Statute, though the Time for Continuance thereof in the Poſſeſſion of the Leſſee be under Twenty-one Years; for otherwiſe the Tenant in Tail might ſo procraſtinate the Commencement of the Leaſe, as to have always the greateſt Part of the Twenty-one Years running out in the Time of his Iſſue, which the Statute never intended to countenance. Dyer 246. a. Leon. 148. & *vide* 2 Bendl. 74. pl. 58. (*a*) Poph. 8. (*b*) Co. Lit. 44. a. 45. b.

So where one made a Leaſe for ten Years, and after made another Leaſe for eleven Years, both theſe Leaſes are good, becauſe they do not in all exceed Twenty-one Years, and ſo the Inheritance not charged with more than a Leaſe for Twenty-one Years, which the Statute allows. Leon. 148.

Leaſes by Tenant in Tail, or Huſband ſeiſed in Right of his Wife of Copyhold Lands, are not within this Statute of 32 *H.* 8. *cap.* 28. but remain perfectly as at Common Law. Cro. Car. 44.

Tenant in Tail made a Leaſe to a Feme Covert for Life, the Huſband ſurrenders, and then the Tenant in Tail makes a Leaſe for three Lives and dies; the Wife, after the Death of her Huſband, entered, claiming, her Leaſe, and dies; and (*c*) held, that the Iſſue ſhall not avoid the Leaſe for three Lives, and yet a conditional Surrender of a former Leaſe hath been expreſly held not to be a ſufficient Surrender to make good any new Leaſe to be made by virtue of this Statute; *Quare* therefore the Difference. Moor, pl. 1084. *Sydnam* and *Capps*. (*c*) 5 Co. 2. Co. Lit. 44. b.

3. When and in what Caſes the Iſſue in Tail, or Strangers, ſhall be bound by voidable Leaſes made by Tenant in Tail.

As this has already been in ſome meaſure cleared under the firſt Branch of this Head, there remains but a few Caſes here to be inſerted.

Baron and Feme, Tenants in Special Tail, with Reverſion in Fee to the Baron, the Baron dies, *A.* his Son and Iſſue in Tail having alſo the Reverſion in Fee, by Indenture, in the Life-time of the Wife, makes a Leaſe 2 Bulſ. 42, 43. *Errington* ver. *Errington*. 4 Mod. 3. S. C. cited.

Page 323 Leaſe to *B.* for forty Years, to begin after the Death of the Wife, rendering Rent, and dies without Iſſue; *C.* his Siſter, to whom the Reverſion deſcended in the Life-time of her Mother, levies a Fine *come ceo, &c.* with Proclamations to *J. S.* then the Wife, Tenant in Tail, dies; and if *J. S.* the Conuzee of the Fine, was bound by this Leaſe, was the Queſtion: no Judgment is given in the Caſe, but the Opinion of the Court, upon the firſt and ſecond arguing of the Caſe, ſeemed to be, that the Conuzee could not avoid this Leaſe; and the Reaſon they went upon was, becauſe this Leaſe; at firſt, took its Effect out of the Eſtate-tail by way of Concluſion, and out of the Reverſion in Fee by way of Intereſt; but the taking effect by way of Concluſion was at an End by the Death of the Iſſue who made it, becauſe he died before the Eſtate-tail came to him; and ſo it reſted barely upon the Reverſion in Fee, which was well charged therewith; then when *C.* the Siſter, inheritable likewiſe to both the Intail and Reverſion in Fee, levied a Fine in the Life-time of the Mother; this paſſed the Reverſion in point of Intereſt charged with that Leaſe, and it likewiſe carried the Eſtate-tail; (not as an Eſtate-tail, for that none could have but the Donees and their Iſſue, inheritable by Force of the Gift; much leſs when the Iſſue who levied it had then nothing in the Intail, her Mother, who had the whole Eſtate-tail in her, being then living;) but it paſſed the Eſtate-tail by way of Bar or Extinguiſhment, ſo that the Leaſe which would have taken place out of the Eſtate-tail by way of Concluſion, if it had ever come to the Leſſor, and which did take place out of the Reverſion in point of Intereſt, now that the Eſtate-tail is put out of the way by virtue of the Fine, the Leaſe then takes place out of the Reverſion preſently, and by conſequence the Conuzee, who has that Reverſion by Conveyance ſubſequent to the Leaſe, muſt hold it ſubject thereto; and the Siſter could not by the Fine convey over the Poſſibility of avoiding the Leaſe, which ſhe herſelf would have had if the Eſtate-tail had come to her; and ſome held, that if either the Brother or Siſter, after the Father's Death, had acknowledged at Statute, and then after levied the Fine, and then the Mother had died, that the Eſtate-tail would be ſo barred and gone, *quoad* the Conuzee of the Statute, that he might lay on his Statute againſt the Conuzee of the Fine, who hath the Fee-ſimple abſolute in him, out of which the Leaſe or Statute were to take place; and the Iſſue in Tail only is inheritable to the Privilege of avoiding ſuch Charges by virtue of his Eſtate-tail, not the Conuzee, who is a Stranger, and cannot have that Eſtate. But afterwards when *Coke* came to be Chief Juſtice, he was clear of Opinion, that the Conuzee of the Fine was not bound by this Leaſe, for he held the Leaſe to be clearly and abſolutely void as againſt the Siſter and her Conuzee, and not merely voidabl; indeed if the Son had come to the Eſtate-tail, it would have bound him, and ſo it would his Conuzee, if he had levied the Fine in the Life of his Mother; but he dying in the Life-time of the Mother, who was perfect Tenant in Tail the Siſter was not at all bound by this Concluſion, but the Leaſe, as to her, was abſolutely void; and then of all *void Charges* a *Stranger* may take advantage, though of ſuch as are only *voidable*, *Privies only*, and *not Strangers*, can take advantage: And he divided the Caſe, and put it as if the Reverſion in Fee had been in the Donor, and ſuch Donor had made a Leaſe for Years, or granted a Rent-charge, and then the Iſſue in Tail, in the Life of the Tenant in Tail, had levied a Fine, and then the Tenant in Tail had died, clearly the Conuzee of the Fine ſhould hold the Land ſo long as there were any Iſſue in Tail; for during that Time the Conuzee hath a Fee-ſimple; and though the Iſſue in Tail here had the Reverſion in Fee, which he paſſed to the Conuzee, together with a Fee determinable on the Failure of Iſſue, and that the Conuzee cannot have two Fee-ſimples in him, yet he hath ſuch a Fee-ſimple as

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ſhall be diſcharged of the Leaſe during the Continuance of the Eſtate-tail, if it had not been barred, and the one Fee-ſimple ſhall not determine or drown the other, but both ſhall have Continuance *quoad* Strangers, as if they were in ſeveral and diſtinct Perſons; and he alſo held, that if the Daughter in this Caſe had entered, and accepted the Rent, yet clearly this Acceptance would not have bound her, or made good the Leaſe, becauſe, as to her, it was abſolutely void, and not merely voidable; and this ſeems the moſt reaſonable and beſt Opinion; but no Judgment was given, but the Caſe ended by Agreement. * Page 324

A. Tenant in Tail, with Reverſion to himſelf in Fee, makes a Leaſe for 99 Years, if two Lives ſhould ſo long live to commence after the Determination of a Leaſe for Years then in Being; *A.* dies, leaving *B.* his eldeſt Son and Heir, who being the Iſſue in Tail levied a Fine to the Uſe of himſelf and his Heirs; the firſt Leaſe determines, then *B.* enters upon his Father's Leſſee; and if his Entry was lawful, was the Queſtion; and it was adjudged, that it was not; for this was an Intereſt derived out of the Eſtate-tail, and alſo out of the Reverſion, and being made by Tenant in Tail was not abſolutely void as againſt his Iſſue, but only voidable; then when the Iſſue, without taking the Advantage the Law gave him in reſpect of his Eſtate-tail to avoid this Leaſe, levies a Fine of the Eſtate, his Eſtate-tail by ſuch Fine is extinquiſhed or barred and gone, and by conſequence his Power to avoid this Leaſe in reſpect of that Eſtate-tail is gone likewiſe, and the Conuzee has no Power to avoid it, becauſe he is a mere Stranger, and no ways in Privity of the Eſtate-tail; nor could this Power to avoid the Leaſe be transferred to the Conuzee, when the Iſſue in Tail had it only in reſpect of his Eſtate-tail, which is now barred, or rather extinguiſhed, as it was held to be, and ſo the Leaſe took place of the Reverſion in Fee. *Note*; This Caſe ſeems to differ from that of *Errington's ſupra*, where the Son, who had made the Leaſe, died without Iſſue in the Life-time of his Mother, who was perfect Tenant in Tail.

4 Mo. 1, 2. Salk. 338. pl. 3. Carth. 257, 258. Show. 370. S.C. *Symonds* and *Cudmore*. 3 Danv. 196. pl. 10, 11. Skin. 284. pl. 3. 317. pl. 4. 3 Salk. 335. Caſes *B. R.* 32. Holt 666. pl. 1.

Huſband and Wife Tenants in ſpecial Tail, with Remainder to the Huſband in Fee, by Conveyance made by the Huſband, during the Coverture have Iſſue a Son, the Huſband dies, the Son in Life-time of his Mother levies a Fine to the Uſe of himſelf and his Heirs; the Wife after makes a Leaſe for twenty one Years without reſerving the antient Rent, and ſo not warranted by 32 *H.* 8 *cap.* 28. and dies, the Son hath Iſſue, and by his Will deviſes theſe Lands to the Defendant, and dies, the Defendant enters upon the Leſſee, who brings Ejectment; and it was adjudged in *B. R.* for the Plaintiff, and that Judgment afterwards affirmed in Error in the Exchequer Chamber, after divers Arguments; and in the Caſe two Points were made: 1. If this Leaſe, being made by a Jointreſs within 11 *H.* 7. *cap.* 20. and not warranted by 32 *H.* 8 *cap.* 28. be voidable by the Iſſue in Tail, upon the Statute 11 *H.* 7. *cap.* 20. in caſe no ſuch Fine had been levied. 2. If the Conuſee of the Fine ſhould have the ſame Power to avoid the Leaſe, either in reſpect of the Eſtate-tail or the Remainder in Fee, as the Iſſue ſhould have had, if no ſuch Fine had been levied. As to the firſt Point it was reſolved, that this Leaſe was not within the 11 *H.* 7. *cap.* 20. for it was no Diſcontinuance, but only an ordinary Leaſe for Years, which the Wife might ſurvive; and therefore this differs from a Leaſe for Life or Lives made by a ſole Jointreſs, not warranted by 32 *H.* 8. *cap.* 28. for that makes a Diſcontinuance preſently, and is expreſly within 11 *H.* 7. *cap.* 28. alſo this differs from the Caſe put in (*a*) Sir *George Brown's* Caſe, that if a Woman Jointreſs in Tail accepts a Fine *come ceo*, *&c.* and grants and renders the Land for 500 or 1000 Years, to evade the Act, that yet this is an Alienation within the Meaning of that Act, as much as if ſhe had expreſly levied a Fine for 500 or 1000 Years, becauſe in both Caſes, after her Death, ſuch Fine would bind the Iſſue in Tail, which

Rol. Abr. 842. Jon. 60. Hutton 84. Cro. Jac. 688. 2 Rol. Rep. 490, 498. *Croker* and *Kelſey*. Sid. 62. Keb. 182. S. C. citcd.

(*a*) 3 Co. 51. 2 Rol. Rep. 491. & *vide* 3 Keb. 333. 436, 448.

*Page 325 which that Statute * intended to prevent; but becauſe ſuch Fines paſſing only an Intereſt for Years, and not meddling with the Freehold, make no Diſcontinuance, nor can be forfeited with collateral Warranty, therefore during the Life of the Jointreſs they continue good, ſhe continuing ſtill Tenant in Tail, as ſhe was before, at leaſt in caſe of the Fine levied by her for Years; but after her Death the Iſſue in Tail may avoid them, becauſe otherwiſe they would be prejudicial to him in binding his Inheritance, and ſo would be equivalent to a Diſcontinuance, and therefore after the Death of the Jointreſs in ſuch Caſe the Iſſue in Tail may avoid them by 11 *H.* 7. *cap.* 20. but not before; but this Leaſe for twenty-one Years being made in the ordinary Form, by Indenture, is not within the Statute 11 *H.* 7. *cap.* 20. and therefore if the Jointreſs in this Caſe had made a Leaſe for 100 or 1000 Years by Indenture only, this would be no Alienation within 11 *H.* 7. *cap.* 20. becauſe the Iſſue might avoid it by the Statute *de Donis*; ſo that there appears a manifeſt Difference between Leaſes for Life or Lives, and Leaſes for Years, and alſo between Leaſes for Years made by Fine, and Leaſes for Years made only by Indenture or Deed Pool; but if ſuch Leaſe, either for Lives or Years, were in all Things warranted by 32 *H.* 8. *cap.* 28. then they would be good and binding upon the Iſſue. As to the ſecond Point, if the Conuzee of the Iſſue in Tail ſhould have the ſame Power of avoiding the Leaſe, either in reſpect of the Eſtate-Tail or the Remainder in Fee, as the Iſſue himſelf ſhould have had if no ſuch Fine had been levied; it was reſolved, that he ſhould not, but that the Leaſe was good, and unavoidable; for notwithſtanding the Fine levied by the Son, the Mother continued perfect and abſolute Tenant in Tail; and therefore the Leaſe made by her would not have been abſolutely void againſt the Iſſue, but only voidable, if he had levied no Fine; but now having levied a Fine, this hath barred the Iſſue and the Entail, ſo that the Iſſue himſelf cannot avoid this Leaſe; for he hath nothing to do with the Intail, and the Conuzee cannot avoid it, becauſe he is a Stranger to the Entail, which could not be transferred to him by the Fine, but only be extinguiſhed as an Eſtate-Tail; and the Statute *de Donis* helps only the Iſſue and thoſe in Reverſion or Remainder; and though the Fine carried likewiſe the Remainder in Fee, and after the Death of the Wife the Entail was not *in Eſſe*, but determined; yet this was only between the Conuzor and Conuzee; for as to the Feme, and all Strangers, the Eſtate-Tail continues ſo long as there is any Iſſue, and no Diverſity when the Fine of the Iſſue is precedent to the Leaſe, and where ſubſequent; for the Leaſe is good againſt all but thoſe who are aided by the Statute *de Donis*; and when the Iſſue in Tail by his own Act hath extinguiſhed or barred the Eſtate-Tail, and deſtroyed the Privity, the Leaſe continues good and unavoidable ſo long as any of the Iſſue in Tail are in being; and if the Feme and this Caſe, after the Fine levied by the Iſſue, had made a Feoffment in Fee, and died, the Feoffee ſhould have held the Land againſt the Iſſue and his Conuzee, ſo long as there were any Iſſues in Tail; and if Tenant in Tail makes a Leaſe for Years, and after levies a Fine to him in the Reverſion, and dies, leaving Iſſue, though in this Caſe he in Reverſion ſhall be in of his antient Reverſion, yet he ſhall not avoid the Leaſe during the Lives of the Iſſues in Tail; for as to Strangers, the Eſtate-Tail hath Continuance in Right, though as to other Purpoſes he ſhall be in of an Eſtate in Fee; and therefore the Difference between this and Sir *George Brown's* Caſe is, that the Leaſe there for three Lives was a Diſcontinuance, and then 11 *H.* 7. *cap.* 20. gives Title of Entry to him to whom the Intereſt after the Death of the Feme ſhould appertain, to avoid it; but here this Leaſe for Years was no Diſcontinuance, nor at all within that Statute; and then it remains at Common Law, where none but the Iſſue in Privity of the Eſtate-Tail, or thoſe in Reverſion or Remainder, ſhall avoid it; and here the Eſtate-Tail, as to all Strangers, hath Continuance, and then the Iſſue cannot avoid it, becauſe he hath no Eſtate-Tail,

nor

* nor the Conuzee, becauſe a Stranger to the Entail; and ſo the Leaſe remains abſolute and unavoidable. * Page 326

If Tenant in Tail makes a future Leaſe, and dies before it is to commence, ſuch Leaſe is merely void, without more Circumſtances; but the Iſſue in Tail has his Election to make it good by accepting the Rent, or by Diſtraining and Avowry, which amounts to an Admittance of the Leaſe, and ſo eſtops and concludes the Iſſue to deny it; ſo that the Election of the Iſſue in that Caſe is only to ſupport and make good the Leaſe of ſome Act of his own Concluſion, and not an Election to avoid it by his own Act, becauſe there is no ſuch Act neceſſary; for the Law eſteems it void *ipſo facto* by the Death of the Tenant in Tail, unleſs the Iſſue doth by ſome Act make it good. Carth. 260. in the Caſe of *Symonds* and *Cudmore*, by *Holt* C. J. againſt the three others who doubted.

Where Leaſes are voidable only, the ſame may in ſome Caſes be avoided by one Perſon, and yet revived and made good by another; and in ſome Caſes and Avoidance of ſuch Leaſes by one Perſon concludes all others to revive or ſet them up again; wherein the Diverſity is between thoſe who at the Time of the Avoidance have the abſolute Fee and Inheritance in them, and thoſe who have only a temporary and particular Eſtate or Intereſt therein.

Therefore if Tenant in Tail, or Biſhop, make a Leaſe for Years not warranted by the Statute, ſo that the Iſſue in Tail or Succeſſor may avoid them, if during theſe Leaſes the Temporalties come into the Hands of the King by the Vacancy of the Biſhoprick, or the Wardſhip of the Iſſue, and his Lands come to the King, or any other, upon the Death of the Tenant in Tail, by reaſon of a Tenure by Knight's Service; in theſe Caſes the King, or other Guardian, may avoid theſe Leaſes in Right of the Biſhoprick or Iſſue, whether made by the Anceſtor within Age, or by the Ward himſelf; but yet the Succeſſor, or Iſſue, when they come to the actual Poſſeſſion of theſe Lands themſelves, may by the Acceptance of the Rent, *&c.* and Waver of the Poſſeſſion, re-eſtabliſh and ſet up ſuch Leaſes again; ſo where the King for his *Primier* Seiſin avoided a Leaſe for Years made by a Tenant in Tail, yet it was adjudged, that after Livery had, the Iſſue in Tail had Election either to defeat or abide by ſuch Avoidance; and therefore if he accepted the Rent from the Leſſee, and waved the Poſſeſſion, this ſet up the Leaſe again. 7 Co. 35. Co. Lit. 46. a.

So if the Wife of Tenant in Tail being endowed of thoſe Lands, avoids a Leaſe made by her Huſband during the Coverture, for thirty or forty Years, yet after her Death the Iſſue in Tail, by Acceptance of Rent, and Waver of the Poſſeſſion, may ſet up ſuch Leaſe again. 7 Co. 36. Co. Lit. 46. a.

So if Tenant in Tail makes a Leaſe for thirty or forty Years, rendering Rent, and dies without Iſſue, his Wife *privement enſeint* with a Son, and the Donor enters, and as to himſelf avoids the Leaſe; then the Son is born, and the Leſſee re-enters; the Son at full Age may either affirm or avoid ſuch Leaſe, as he thinks fit; for the Leaſe was not abſolutely determined or avoided, more than the Eſtate-Tail itſelf, out of which it was derived, but only *ſecundum quid*, and ſubject to be ſet up again upon the Birth of the Iſſue, which revived the Eſtate-Tail; but if ſuch Leaſe were made by the Tenant in Tail before Marriage, rendering Rent, and then he married, and died, leaving his Wife *privement enſeint*, and the Donor enters, and as to himſelf avoids the Leaſe, yet if the Wife be after endowed, the Leaſe is revived as againſt her, becauſe her Eſtate is *quodam modo* a Continuance of the Eſtate-Tail of the Huſband, and therefore revives all Charges made by him before the Marriage; but if the Wife be after delivered of a Son, and dies, now the Iſſue may again avoid that Leaſe or affirm it, as he thinks fit; or if ſuch Leaſe were made after Marriage, and the Wife, being endowed thereof, avoids that Leaſe, yet after her Death the Iſſue in Tail may revive it; for in all th ſe Caſes the Avoidance of ſuch Leaſes being only by thoſe who had a temporary Eſtate or Intereſt in the Land, cannot bind thoſe who 7 Co. 38. Godb. 325.

ſucceed

*Page 327 *ſucceed to the Inheritance thereof, but that they may, if they think fit, re-eſtabliſh and ſet up ſuch Leaſe again, which, as to them, was at firſt only voidable, and not abſolutely void.

7 Co. 36. Co. Lit. 46. b. But if a Woman be endowed of an Advowſon, which was appropriated, during the Coverture, and ſhe preſents, and her Preſentee is admitted, inſtituted and inducted, though the Incumbent dies during the Life of the Dowereſs, yet is the Appropriation defeated and diſſolved for ever; becauſe the Incumbent, who came in by her Preſentation, had the whole Fee and Eſtate in him, as much as any Incumbent ever can have, and conſequently there can be no reverſionary or contingent Intereſt left to revive the Appropriation; but if the Wife in this Caſe had died before any Preſentation, then the Appropriation had remained untouched; for then nothing had been done to defeat or alter it, and make it preſentable; for the actual Preſentation only defeats and diſſolves the Appropriation, not the bare Power or Preſenting, without it be reduced into Execution.

(D) Of Leaſes for Lives or Years by Eccleſiaſtical Perſons: And herein,

1 What Leaſes they might have made by the Common Law, and of the ſeveral enabling and diſabling Statutes, with ſome general Obſervations on them.

Comp. Incumb. 415. AS to Leaſes made by Eccleſiaſtical Perſons, by the Common Law, we ſhall but briefly obſerve, that all Eccleſiaſtical Perſons had in former Times as full Power and Authority to leaſe, grant, or alien their Poſſeſſions, as Temporal Perſons had, that is, if the Grant, *&c.* made by a ſole Corporation was with the Conſent of others, whoſe Confirmation was in ſuch Caſe neceſſary; for though Deans and Chapters, Maſters and Fellows of Colleges, Maſters and Brethren of Hoſpitals, and ſuch like Corporations Aggregate, might of themſelves alone, without the Conſent or Confirmation of any, have made long Leaſes for Lives or Years, or Gifts in Tail or Fee, at Pleaſure; yet Biſhops, Deans, *&c.* ſeiſed in Right of their Biſhopricks, Deanries, *&c.* ſo Archdeacons, Prebendaries, Perſons, Vicars, *&c.* if they aliened or leaſed, muſt have had the Conſent and Confirmation of others, that had the Power of confirming in that Behalf, and then their Grants, *&c.* were as good as thoſe made by Aggregate Corporations.

But the Law, as to the Capacity of Clergymen in granting, leaſing, *&c.* being greatly altered by divers Acts of Parliament, and thoſe not a little intricate and perplexed, it will be neceſſary to ſet down the Statutes themſelves, to render the Caſes reducible to them more clear and intelligible.

32 H. 8. c. 28. The firſt Statute concerning Leaſes by Eccleſiaſtical Perſons, which is alſo the only Statute that gives Directions concerning Leaſes by Tenant in Tail, or Huſbands ſeiſed of Lands in Right of their Wives, is 32 *H.* 8. *cap.* 28. which provides as followeth: "Whereas great Numbers of the "King's Subjects have heretofore taken Leaſes of Lands, Tenements, "and other Hereditaments, for Term of Years, and divers of them for "Term of Life, and have given and paid great Fines and Sums for the "ſame, and alſo been at great Coſts and Charges, as well in and about "great Reparations and Buildings upon their ſaid Farms, as otherwiſe "concerning their ſaid Farms; yet notwithſtanding the ſaid Farmers,

"after

"after the Deaths or Reſignation of their Leſſors, have been, and be *Page 328
" daily, with great Cruelty, expulſed and put out of their ſaid Farms
" and Takings by the Heirs or Succeſſors of their ſaid Leſſors, or by
" ſuch Perſons as have Intereſt therein, after the Deaths or Reſignations
" of their ſaid Leſſors, by reaſon of privy Gifts of Intail, or for that
" the Leſſors had nothing in the Lands, Tenements, or other Hereditaments
" ments ſo letten at the Time of the Leaſes thereof made, but only in
" the Right of their Wives, or ſuch other like Cauſe, to the great Impoveriſhment, and in a Manner utter Undoing, of the ſaid Farmers; for
" Reformation whereof, be it enacted, &c. That all Leaſes to be made of
" any Lands, Tenements, or other Hereditaments, by Writing indented,
" under Seal, for Term of Years, or for Term of Life, by any Perſon
" or Perſons, being of full Age of Twenty-one Years, having an Eſtate
" of Inheritance either in Fee-ſimple or Fee-tail, in their own Right, or
" in Right of their Churches and Wives, or jointly with their Wives,
" of an Eſtate of Inheritance, made before the Coverture or after, ſhall
" be good and effectual in the Law againſt the Leſſors, their Wives,
" Heirs and Succeſſors, and every of them, &c. *Provided* that the ſaid
" Act ſhall not extend to any Leaſes to be made of any Manors, Lands,
" Tenements or Hereditaments, being in the Hands of any Farmer or
" Farmers, by virtue of an old Leaſe, unleſs the ſame old Leaſe be
" expired, ſurrendered, or ended, within one Year next after the making
" of the ſaid new Leaſe; nor ſhall extend to any Grant to be made of
" any Reverſion of any Manors, Lands, Tenements, or Hereditaments,
" which have not moſt commonly been letten to Farm, or occupied by
" the Farmers thereof, by the Space of twenty Years next before ſuch
" Leaſe thereof made; nor to any Leaſe to be made without Impeachment of Waſte, nor to any Leaſe to be made above the Number of
" *Twenty-one Years* or *three Lives* at the moſt, from the Day of the making thereof; and *that upon every ſuch Leaſe there be reſerved yearly*,
" during the ſame Leaſe, due and payable to the Leſſors, their † Heirs † See the
" and Succeſſors, to whom the ſame Lands ſhould have come after the Caſe of
" Deaths of the Leſſors, if no Leaſe had been thereof made, and to *Cother* and
" whom the Reverſion thereof ſhall appertain, according to their Eſtates *Merrick* ante
" and Intereſts, *ſo much yearly Farm or Rent*, or more, as hath been 320.
" moſt accuſtomably yielden or paid for the Manors, &c. ſo to be letten
" within twenty Years next before ſuch Leaſe thereof made, and that
" every ſuch Perſon or Perſons, to whom the Reverſion of ſuch Manors,
" &c. ſo to be letten ſhall appertain, as is aforeſaid, after the Deaths of
" ſuch Leſſors, or their ‡ Heirs, ſhall and may have ſuch like Remedy ‡ See the
" and Advantage, to all Intents and Purpoſes, againſt the Leſſees thereof, Caſe of
" their Executors and Aſſigns, as the ſame Leſſor ſhould or might have *Cother* and
" had againſt the ſame Leſſees; *Provided* alſo, that this Act extend not *Merrick* ante
" to give any Liberty or Power to any Perſon to take any more Farms, 320.
" Leaſes or Takings, of any Manors, &c then he ſhould or might lawfully have done before the making of this Act; nor extend to any Liberty or Power to any Perſon, or Vicar of any Church or Vicaridge,
" for to make any Leaſe or Grant of any of their Meſſuages, Lands, Tenements, Tythes, Profits or Hereditaments, belonging to their Churches
" or Vicaridges, otherwiſe, or in any other Manner than they ſhould or
" might have done before the making of this Act."

This Act extends only to ſole Corporations, as Biſhops, Deans, &c. 10 Co. 60. a.
but as to Corporations Aggregate, as Deans and Chapters, &c. though they be ſeiſed in Right of their Churches, this is no enabling Statute; for they, by the Conſent of the major Part of them, might have made any Leaſes or Grants of their Eſtates without Limitation before this Statute, and ſo they might have done after, till by others ſubſequent Statutes they were reſtrained, this being merely enabling, and not at all reſtraining them; and though by this Statute the ſole Corporations before mentioned

could

*Page 329 * could not, without the Consent and Confirmation of others, have made Leases for three Lives, or Twenty-one Years, yet with Confirmation they might have made longer Leases, or absolute Alienations, of any of their Possessions; and therefore to restrain Bishops, and other Ecclesiastical Persons, where the Statutes of 1 & 13 *Eliz.* made, which are as follow,

Moor 107.

For restraining of Bishops, the 1 *Eliz. cap.* 19. says, "That all Gifts, "Grants, Feoffments, Fines, and other Conveyances, or Estates from "the first Day of this present Parliament had, made done, or suffered, or "to be had, made, done or suffered, by any Archbishop or Bishop, of any "Honours, Castles, Manors, Lands, Tenements, or other Hereditaments, "being Parcel of the Possessions of his Archbishoprick or Bishoprick, or "united, appertaining or belonging to any of the same, to any Person "(other than the (*a*) Queen, her Heirs and Successors) whereby any "Estate should or might pass from the Archbishop or Bishop other than "for Term of Twenty-one Years, or three Lives, from such Time as any "Lease, Grant or Assurance shall begin, and whereupon *the old accustomed* "*yearly Rent*, or more, shall be reserved payable yearly during the said "Term of *Twenty-one Years*, or *three Lives*, shall be utterly void; any "Law, Custom, *&c.* notwithstanding."

(*a*) This Statue leaving Bishops their former Power of granting to the Queen, her Heirs and Successors to little Effect, for that many Estates were granted to the Queen, upon Design that she should grant them over to others, to prevent which was the Statute 1 Jac. 1. c. 3. made, which disables all Archbishops and Bishops from granting any of their Possessions to the King, his Heirs or Successors, and makes all such Leases, Grants, *&c.* to the King, his Heirs or Successors, utterly void and of none Effect. Co. 71. Gibs. *Codex* 679.

The Statute which disables all other Ecclesiastical Persons is 13 *Eliz. cap.* 10 which is as followeth: "And for that long and unreasonable "Leases made by Colleges, Deans and Chapters, Parsons and Vicars, and "others, having spiritual Promotions, be the chiefest Cause of the Dilapidations and the Decay of all Spiritual Livings and Hospitality, and the "utter Impoverishing of all Successors, Incumbents of the same, be it "enacted, "That from henceforth all Leases, Gifts, Grants, Feoffments, "Conveyances or Estates, to be made, had, done or suffered, by any "Master and Fellows of any College, Dean and Chapter of any Cathedral "or Collegiate Church, Master or Guardian of any Hospital, Parson, "Vicar, or any other, having any Spiritual or Ecclesiastical Living, or any "House, Lands, Tythes, Tenements or other Hereditaments, being any "Parcel of the Possessions of any such College, Cathedral, Church, Chapel, "Hospital, Parsonage, Vicaridge, or other Spiritual Promotion, or any "ways appertaining or belonging to the same, or any of them, to any "Person or Persons, Bodies Politick or Corporate (other than for the Term "of *Twenty-one Years*, or *three Lives*, from the Time as any such Lease "or Grant shall be made or granted; whereupon *the accustomed yearly* "*Rent*, or more, *shall be reserved* and payable during the said Term) shall "be utterly void and of none Effect, to all Intents and Purposes whatsoever; any Law, Custom, *&c.* notwithstanding: *Provided*, &c. that "nothing herein extend to make good any Lease, or other Grant, to "be made by any such College or Collegiate Church within either or both "the Universities of *Oxford* and *Cambridge*, or elsewhere, within the Realm "of *England*, for more Years than are limited by the private Statute of "the same College: *Provided* also, that this Act shall not extend to any "Lease hereafter to be made, upon Surrender of any Lease heretofore "made and now continuing, so that the Lease to be made do not contain "more Years than the Residue of the Years of the former Lease, now "continuing, shall be at the Time of such Lease hereafter to be made, nor "any less Rent than is reserved in the said former Lease."

On

* On these Statutes we shall observe, 1. That the Statutes of 1 *Eliz. cap.* 19. is but a private or particular Statute, and must be specially pleaded, else the Court will take no notice of it; but 13 *Eliz. cap.* 10. is a general Law, whereof the Judges are bound *ex officio* to take notice, though it be not pleaded, because it extends to all Ecclesiastical Persons whatsoever, except Bishops, who were before provided for by the 1 *Eliz. cap.* 19. *Page 330 5 Co. 2. 4 Co. 76. Moor 253. Cro. Jac. 112. 2 Rol. Abr. 466.

2. It has been adjudged and held in Parliament, that the King was bound by 13 *Eliz. cap.* 10. though not named, because the Statute was general and for the public Good; but for some Time the Law was held otherwise, and therefore where a Lease was made to the King by a Dean and Chapter, and the King had assigned it over, after that, the Law came to be held that the King was bound, the Assignee had his Lease made good to him in Chancery against the Statute, because he could not know the Law in a Matter so dubious. Leon. 306. Yelv. 106. Mod. 205. 2 Mod. 56. 5 Co. 15. b. 11 Co. 75. Rol. Abr. 378. Rol. Rep. 151.

3. That all Leases made according to 13 *Eliz. cap.* 10. by any single Corporation, if not warranted likewise by 32 *H.* 8. *cap.* 28. must be confirmed by those who by Law are to confirm the same. Comp. Incumb. 417.

4. That these Statutes of 1 *Eliz. cap.* 19. and 13 *Eliz. cap.* 10. are merely restraining, so that though Bishops, and other Ecclesiastical Persons, might, with the Confirmation of those required by Law, have made any Lease or perpetual Grant, yet now no Confirmation whatever will make them good for above three Lives, or Twenty-one Years. Comp. Incumb. 419.

5. That no Lease by an Archbishop or Bishop for three Lives, or Twenty-one Years, made according to the Exception of 1 *Eliz. cap.* 19. is good to bind the Successor, if it be not in every Thing pursuant to 32 *H.* 8. *cap.* 28. unless it be confirmed by the Dean and Chapter; for Leases for Twenty-one Years, or three Lives, being only exempted and taken out from the general Disability imposed on Bishops by the first Part of the Act, receive no Sanction at all from that Act, but as they are taken out to rest upon 32 *H.* 8. *cap.* 28. and therefore though they are for Twenty-one Years, or three Lives, yet if Part of the Land were not in Possession, or that the old Lease were not surrendered or expired within one Year before the new Lease made, or in any other Respect, such new Lease was not warranted by 32 *H.* 8. *cap.* 28. to bind the Successor, there must be the Confirmation of the Dean and Chapter, because at Common Law such Confirmation was necessary; and these Leases not being warranted by 32 *H* 8. *cap.* 28. which is the only Statute that enables Bishops solely to make Leases to bind their Successors, remain at Common Law, and by Consequence, without Confirmation, are voidable by the Successors as much as if they were made for one hundred Years or Lives. 10 Co. 60. b. Co. Lit. 45. a. Moor 108.

6. That 13 *Eliz. cap.* 10. hath been always construed largely and beneficially to prevent all Inventions and Evasions against the true Intent thereof; therefore where the Statute says, Master and Fellows of any College, yet it hath been often held, that be the College incorporated by that Name, or by the Name of Warden and Fellows, or Warden and Scholars, or Warden, Fellows and Scholars, or Master, Fellows and Sholars, or Master and Scholars, or Provost, Fellows and Scholars, or by any other Name of Corporation, and be the College Temporal for the Advancement of the liberal Arts and Sciences, or mere Ecclesiastical or Mixt, that all these are within the Restraint of this Act; so where the Statute says Master or Wardens of any Hospital, be the Hospital incorporated by any other Name, and be it a sole Corporation, or Corporation Aggregate of many, yet the Statute extends to them. 11 Co. 76. *Magdalen* College's Case.

The next Statute that made any Alteration in these Things was 14 *Eliz. cap.* 11. which as to Houses in Cities and great Towns is as followeth: 14 Eliz. c. 11.

" Whereas in an Act made 13 *Eliz. c.* 10. there is no Branch to avoid cer-

Page 331 " tain Leaſes to be made by Maſters and Fellows of Colleges, Deans and " Chapters of Cathedral or Collegiate Churches, Maſters or Guardians of " any Hoſpital, or by any other Parſon or Vicar, or any other having any " Spiritual or Eccleſiaſtical Living; Be it enacted, that the ſaid Branch, " nor any Thing therein contained, ſhall not extend to any Grant, Aſſur- " ance or Leaſe of any Houſes belonging to any Perſons or Bodies Politick " or Corporate aforeſaid, nor to any Grounds to ſuch Houſes appertaining, " which Houſes be ſituate in any City, Borough, Town Corporate or " Market-Town, or the Suburbs of any of them; but that all ſuch Houſes " and Grounds may be granted, demiſed and aſſured, as by the Laws of " this Realm and the ſeveral Statutes of the ſaid Colleges, Cathedral " Churches and Hoſpitals they lawfully might have been before the Making " of the ſaid Statute, or lawfully might be, if ſuch Statute were not, ſo " always that ſuch Houſe be not the Capital or Dwelling-houſe uſed for " the Habitation of the Perſons aboveſaid, nor have Ground to the ſame " belonging above the Quantity of ten Acres; provided that no Leaſe ſhall " be permitted to be made by Force of this Act in Reverſion, nor without " reſerving the accuſtomed yearly Rent at the leaſt, nor without charging " the Leſſee with the Reparations, nor for longer Term than for forty " Years at the moſt; nor any Houſes ſhall be permitted to be aliened, un- " leſs in Recompence thereof there ſhall be a good and ſufficient Aſſurance " made in Fee-ſimple abſolutely to ſuch Colleges, Houſes, Bodies Politick " or Corporate, and their Succeſſors, of Lands of as good Value, and of " as great yearly Value at the leaſt, as ſhall be aliened; any Statute to " the contrary notwithſtanding."

Comp. Incumb. 423. *Note*, This Statute makes no Alteration of the Statute 1 *Eliz. cap.* 19. nor has any Relation to it, but only to the Statute 13 *Eliz. cap.* 10. and therefore gives no Power to Biſhops to let Houſes, otherwiſe than according to 1 *Eliz. cap.* 19.

Cro. Eliz. 564. *Note alſo*, That this Statute need not be found by Verdict, being a general Law.

By this Statute it is expreſly provided, that no Leaſe ſhall be made of ſuch Houſes in Reverſion; but by 13 *Eliz. cap.* 10 no Reſtraint being made of ſuch Leaſes, it was found neceſſary to provide againſt them by another Statute, *viz.* the 18 *Eliz. cap.* 11.

18 Eliz. c. 11. continued by 43 Eliz. *Note*; This Statute is a general Law. 4 Co. 76, 120. 2 Rol. Abr. 465. Which reciting, that ſince the making of the 13 *Eliz. cap.* 10. divers Eccleſiaſtical and Spiritual Perſons, and others having Spiritual or Eccleſiaſtical, Livings, have from Time to Time made Leaſes for Term of Twenty-one Years, or three Lives, long before the Expiration of the former Years, contrary to the true Intent and Meaning of the ſaid Statute; " Be it there- " fore enacted, That all Leaſes to be made by any of the ſaid Eccleſiaſti- " cal Spiritual, or Collegiate Perſons, or others, of any of the ſaid Eccle- " ſiaſtical, Spiritual, or Collegiate Lands, Tenements or Hereditaments " whereof any former Leaſe for Years is in Being, not to be expired, " ſurrendered or ended within three Years next after the making of any " ſuch new Leaſe, ſhall be void, fruſtrate, and of none Effect, and that " all and every Bond and Covenant for renewing or making of any Leaſe, " or Leaſes contrary to the true Intent of this Act, or of the ſaid Act " made in the ſaid 13th Year, ſhall be utterly void; any Law, Statute, " *&c.* Provided that this Act, nor any Thing therein contained, ſhall " extend or be prejudicial to, make fruſtrate or void any Leaſe or Leaſes " heretofore made by any of the ſaid Spiritual or Eccleſiaſtical Perſons, or " any of them; but that the ſame, and every of them are of the like " Force and Effect as they, or any of them, were before the making of " this preſent Statute."

Hob. 269. *Crane* and *Taylor*. The Statute of 18 *Eliz. cap.* 11. has Relation only to the Statute of 13 *Eliz. cap.* 10. to reſtrain Leaſes in Reverſion where above three Years of the firſt Leaſe is then to come, but leaves the Statute of 14 *Eliz. cap.* 11. perfectly at large as to Houſes in Cities, without making void ſuch Leaſes, or

any

any Bonds or Covenants * concerning them; for as to ſuch Houſes the Statute of 14 *Eliz. cap.* 11. is a new Law, and ſets looſe the 13 *Eliz. cap.* 10. therefore where an Action of Covenant was brought againſt the Dean of *Lincoln* and one of the Prebendaries, upon a Covenant made by the Dean and Chapter, by their ſpecial Names jointly and ſeverally, to make a Leaſe of a Houſe in *London*, though it was argued to be void upon the Statute 18 *Eliz. cap.* 11. that Statute extending only to 13 *Eliz. cap.* 10. and not to the 14 *Eliz. cap.* 11. which, as to Houſes in Cities, repealed 13 *Eliz. cap.* 10. and makes all Leaſes thereof good, ſo they do not exceed forty Years, *&c.* and are not made in Reverſion, which was not prohibited by 13 *Eliz. cap.* 10. Alſo the Statute 14 *Eliz. cap.* 11. forbids Alienations of ſuch Houſes, except there be full Recompence given to the Church at the ſame Time, ſo as with ſuch Recompence they may alien ſuch Houſes in Fee, which was not permitted by 13 *Eliz. cap.* 10. and it was adjudged accordingly; and it is (*a*) ſaid, the Reaſon of repealing 13 *Eliz. cap.* 10. as to Houſes in Market-Towns, was to make thoſe Places more populous.

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(*a*) 1 Vent. 245.

But to avoid the Force of thoſe Statutes of 13 *Eliz. cap.* 10. and 18 *Eliz. cap.* 11. and the Clauſe making void Bonds and Covenants againſt them, a Contrivance was ſet on Foot to this Effect; the Dean and Chapter of *Windſor*, in the 35th Year of *Eliz.* made an Agreement among themſelves by Lots to have an Aſſurance of a Leaſe to each of them, of certain Part of the Poſſeſſions of their Church, which after the Lots caſt, whereby every one knew his own Leaſe, they executed the Aſſurance in this Manner: The Corporation enters into an Obligation of 500 *l.* to every Canon that was to have a Leaſe, and the Payment limited to be within a ſhort Time before the Expiration of the old Leaſe in Being, and the Canon the ſame Day entered into an Obligation to pay the College 510 *l.* at the ſame Time, if they did make a Leaſe according to a Schedule annexed, which Schedule was *verbatim* the Demiſe agreed to be made; and it was farther proved, that the Intent and Agreement betwixt them was, that one 500 *l.* ſhould be ſtopped for the other 500 *l* and that the Corporation ſhould have only the 10 *l.* for the Leaſe; which Matter being diſcloſed in Chancery, the Lord Keeper *Egerton* made a Decree, that the Obligation of 500 *l.* made by the Dean and Canons to each Canon was void by 18 *Eliz. cap.* 11. and in the ſame Caſe a Precedent was ſhewn between *Fry* and the Dean and Canons of *Wells*, decreed 44 *Eliz.* in Chancery, which was thus: *Fry* gave to the Dean and Canons of *Wells* 1000 *l.* and took an Obligation of 2000 *l.* with Condition to repay the 1000 *l.* and for Non-payment brought an Action of Debt againſt the Dean and Prebends, and obtained a Judgment, and made a Defeaſance thereof, that if they make a Leaſe to him of Land then in Leaſe to Sir *Amias Pawlett* for fifteen Years to come, then the Judgment ſhould be void; and the Truth of the Caſe was, that the 1000 *l.* was paid, and 600 *l.* thereof employed in Payment of Tenths due by the Church; yet by the Opinion of *Popham*, *Anderſon* and *Periam*, it was decreed in Chancery, that the Judgment was void by 18 *Eliz cap.* 11. which makes void Bonds and Covenants for making Leaſes againſt that Statute or 13 *Eliz. cap.* 10. but by way of Arbitrament they awarded to *Fry* the 600 *l.* that was paid and employed in the Affairs of the Church, and after the 43 *Eliz. cap.* 9. *ſect.* 8. was made to extend to Judgments in ſuch Caſes.

Moor 789. *Dean and Canons of Windſor* ver. Sir *Gilbert Perwin.*

Another Statute concerning Leaſes made by Colleges in the two Univerſities, and the Colleges of *Wincheſter* and *Eaton*, is 18 *Eliz. cap.* 6. which adds one Thing more, as followeth: "That no Maſter, Provoſt, "Preſident, Warden, Dean, Governor, Rector, or chief Ruler of any Col- "lege, Cathedral Church, Hall or Houſe of Learning in any of the "Univerſities of *Cambridge* and *Oxford*, nor any Provoſt, Warden, or "other Head Officer of the Colleges of *Wincheſter* or *Eaton*, nor the Cor- "poration of any of the ſame, by what Title, Stile or Name ſoever they

" now be, ſhall or may be called, after the End of this preſent Seſſion of " Parliament ſhall make any Leaſe for Life, Lives or Years, of any Farm, " or any their Lands, Tenements, or other Hereditaments, to the which
*Page 333 "*any Tythes, Arable Land, Meadow, or Paſture doth or ſhall appertain, " except that the one Third Part at leaſt of the old Rent be reſerved in " Corn for the ſaid Colleges, Cathedral Churches, Halls and Houſes, that " is to ſay, in good Wheat after the Rate of 6 *s.* and 8 *s.* the Quarter, " or under, and good Malt at 5 *s.* the Quarter, or under, to be delivered " yearly upon a Day prefixed at the ſaid Colleges, Cathedral Church, " Halls or Houſes; and for Default thereof to pay to the ſaid Colleges, " Cathedral Church, Halls or Houſes in ready Money, at the Election " of the ſaid Leſſees, their Executors, Adminiſtrators, and Aſſigns, after " the Rate of the beſt Wheat and Malt in the Market of *Cambridge*, for " the Rents that are to be paid to the Uſe of the Houſe or Houſes there, " (and ſo for *Oxford* and *Winchester*, *in totidem Verbis*,) and in the Market " of *Windſor* for the Rents that are to be paid to the Uſe of the Houſe or " Houſes at *Eaton*, is or ſhall be due, without Fraud or Deceit; and that " all Leaſes otherwiſe hereafter to be made, and all collateral Bonds or " Aſſurances to the contrary by any of the ſaid Corporations ſhall be void " in Law to all Intents and Purpoſes; the ſame Wheat, Malt, or Money " coming of the ſame, to be expended to the Uſe of the Relief of the " Commons and Diet of the ſaid Colleges, Cathedral Church, Halls and " Houſes only, and by no Fraud or Colour let or ſold away from the Profit " of the ſaid Colleges, Cathedral Church, Halls and Houſes, and the " Fellows and Scholars in the ſame, and the Uſe aforeſaid; upon pain of " Deprivation of the Governor and chief Rulers of the ſaid Colleges, " Cathedral Church, Halls and Houſes, and all other thereunto conſent- " ing: But this Act, or any Thing therein contained, ſhall not extend or " be in any wiſe prejudicial to any Leaſe to be made of a Barn called " *Muncken Barn*, with a certain Portion of Tithes riſing, growing, and " being in the Pariſh of *Southwark* in the County of *Suſſex*, being Parcel " of the Poſſeſſions of *Maudlin College* in *Oxford*, ſo that the Term de- " miſed in and by the ſaid Leaſe exceed not the Number of ten Years " from and after the Feaſt of St *Michael the Archangel* next coming, " neither ſhall this Act extend to any Leaſe to be made by the Preſident " and Scholars of the College of St. *John Baptiſt* in *Oxford*, to any Heir " Male of Sir *Thomas White*, Founder of the ſaid College, which Leaſe " ſhall be made according to the Meaning of the Foundation and Statutes " of the ſaid College, of the Manor of *Fifield*, and no other Hereditaments."

Leon. 306. Sav. 129. In the Conſtruction of this Statute it hath been holden, that it is a private Act, becauſe it concerns only thoſe particular Places; and therefore muſt be pleaded or given in Evidence, or found by a Jury, otherwiſe the Court is not bound to take notice of it.

Leon. 306, 333. Sav. 129. Alſo it is ſaid, that in a Declaration upon a Leaſe made by any of theſe Colleges it ought to be ſhewed, that the Corn was reſerved according to the Statute, otherwiſe this may be good Cauſe to move in Arreſt of Judgment; but of this it may be doubted; for in the Caſe itſelf, cited in *Leon.* for that Purpoſe, it appears that that Exception was diſallowed; for tho' it does not appear in the Declaration that Corn was reſerved, yet it may be that it was reſerved in the Leaſe; and if not, yet the other Party ought to ſhew it; and therefore the Exception to the Declaration for not ſhewing it was diſallowed.

By the Statute 22 *Car.* 2. *cap.* 11. it is enacted, " That for ever hereafter " the Mayor, Commonalty, and Citizens of *London* may and ſhall have a " Market, to be kept three or four Days in the Week, as to them " ſhall ſeem convenient, upon the Ground now ſet out by the Aſſent of " the Dean and Chapter of the Cathedral Church of St. *Paul*, *London*, for " a Market-place within *Newgate*, and that the ſaid Dean and Chapter ſhall " make

" make and give one or more Leaſe or Leaſes of the ſaid Ground to the " ſaid Mayor, Commonalty, and Citizens, and alſo of the Wall of the " ſaid Church-yard, abutting ſeverally upon *Pater-noſter-Row* and the "*Old Change*, for the Term of forty Years, reſerving the yearly Rent of *Page 334
" four Pounds for the Ground of the ſaid Market-place, and Two-pence " for every ſuperficial Foot of the Ground or Soil of the ſaid Wall, as it " is now ſet out by the Surveyors of the City and of the ſaid Dean and " Chapter, and ſo from forty Years to forty Years for ever, at the like " yearly Rent, and one Year's Rent, after the Rates aforeſaid, to be paid " by way of Fine for each of the ſaid Grounds reſpectively, upon the " making every new Leaſe thereof; which ſaid Leaſe and Leaſes ſhall " be good and effectual in the Law, as againſt the Dean and Chapter, and " their Succeſſors, and all Perſons claiming by, from or under them, " and that no Houſe, Shed, or other Building, ſhall ſtand, or hereafter " be erected and fixed upon the ſaid Market-Place, other than the Market-" Houſe already built with the Conſent of the ſaid Dean and Chapter; " any Thing in this or any other Act to the contrary notwithſtanding: " And whereas the ſaid Parſons or Vicars, or ſome of them, (within the " ſaid City of *London*) are intereſted in ſeveral Glebe Lands or Grounds, " the which they cannot rebuild themſelves, nor let ſuch Leaſe or Leaſes " as may be an Encouragement to others to rebuild the ſame; Be it " enacted, that the ſaid Parſons and Vicars, and every of them reſpec-" tively, be impowered, and are hereby impowered to let ſuch Leaſe or " Leaſes of their ſaid Glebe-Lands or Grounds, with the Conſent and " Approbation of the Patron or Patrons, and Ordinary, for any Term " not exceeding forty Years, and at ſuch yearly Rents, without Fine, as " can be obtained for the ſame."

Before we mention any Caſes, or make any Obſervations on the fore-going Statute, it may be neceſſary to take Notice, That at Common Law if a Parſon had made a Leaſe for Years of his Glebe-Land, to begin after his Death, or granted a Rent Charge in that Manner, and ſuch Leaſe or Grant were confirmed by the Patron and Ordinary, this would have bound the Succeſſor of the Parſon; becauſe here was the Conſent and Concurrence of all Perſons intereſted, and the Leaſe or Charge bound immediately from the perfecting of the Deed by the Parſon, Patron, and Ordinary, though it was not to take effect in Poſſeſſion till after the Parſon's Death; but now no Confirmation whatever will make ſuch Leaſe or Grant good againſt the Succeſſor, by reaſon of the Statutes made to avoid them. Dyer 69. a. Hob. 7. Rol. Rep. 443.

If a Perſon obtain a Grant to build Houſes on Church or College Lands, this is confirmed, (in caſe where Confirmation is neceſſary,) yet this Grant is no Alienation againſt the Statutes, but is only a Covenant or Licence, and nothing elſe; for the Soil remains in the Grantor, and by Conſequence the Houſes built thereon are in him. Hetl. 57. Mayor and Commonalty of *Winchester*'s Caſe.

If a Pariſh be upon the Deſign of incloſing Lands, and a Parſon hath Tithes in Kind, and Common for Beaſts thereout, the Chancery may decree him to take a Quantity of Ground elſewhere, in lieu thereof. *Comb. Incumb.* 334.

So where one had a Leaſe of Tithes in Kind, it was ordered in Chancery, that a Commiſſion ſhould go forth to ſet out other Meadow and Ground in lieu thereof; the Reaſon of which Caſes ſeems to be, either for the Prejudice the Public might ſuffer, if ſuch Recompence in no Caſe ſhould be allowed, or for that the Succeſſor of the Parſon have no Injury thereby, being recompenced in other Lands; *ſed quære* why an Act of Parliament in ſuch Caſes ought not to be procured; for it ſhould ſeem the Chancery, as well as the other Courts, are bound by all Acts of Parliament, which are poſitive Laws, and have no Liberty of breaking through them, upon any Pretence of Convenience or Neceſſity, more than other Courts. *Comb. Incumb.* 334.

By

Hob. 269. Noy 5. By the Statute of 14 *Eliz. cap.* 11. as appears before, all thoſe who were reſtrained by 13 *Eliz. cap.* 10. have Liberty given them to alien Houſes in Cities abſolutely, ſo as at the Time of ſuch Alienation there be a Recompence in Lands given to them, and their Succeſſors, of as great Value as the

*Page 335 * Houſes aliened are; but this Liberty of aliening, upon ſuch Recompence to be given, extends only to Houſes; for as to Lands they have no ſuch Power, nor can they exchange them, to bind their Succeſſors, upon any Recompence whatſoever; and *quære* whether ſuch Houſe may be exchanged for Lands of greater Value, without Licence, againſt the Statutes of *Mortmain*.

Sid. 162. It is agreed, that Corporations of Mayor and Commonalty, Bailiffs and Burgeſſes, and ſuch other Lay Corporations, are out of all the before-mentioned Statutes, and may make Leaſes, and other Eſtates, as they might ever have done.

Deg. 135. Mich. 4. Car. 1. in *Scaccar*, *Clagg* and *Lampley*. It hath been adjudged, that a Spiritual Perſon not Beneficed is not within the 21 *H.* 8. *cap.* 13. which prohibits Spiritual Perſons from taking Leaſes to Farm, *&c.* for Life, Years, or at Will, in their own Name, or in the Name of any other Perſon or Perſons to his Uſe, *&c.*

Dyer 27, 28. 358. a. Leon. 309. 3 Keb. 436. A Leaſe being made to a Spiritual Perſon againſt 21 *H.* 8. *cap.* 13. and a Bond or Obligation taken for Performance of Covenants, the Obligee brought an Action of Debt upon this Bond, and had Judgment; which proves that the Leaſe was not abſolutely void between the Leſſor and Leſſee, as the Words of the Statute are; and though in *Dyer*, where this Caſe is reported, this is not mentioned to be any Cauſe of the Judgment, yet *Periam* in 1 *Leon.* held it to be the greateſt Cauſe of the Judgment; and ſo it appears to have been adjudged in another Place; for the Statute inflicts a Penalty of 10*l.* for every Month that the Clerk ſhall occupy ſuch Farm, and therefore it cannot be void; but the Leaſes made void by that Statute are only thoſe which Spiritual Perſons before that Act, or after, had, and before *Michaelmas* then next following were not bargained, ſold, or granted away.

Bro. Tit. *Action ſur le Stat.* 2. In an Action upon 21 *H.* 8. *cap.* 13. againſt a Parſon for taking of Farms, it is a good Plea to ſay, *Non habuit ſeu tenuit ad firmam contra Formam Statuti*; and the Defendant may give in Evidence, that the Farm was for the Maintenance of his Houſe, *&c.* according to the Proviſo in the Statute for that Purpoſe †.

†Would not the general Iſſue *Nil debet*, be as good, if not more eligible?

Bro. Action ſur le Stat. 4. Alſo the Writ grounded on this Statute ought to be *Qui tam* for the King and Party; and therefore a Writ, which demanded the Whole, was ruled not to be good; but that the Statute need not be mentioned in the Writ.

35 Eliz. c. 5. ſ. 2. By another Act, intituled, *An Act for erecting of Hoſpitals, or Abiding or Working Houſes for the Poor*, it is (amongſt other Things) provided, That all Leaſes, Grants, Conveyances, or Eſtates to be made by any Corporation ſo to be founded exceeding the Number of Twenty-one Years, and that in Poſſeſſion, and whereupon the accuſtomable yearly Rent, or more, by the greater Part of twenty Years next before the taking of ſuch Leaſe, ſhall not be reſerved, and yearly payable, ſhall be void.

4 Leon. 51. *Action* and *Pritcher*. Cro. Eliz. 350. *Watkinſon* and *Mann*. Co. Lit. 44. b. 3 Bulſ. 290. Bro. Tit. *Leaſes* 9. As to the Perſons who may be ſaid to be ſeiſed in Right of their Churches, ſo as to be impowered by the Statute of 32 *H.* 8. *cap.* 28. to make Leaſes for three Lives, or twenty-one Years, to bind their Succeſſors it appears to have been adjudged, though to be ſeiſed in Right of his Prebendary, and not in Right of his Church, he may yet within the Equity of that Act make Leaſes for three Lives, or twenty-one Years, to bind his Succeſſor, obſerving the ſeveral Qualifications required by the Act; for the Words of the Act being general, all Perſons having an Eſtate of Inheritance in Right of their Church, with a ſpecial Exception of Parſons and

Vicars

Vicars only, ſhew the Intent of the Act to include and take in all but thoſe ſo excepted; and *Popham* ſaid, that in Dr. *Dale*'s Caſe, for an Houſe near St. *Paul*'s, it was ſo adjudged, and ſo had been twice adjudged in his Experience; and *Fenner* ſaid, it was ſo adjudged in the Caſe of a Treaſurer of a Church, and Prebendaries are Eccleſiaſtical Perſons, for they are admitted and inſtituted, and have *Locum in Choro, & Vocem in cappella.* Palm. 105. *Comb. Incumb.* 325.

* So likewiſe it hath been adjudged, that a Chancellor of a Cathedral Church may make Leaſes for twenty-one Years, or three Lives, within this Statute, to bind his Succeſſor; ſo of a Treaſurer, Archdeacon, and Precentor; for they are Prebendaries, and more, for they are generally choſen out of the Prebendaries, and have thoſe Dignities ſuperadded or annexed; and though Chancellors and Treaſurers are in ſome ſort Miniſterial, yet are they not *inter minoris Ordines*, as the *Oſtiarii* and *Vergers* are, who are only Servants to carry Candles and Wax, keep the Doors, *&c.* but the others are ſeiſed in Fee in Right of their Church, *&c.* and have moreover theſe Dignities ſuperadded; but a Caſe was cited to have been adjudged in the Exchequer, that Leaſes made by the Chanters of St. *Paul*'s muſt be confirmed; for it was ſaid, they are not properly Chanters, but Singing Men only, and *minoris Ordinis*; but the Chanters, properly ſo called, Precenters, *&c.* are *majoris Ordinis*; as the Biſhop of *Sarum*, in Right of his Biſhoprick, is *Præcentor Angliæ*; which ſhews it to be Honorary, and a Spiritual Dignity. *Page 336 Lev. 112. Sid. 158. Keb. 576. *Bisver. Holt.* Palm. 105. *Euſden* ver. *Dennis.*

If a Parſon, Prebend, Mayor, Dean, Abbot, *&c.* or any other ſole Corporation make a Leaſe for Years, either upon theſe Statutes, or at Common Law, though the Leſſor be under the Age of twenty-one Years, yet he ſhall not avoid ſuch Leaſe for that Cauſe; for ſince they are admitted to exerciſe ſuch Offices or Functions, though within Age, they are likewiſe by Law ſuppoſed capable of doing all Things belonging thereto, as other Perſons of full Age may do; and therefore ſuch Acts as are done by them in their Politick Capacity, which is ſubject to no Age or Infirmity, as the Body natural is, are valid and effectual, notwithſtanding their Minority, which in ſuch Caſe is not material. Bro. Tit. *Age* 64, 80.

2. Of the Rules to be obſerved, and Qualifications requiſite to the Perfection of Leaſes by Eccleſiaſtical Perſons: And therein,

Rule 1. *Where an Indenture or Deed is neceſſary.*

The firſt Thing to be obſerved upon the ſeveral Statutes before-mentioned concerning Leaſes is, that as well upon the Statutes of the 1 *Eliz. cap.* 19. & 13 *Eliz. cap.* 10. as upon 32 *H.* 8. *cap.* 28. the Leaſes to be made by Virtue thereof muſt be by Indenture; for though the Statutes 1 *Eliz. cap.* 19. & 13 *Eliz. cap.* 10. do not require it, yet in that and all other Qualities and Properties required by the 32 *H.* 8. *cap.* 28. (except concurrent Leaſes only) they muſt follow the Pattern thereof; and (*a*) if the Deed be indented, whether it begin *This Indenture* or not, is not material; for notwithſtanding that, it is an Indenture; on the contrary, if it be not indented, the calling it an Indenture will not make it ſo †. Co. Lit. 44 b. 3 Keb. 379. (*a*) 5 Co. 25. *Stile*'s Caſe. Co. Lit. 143. a. 229. a. Cro. Eliz. 472.

2 Inſt. 672. 2 Rol. Abr. 22.——† If only the Form of indenting the Parchment, or Paper, be wanting, that is not material, for it might even be done in Court, and therefore no Exception is now taken on ſuch a trifling Omiſſion.

But the moſt obſervable Thing under this Head is, how far a Parol Leaſe or Agreement by the Parſon with his Pariſhioner or a Stranger for his Tithes ſhall be good, and how far and in what Caſes not; concerning which *Comp. Incumb.* 337. *&c.*

which there are various Cases and Opinions in the Books, many of which have no Foundation from the Statute, but stand intirely on their own Bottom.

Godb. 374. 2 Rol. Abr. 63. Cro. Eliz. 188, 249. Perk. s. 62. Cro. Jac. 317, 613. *Page 337 10 Co. 92. Leon. 23. 2 Brownl. 11, 17. 2 Keb. 17.

And herein all the Books agree, that if a Person lease or grant over his Tithes to a Stranger for Life or Years, or even for a Year, that such Lease or Grant must be in Writing; and if it be not, it will be absolutely void; the Reason whereof is, because Tithes are Things which lie merely in Grant, and whereof no manual Occupation can be; till they are actually collected, they are not Things substantive, whereof the Property can be changed by the Notoriety of Livery and Seisin, or any actual taking of Possession; but their whole Essence before they are severed and divided consists only in Notion and Idea; therefore without Deed the Grantee or Lessee can make no Manner of Title to them; for without that, there is nothing can be done to invest him with the Property thereof, but the Essence and Substance of his Title is to be derived from the Deed, granting or leasing them to him; and for this Reason it is that he must not only have a Deed thereof, but must also in pleading shew it with a *Profert hic in Curia*; for otherwise the Court, which is to judge *secundum allegata & probata*, can no more adjudge his Title good, than if he had no Deed at all; but yet (a) if such Grant or Lease be made of Tithes without Deed, and the Grantee or Lessee sues for them in the Spiritual Court, the Defendant must plead that all the Title the Plaintiff has is by Lease without Deed; nor can he suggest this Matter to ground a Prohibition on; but he ought either to set out his Tithes without regarding who hath the Title to them, which will discharge him, or he ought to prescribe *in modo Decimandi*, and surmise that the Tithes belong to *J. S.* with whom he hath compounded to pay such a Sum for all Tithes.

(a) Leon. 23. *Whitby* ver. *Sanders.*

2 Rol. Abr. 63. Latch 177. Bro. Tit. *Incidents*, 7. Tit. *Leases*, 15, 20. Tit. *Grant*, 44, 59. Clayton, s. 25. *Bradford's* Case. Comp. Incumb. 338.

But if a Parson lease his Rectory or Parsonage for Years, in this Case the Tithes and Offerings will pass as incident to the Rectory, though there be no Deed, because the Rectory is the Principal, and the Lease of that being good without Deed, the Tithes and Offerings, which are but as Part of or accessory to the Rectory, must pass likewise, though they are not named; and some hold, that by such Parol Lease of the Rectory the Tithes will pass, though there be no House, but only the Church and Church-yard.

If a Portion of Tithes hath been long used with a Chapel, by Grant or Lease of the Chapel, with all the Tithes thereunto belonging, this is a sufficient Description to pass the Tithes, though generally a Portion of Tithes ought to be so named; but it does not appear whether in this Case the Grant or Lease of the Chapel were by Deed or not.

As concerning Leases of Tithes to the Parishioner himself, who ought to pay them, there are Variety of Opinions in the Books, how far such Leases or Agreements shall be good without Writing, if they are made for the Life of the Person, or for Years, or for one Year only, and how far, and in what Cases, the Assignee of the Parishioner shall take advantage of, or be bound by such Leases or Agreements

Cro Jac. 137 Cro. Eliz. 188, 249. Noy 121. Yelv. 94. 2 Leon. 29. 3 Leon. 357. Godb. 333. Palm. 377. 2 Brownl. 117. Lev. 24.

First then, most of the Books agree, that if the Parson, in consideration of such a Sum then paid, or so much annually to be paid, by the Parishioner, do contract or agree by Parol with him, that he shall retain his Tithes, or shall be discharged of the Payment of his Tithes during the Life of the Parson, or for so many Years as he shall be Incumbent, this shall be void; and the Reason given is, because as a Lease this cannot be good without Writing, and as a Composition or Agreement it cannot be good, because, it is uncertain at the making of it.

2 Rol. Abr. 63. Godb. 333. Palm. 377.

But yet some Books hold such Parol Agreement for the Life or Incumbency of the Parson to be good, and that if he demands Tithes against it in the Spiritual Court, a Prohibition shall be awarded to stay his Suit †.

It

Hetley 31, 107, 122.——† See the next Case; and see *infra* 338, 9, &c.

It is held in ſeveral Books, that though ſuch Parol Agreement with the Pariſhioner for the Life or Incumbency of the Parſon be not good, yet if it be for ſo many Years certain, that this is good, though it be not by Deed or Writing; becauſe it is in Nature of a Compoſition or Agreement with the Pariſhioner himſelf, who ought to pay them; and that therefore if he ſues in the Spiritual Court for Tithes, againſt ſuch Agreement, that a Prohibition ſhall be awarded to ſtay his Proceeding. Yelv. 94. Noy 121. 3 Leon. 257. 2 Brownl. 11. 2 Rol. Abr. 63. Godb. 354, 374. Cro Jac. 668.

* So it is likewiſe held, in purſuance of that Opinion, that if the Pariſhioner, after ſuch Agreement to retain his Tithes for Years, makes a Leaſe of thoſe Lands to another, that the Leſſee alſo ſhall be diſcharged of the Payment of Tithes, becauſe the Diſcharge runs along with the Land; but others held the contrary; and that if the Aſſignee be ſued in the Spiritual Court he ſhall have no Prohibition, becauſe by ſuch Parol Contract no Intereſt was transferred to the Pariſhioner, but it was only a Perſonal Agreement between the Parties themſelves, and cannot extend to Strangers. * Page 338 Hetley 31. Yelv. 94. *Hawkes* and *Brethwith.*

But all that hold ſuch Parol Agreement for Years to be good, hold likewiſe, that, if the Agreement were with the Pariſhioner, his Executors and Aſſigns, there the Executors or Aſſigns of the Pariſhioner, or even their Leſſee at Will, ſhall take advantage thereof; and if they are ſued in the Spiritual Court, ſhall have a Prohibition, and compel the Parſon to take his Remedy upon the Contract; and that if the Executors of the Pariſhioner have made a Leaſe over at Will, they ſhall have their Remedy over againſt the Tenant at Will, who came in under the Benefit of ſuch a Diſcharge, and therefore ought to be contributory to the Charge of it: and that granting ſuch Prohibition is a Means to compel the Parſon to ſeek his true Remedy. 2 Rol. Abr. 63. Cro. Jac. 668. Godb. 333. Palm. 377.

And yet we find ſome Caſes where ſuch Agreement was by Deed with the Pariſhioner and his Aſſigns, that the Pariſhioner, or Aſſignee, being ſued in the Spiritual Court, would have no Prohibition, becauſe, as they held, the Covenant or Agreement paſſed no Intereſt in the Tithes; and therefore, for Breach of ſuch Covenant, the Aſſignee had no Remedy, but by Action of Covenant on the Deed. Palm. 36. *Aldriche's* Caſe. Palm. 377. 2 Leon. 73. *Wellock's* Caſe.

Accordingly alſo ſeveral Books held, that though ſuch Parol Agreement for Life or Years, be not ſufficient Foundation for granting a Prohibition, yet ſuch Suit in the Spiritual Court is a Breach of the Contract or Agreement, for which the Party may have Remedy by Action upon the Caſe, upon the *Aſſumpſit*, that he ſhould hold diſcharged. 2 Leon. 29. Poph. 140. *Fulcher* ver. *Griffin.* Godb. 333. Palm. 377.

Rol. Abr. 43. *Brown* verſus *Kinman.*

So likewiſe it is held, in ſeveral Books, that though ſuch Parol Agreement to retain for Life, or Years, be not good by way of paſſing an Intereſt, yet if an Action of Debt be brought upon the Statute 2 & 3 *E.* 6. *cap.* 13. and the Agreement be pleaded, and found for the Defendant, that this ſhall be ſufficient to bar the Plaintiff of the treble Damages given by that Statute; ſo if *Nihil debet* be pleaded, and ſuch Agreement be given in Evidence, it is ſufficient to excuſe the Defendant from the Penalty of treble Damages. Lev. 24. Raym. 14. Keb 5, 21. 2 Keb. 34. 3 Keb. 24.

But the beſt Opinion ſeems to be, that ſuch Parol Agreement with the Pariſhioner himſelf for more than one Year is void; and even to make good this, it ought not to be entered into till after the Corn is ſown, becauſe when once the Corn is ſown, then it is ſuppoſed to be *in eſſe*, and growing all that Year; and then ſuch Agreement is in the Nature of a Sale of a Thing or Chattel actually *in eſſe*, which, like Sales of other Goods and Chattels, needs no Writing; but if it be for more than one Year, then it is in Nature of a Leaſe or Grant of the Parſon's Right or Intereſt in the Tithes, which, before they are *in eſſe*, conſiſts only in Notion; and therefore, to bind the Parſon, there ought to be a Deed or Writing; and if there be not, he may ſue for them in the Spiritual Court, and ſhall not be tied up by a Prohibition; and ſuch Parol Grant or Agreement, for more Years than one, is not only 2 Brownl. 17. Cro Jac. 137. Hob. 176. Cro. Eliz. 188, 249. 2 Leon. 29. 3 Leon. 257. Owen 103. Lev. 24. Raym. 14. Keb. 5. Godb. 333, 334. Latch 176.

void

Noy 89. Comp. Incumb. 340. void for all the Years after the first, but in the Whole; for the Contract being intire, must be void in all, or good in all, and shall not be good and void by Parcels.

Comp. Incumb. 338. *Page 339* Latch 176. Noy 89. Godb. 374. But a Diversity seems to be taken in some Books, between the Parson or Vicar, and the Impropriator; the Parson or Vicar, they say, may lease his Tithes for one Year without Deed, but the Impropriator cannot, but it will be absolutely void; and it is said to be so ruled in *Bennet* and *Suel*'s Case, and in the Case of *Bellamy* and *Balthorp*, it appearing that the Lease for one Year by the Impropriator, which was held void, being to a Stranger of the Tithes of the whole Parish, by the Opposition that follows in saying otherwise it is, if it be a Lease of the Tithes for a Year, by the Parson himself, it must also be meant of a Lease to a Stranger, and not to the Parishioner himself, who ought to pay them; and then it follows, that a Parson, or Vicar, may lease the Tithes of their whole Parish for one Year to a Stranger, without Deed, which, it seems, they may do, notwithstanding the Books above-mentioned, as is proved by constant Practice; for perhaps it would be difficult and troublesome for the Parson himself to collect all the Tithes in *Specie*, and it may be several of the Parishioners will not take Leases, or agree or compound for their own Tithes; and therefore, if the Parson can find one who will take all that Trouble off his Hands, and leave him more at liberty to attend his Cure, it seems reasonable he should be at liberty to set his Tithes (as they call it) to such Person for that Year; and it would be too troublesome and unreasonable to expect, that upon every such yearly Setting of his Tithes, he should be forced to be at the Expence of a new and formal Lease in Writing, especially since such Setting or Leasing is generally made about *Easter*, when the Corn is actually growing, and in a good Forwardness; and therefore such Setting or Leasing is rather a Sale of Chattel *in esse*, than a leasing or making over of a Thing only in Potentiality or Idea, and then such Sale may be good without Deed, as it would be of any other Goods or Chattels; and why the Impropriator himself, in the like Case, should not have the same Power, seems hard to be accounted for; though, perhaps, in the Case where this Difference is taken, the Vendee, or Lessee, strictly speaking could not justify in Trover against the Owner, as by virtue of the Lease *qua* Lease without Deed. But *Quære*, if he had pleaded it as a Sale for a valuable Consideration, if that would not have altered the Case, and made good his Justification in taking them after they were severed.

Latch 115. *Vicar of Anford*'s Case. Palm. 423. S. C. by the Name of *Harris* and *Dilworthy*. A Parson by Parol, leased his Tithe Hay to the Vicar, and the Vicar paid the Rent for the first Year, but finding that the Rent was more than the Tithe was worth, refused to hold the Bargain any longer; and being sued in the Court of Requests (which was a Court of Equity) and then not pleading there any Notice of his Refusal, and Sentence and Decree being given for the Parson, the Vicar prayed a Prohibition; and it was agreed by the Court that if the Vicar had received the Profits, he was sueable in the Court of Requests for the Rent; and that if he had given Notice of the Refusal of the Bargain, he had been discharged of the Rent from the Time of the Notice † given, because he had no Remedy for the Tithes, for that it was a void Contract in Law; and by *Dodderidge* and *Jones* the Case is the same, though he hath not given Notice.

† It is Time enough to give Notice to determine a Composition before reaping the Corn or picking the Hops, but not after. *Per* Price *B. Bunb.* 15. *Sed qu.*

Comp. Incumb. 339, 340. By all the Cases before-mentioned, it appears how unsettled a Point ‡ this is; and it is said now to be the constant Practice of the Courts at *Westminster* not to grant Prohibitions upon the Suggestions of such Agreements, but to leave it to the Spiritual Court to determine; and if the Party thinks himself there aggrieved, he may appeal; and this seems to hold still, as to

‡ It is said a Composition by way of Retainer, by Parol, is good only for one Year; and that a Lease of Tithes by Parol, even for one Year, is void. *Heddington* ver. *Bridgeman*, 1715. in *Sc. Bunb.* 2.

such

ſuch Parol Leaſes under the Term of three Years; for if they be above three Years, then by the Statute of Frauds and Perjuries, they are made to have the Force only of Leaſes at Will; and if under three Years, yet by that Statute there muſt be yearly reſerved two Thirds, at leaſt, of the full improved Value of the Thing demiſed.

[A Compoſition cannot be determined as to Part, and continued as to the Reſt. *Reynel* v. *Rogers*. *T.* 1717. *in Sc. Bunb.* 15.]

* *Rule* 2. *When ſuch Leaſes are to begin.* *Page 340

And herein by the Statute of 32 *H. cap.* 28. is different from the Statutes of 1 *Eliz. cap.* 19. & 13 *Eliz. cap.* 10. for the 32 *H.* 8. *cap.* 28. requires ſuch Leaſes to begin *from the Day* of the making; but by the Exceptions in 1 & 13 *Eliz.* they are to begin *from the making thereof*; and the Diverſity between theſe Expreſſions will appear more fully by the following Caſe, which we will reduce under the following Heads. Co. Lit. 45. a. 5 Co. 6. *Mountjoy's* Caſe. 3 Keb. 379.

1. When ſuch Leaſes as have no Date at all, or a void or impoſſible Date, are to begin.

As to ſuch Leaſes as have no Date at all, or a void or impoſſible Date, as the 30th Day of *February*, or the 40th of *March*, theſe muſt begin from the Delivery, for there is no other certain *Indicium* of the Time of their taking Effect; and therefore the Delivery, which is ſolemn and notorious, gives them from thenceforth a Sanction, and binds the Parties thereto. Co. Lit. 46. b. 2 Co. 5. 2 Inſt. 674. Yelv. 194. Hob. 140. 2 Rol. Abr. 21.

Plow. 402. Rol. Abr. 848. Latch 61.

2. Such Leaſes as have a good Date, and are delivered on the ſame Day; in what Caſes the Day of the Date or Delivery is to be taken incluſive, and in what Caſes excluſive.

Where Leaſes have a good Date, and are delivered on the ſame Day, *Habendum* for twenty-one Years, without ſaying from what Time or when they ſhall begin; the Leaſes in this Caſe ſhall begin from the Delivery, for the Delivery makes it preſently to be the Deed of the Leſſor, and when nothing appears to the contrary, the Lands contained in ſuch Deed ſhall paſs to the Leſſee at the ſame Time: for otherwiſe it would be the Deed of the Leſſor to no manner of Purpoſe; and there can be no Reaſon to affix the Time when the Lands ſhall paſs after one Day more than another, therefore the Delivery, which in this Caſe makes it the Deed of the Leſſor, ſhall likewiſe fix the *Terminus a quo* the Contract or Leaſe ſhall begin. Co. Lit. 46. Comb. Incumb. 340. Rol. Abr. 849.

So if a Leaſe be made for twenty-one Years *Habendum* from the making, or from the Sealing and Delivery, or from henceforth, this ſhall take effect from the Delivery, whether there be a Date or not, for the Delivery gives Sanction to the Deed, and before Delivery it is no Deed at all; and, by conſequence, from henceforth, or from the Making, muſt relate to the Time of its taking effect as a Deed, and not from any other Time; and in ſuch Caſe the Day of the Delivery is taken incluſive; ſo that if ſuch a Leaſe be delivered the 20th Day of *June*, the Leaſe ſhall determine on the 19th Day of *June* incluſive; and though the Leaſe was delivered at four of the Clock in the Afternoon, or at any Time after on the ſaid 20th Day of *June*, yet that whole Day ſhall be taken incluſive, to prevent Clamour and Incertainty, by making Fractions and Diviſions in a Day; and yet in (*a*) *Latch* where one declared of a Leaſe of 25 *March*, *Habendum abinde* for a Year, rendering Hob. 140. 5 Co. 1. 2 Co. 5. a. 2 Inſt. 674. Moor 879. CroJac. 264. CroCar. 263. Dyer 286, 307. Hob. 73. 2 Rol. Abr. 520.

(*a*) Latch 157. *Alſop's* Caſe.

rendering Rent at *Michaelmas* and the *Annunciation*; and objected that the laſt *Annunciation* was not within the Year; *ſed non allocatur*; for *abinde* ſhall be taken *a Confectione*, and excluſive of the Day.

*Page 341 5 Co. 1, 94. Co. Lit. 46. Moor 879. Cro. Jac. 248, 340. Cro. Eliz. 766.

* But if a Leaſe be made to begin *a Die confectionis*, or *a Die Datus*, there the Day of the Delivery, or the Day of the Date, is to be taken excluſive, becauſe the Prepoſition *a* is Privative of the whole Day before which it is prefixed; and therefore if the Leſſee in ſuch Caſe ſhould declare of an Ejectment the Day of the Delivery or Date, it would be againſt him, becauſe that was before his Title began.

Co.Lit.46.b. Dyer 218. Moor 41. 5 Co. 1. 2 Inſt. 674. 2 Rol. Abr. 520. Rol. Rep. 137. 3 Bulſ. 203.

So if a Leaſe be dated and delivered the ſame Day, and the *Habend'* be *a Datu*, or from the Date hereof, it has been held that the whole Day of the Date is to be taken excluſive; and by conſequence, that from the Date, and from the Day of the Date, are all one, if there be a Date; but if there be none, then the Date ſhall be taken for the Day of the Delivery, and that whole to be excluded.

Cro. Jac. 135. *Oſborn* and *Rider*. Bulſ. 177. S. C.

But yet the contrary to this has been adjudged in one Caſe where an Ejectment was brought on a Leaſe made 1 *January* 3 *Jac. Habend' a Datu Indenturæ prædict'*, and the Ejectment was the ſame Day, and after Verdict for the Plaintiff it was moved in Arreſt, *&c.* that this Leaſe being made *Habend' a Datu Indenturæ prædict'*, was as much as from the Day of the Date, as in 5 *Co.* 1. and then the Ejectment being alledged the ſame Day, is ill; but all the Court reſolved that the Date is the Time of the Delivery, and it differs from the Time or Day of the Date, and therefore the Ejectment being alledged *poſtea* the ſame Day was good enough, and the Plaintiff had Judgment.

Moor 107. And. 65. *Fox* and *Collier*.

So where the Archbiſhop of *York* 6 *Novem.* 18 *Eliz.* by Indenture, made a Leaſe for Twenty-one Years *Habend' a Datu Indenturæ*, no Exception was taken to it, which proves that *a Datu Indenturæ* is the ſame as from the making, and that the Day of the Date, or Day of the making, is not to be taken excluſive in ſuch Caſe, becauſe then the Leaſe would not be warranted by the Exception in 1 *Eliz. cap.* 19. which ſays other than for three Lives, or Twenty-one Years from the making, which is incluſive of the Day of the making.

3 Lev. 438. *Hatter* and *Aſh*. 2 Salk. 413. pl. 1. C. S. Ld. Raymond 84.

Ejectment by the Succeſſor of a Prebend upon a Leaſe made for Life *Habend' a Datu*; and if this ſhould bind the Succeſſor was thrice argued, and for the Plaintiff urged, that it ſhould not; that *a Datu* is all one with *a Die Datus*, and then Livery being made the ſame Day that the Indenture bears Date was void, becauſe it cannot expect. 2. That this was a Leaſe in Reverſion, not being to begin in point of Intereſt till the Day after the making or Date, which is not good by 13 *Eliz. cap.* 10. for here the Day of the Date is excluded. But it was anſwered and reſolved, that in Propriety of Speech *Datus*, or dated in *Engliſh*, is the very Act of the Delivery of the Deed; for *Datus* in *Latin*, being taken participly, is given or delivered in *Engliſh*; and *Datus* ſubſtantively taken in *Latin* is the Date of Delivery in *Engliſh*, which ſignifies all one; and in *Clayton*'s Caſe, the ſix Months were taken the moſt extenſively to make good the Deed by Inrolment, but to make a Word of an equivocal Senſe as this is (which may be taken either incluſive or excluſive of the Day of the Delivery or Date of it) to make the Leaſe void is unreaſonable, therefore it ſhall rather be taken in ſuch Senſe as may make it good, *ut res magis valeat quam pereat*; and therefore it was adjudged good by the three puiſne Judges, the Chief Juſtice *Treby* diſſenting, though he was at firſt of the ſame Opinion, and ſo alſo was *Powell*, but afterwards changed it for the Defendant; which ſhews the Nicety of theſe Diſtinctions.

3. Such

* 3. Such Leaſes as have a good Date, but are not delivered till a Week or Month, &c. after, when they are to begin, and how the Declaration on ſuch Leaſes is to be framed. *Page 342

And it is to be obſerved, that every Deed ſhall be intended to be delivered on the ſame Day it bears Date, unleſs the contrary be proved; and it is the beſt Courſe (as the Law intends) to deliver it on the ſame Day that it bears Date: therefore where in an Ejectment the Plaintiff declares of a Leaſe dated 1 *Novem. Habend' a Confectione*, or *a Die Datus*, *Sigillationis & Deliberationis Indenturæ prædict'*, and lays the Ejectment 2 *Novem.* though it was objected that the Declaration was not good, becauſe it did not appear when the Leaſe was ſealed and delivered, and it might be delivered long after the Date; and the Courſe is to ſay, that ſuch a Day and Year *dimiſit per Indenturam*, bearing Date the ſame Day and Year; yet it was adjudged, that the Declaration was good, becauſe when he declares that he let by Indenture of ſuch a Date, it ſhall be intended to be delivered on the ſame Day, unleſs it be ſhewn with a *Primo Deliberatum* at another Day; and he, who pleads a Deed of ſuch a Date, cannot by Replication, or other Pleading, maintain it to be delivered at another Time, for that would be a Departure. 2 Inſt. 674. Cro. Jac. 264. Cro. Eliz. 773. Cro. Jac. 646. Dyer 167. b. 221. b.

But if the Truth be that the Leaſe was ſealed and delivered at another Time than it bears Date, then the Plaintiff ought to ſhew it in his Declaration; or the Defendant, if it be material for him, may ſhew in his Plea the Delivery at another Time than the Date, and traverſe, that it was delivered on the Day it bears Date. Cro. Jac. 264.

Accordingly an Ejectment was brought of a Leaſe made 12 *December Habend' a Primo Die*, and upon Not guilty, the Jury found the Leaſe dated 1 *December*, *Habend'* from henceforth, but delivered 12 *December* which proves that where the Date and Delivery were at ſeveral Times, they ought to be diſtinguiſhed in the Declaration; but the Queſtion therein was, whether this Leaſe was the ſame whereof the Plaintiff declared, that is, whether being limited to take Effect from henceforth, the Day of the Date ſhould be taken excluſive, ſo as to warrant the Declaring of a Leaſe *a Primo Die*; for it was objected, that this did not warrant the Declaration, becauſe from henceforth, and from the Day of the Date, are ſeveral Commencements, the one beginning on the Day it is ſealed and delivered, the other the Day after. But it was reſolved *per Curiam*, that they are both one, being a Computation up to a Time paſt; and when the Leaſe is ſealed at a Day after the Date, whether it be limited to begin from henceforth, or from the Day of the Date, yet in Pleading it ſhall be alledged to begin from the Day on which it is dated; and Serjeant *Moor* took this Diverſity in another Caſe, that if one leaſes Land in Intereſt, *Habend' a Datu*, there the Day of the Date ſhall be taken incluſive, the Date and Delivery being both on the ſame Day; but where it does not begin in Intereſt at the Time it is dated, as where the Date and Delivery are ſeveral, and the *Habend'* is *a Datu*, there the Day of the Date ſhall be taken excluſive, becauſe it is to commence from the Date, that is, from the Day of the Date, for the Date in that Caſe can mean nothing elſe, ſince it is not delivered till after; and therefore the Computation of its Commencement being from a Day backwards, that whole Day ſhall be excluded; and perhaps this Diverſity may reconcile the Caſes of *Clayton*, 5 *Co.* and *Oſburn* and *Rider*, *Cro. Jac.* 135. before put; for in *Oſburn*'s Caſe the Leaſe was made the ſame Day it was dated, and ſo began then in Intereſt; but the Caſe cited in *Clayton*'s Caſe, is to prove the Date and the Day of the Date to be all one, was from a Computation backwards upon the Statute of Inrolments, which appoints Cro. Jac. 258. *Lewellin* and *Williams*.

them

Page 343 them to be inrolled within ſix Months after the Date; and there it was adjudged that a Deed inrolled upon the laſt Day of the ſix Months, accounting the Day of the Date excluſive, was yet well inrolled within the Statute; but this, as has been obſerved, was a Computation backwards, and that from the Date, and from the Day of the Date, is all one, is only an *Unde ſequitur* of my Lord *Coke*'s own, from the Caſe of the Inrolment; and in his 1 *Inſt.* 46. *b.* where he mentions it again, yet he cites for it *Clayton*'s Caſe and *Dyer*, 286. where that Caſe of the Inrolment is reported: And though the Caſe of *Bacon* and *Waller*, 3 *Bulſ.* was adjudged according to *Clayton*'s Caſe, that the Date and Day of the Date were all one, and the Day to be taken excluſive; ſo that a Leaſe there dated and delivered 26 *May*, *Habendum* from the Date, did not begin till 27 *May*; yet it appears both by (*a*) *Bulſ.* and *Rolls*, that the Judgment therein given was founded on the Caſe of *Lewellin* and *Williams*, where the Date and Day of the Date were held all one; yet, as it appears, the Reaſon of that Caſe was upon a Computation from a Time paſt, and that the Leaſe therein did not begin in point of Intereſt upon the Day it bore Date, and by conſequence was no Warrant for the Judgment that was given in *Bacon* and *Waller*'s Caſe; and then that Judgment being founded on the Authority of the former Caſe, can be of Authority no farther than as it agrees with that former Caſe, and then it is of none at all, becauſe, as appears before, it varied materially from it; and ſo the Diverſity taken by Serjeant *Moor*, which is likewiſe warranted by the Caſe of (*b*) *Oſburn* and *Rider*, ſeems to remain unſhaken, and to be the true Diſtinction for ſettling the Books.

(*a*) 3 Bulſ. 203. Rol. Rep. 387. *Bacon* and *Waller*.

(*b*) Cro. Jac. 135.

In Ejectment the Plaintiff declares of a Leaſe 7 *Jan.* by Indenture dated 6 *Decemb. Habend' a Die Datus Indenturæ prædict*, and gave in Evidence a Leaſe dated 6 *Decemb. Habend' a tempore confectionis Indenturæ*, and it was held not the ſame Leaſe whereof the Plaintiff declares, becauſe, ſays the Book, *a Die Datus* excludes the Day; but a better Reaſon ſeems to be, becauſe it does not agree in point of Deſcription with the Leaſe whereof he declares; for if the Declaration had been of a Leaſe 7 *Jan. Habend' a* 6 *Die Decembris*, then by the Authority of *Lewellin*'s Caſe this had been good; yet being upon a Computation from a Time paſt, the Day of the Date muſt be pleaded excluſively; but when he declares of a Leaſe 7 *Jan.* by Indenture dated 6 *Decemb. Habend' a Die Datus*, this muſt be intended a Deſcription of the Leaſe as it is compriſed in the Indenture; and when he afterwards ſhews an Indenture, containing a Leaſe *Habend' a tempore confectionis*, this is a Deſcription of another Leaſe, and not of that which was to begin *a Die Datus*; and this likewiſe ſeems to be the Reaſon, that in another Caſe, where the Plaintiff, in Bar of an Avowry, pleads a Leaſe 30 *March Habend'* from the Feaſt of the Annunciation next before, and upon Traverſe of the Leaſe *modo & forma*, the Jury found a Leaſe to the Plaintiff on the 25th Day of *March* for one Year from thence next enſuing; and though held not to be the ſame Leaſe the Plaintiff pleaded, becauſe this begins on the 25th of *March* inclusive, and the Leaſe pleaded from the 25th of *March* excluſive, yet the Plaintiff had Judgment, being found in Subſtance that the Plaintiff had ſuch a Leaſe as by Force thereof he might have Common the 11th of *April* following, *&c.* but agreed clearly, that if he had declared ſo in Ejectment, it would have been againſt him, becauſe there he demands and recovers the Term, and therefore muſt ſet out his Title truly, which appears to have been by a Leaſe dated and executed the 25th of *March*, *Habend'* from thenceforth; and therefore a Leaſe executed but the 30th of *March*, and dated the 25th of *March*, *Habend'* from thenceforth, could not be the ſame, not agreeing in point of Deſcription; but if the Truth had been that the Leaſe had been executed but the 30th of *March*, then, it ſeems, he might have declared of a Leaſe then made *Habend'* from the 25th Day of *March*, being a Computation from a Time paſt, though the Leaſe were dated 25th *March*, *Habend'* from thenceforth, becauſe

Cro. Jac. 647. *Scavage* and *Parker*.

Hob. 73. Moor, pl. 1188. *Pope* ver. *Skinner*.

* because it did not then begin in Interest: But *Quære* if the beter Way in all these Cases, to prevent any Mistakes, be not to declare of a Lease dated such a Day, *Habend'* from henceforth, or from the making, or from the Day of the Date, or Day of the making, &c. exactly as it is in the Lease †, with a *Primo deliberat'* such a Day, if the Truth be so, rather than to take upon him to judge when the Day shall be taken inclusive, and when exclusive, and so as in this Case to declare of the *Habend' a* 25 *Die Martii*, when in Truth the *Habend'* was worded from henceforth; though if the Lease had been executed but 30 *March*, it seems that if he had declared of a Lease 30 *March Habend' a* 25 *March*, this had been good, for the Reasons before-mentioned. *Page 344

† This is now the Form constantly used by good Pleaders.

A Lease in Reversion was made to commence *ad Festum Annunciationis* after the former Lease should be determined; and it was objected, that it ought to be *a Festo Annunciationis*; yet the Court held it to be all one, for that there shall be no Fraction of a Day: But *Quære* how this would have made a Fraction of a Day; for there seems to be a whole Day's Difference, *ad* including the Feast-Day, and *a* excluding it. Cro. Car. 502. *Loyd* ver. *Gregory*.

A Parson leases by Indenture the Tithes of 200 Acres of Land to the Owner of the Land, of which he, and his Wife, and his Heirs were seised, *Habend'* from *Mich.* next following to him and his Heirs, during the Life of the Parson: the Lessee dies, and his Wife had the 200 Acres for her Jointure, and married *B.* who let the 200 Acres to the Plaintiff; the Heir of the first Husband grants also to the Plaintiff the Tithes of those Lands at Will, and he being sued for Tithes by the Parson against his own Lease brought a Prohibition; but a Consultation was after granted; for by *Flemming*, *Fenner*, and *Williams*, the Lease being for Life, and to begin at a Day to come, was void; for though Tithes are Spiritual, and are not extinct in the Land, yet in the Conveyance of them they ought to follow the Nature of Land, Rent or other Hereditaments *in esse*, which cannot be granted for Life at a Day to come. But *Yelverton* and *Croke* thought, that this Lease being to the Owner of the Land did not enure by way of *Interest*, but by way of *Discharge*; for the Plaintiff hath pleaded, by Force of which the Lessee was seised of the Tithes to him and his Heirs for the Life of the Parson; they, as Judges, could not intend it to be otherwise; and besides, it cannot be intended by way of Discharge, because there are no such Words in the Lease, and it was more for the Lessee's Benefit to have it by way of Interest than by way of Discharge; for then this would be such a Privilege annexed to the Land as could not be granted over; whereas here the Wife, was Owner of the Land, but the Son and Heir of the Lessee took upon him to be Owner of the Tithes; and *Yelverton* inclined, that the pleading of the Lease, and of the Seisin by Force of it, was not good. Yelv. 131. *Edmonds* ver. *Boothe*.

A Lease of Houses within 14 *Eliz. cap.* 11. may be made for Years from a Time to come; for that Statute does not require them to begin from the making, or Day of the making, but only that they do not exceed forty Years from the making. Poph. 9. *Thompson* ver. *Trafford*.

And it is said, that a Lease for Lives being avoided at Common Law, for that it was made to commence from a Time to come, an Injunction was granted out of Chancery to continue Possession. Comp. Incumb. 341.

A Lease to three for their Lives, *Habend' a Die Datus*, is good, if Livery be made after the Day of the Date, because till Livery nothing passes, and being made after the Day of the Date, it may then operate presently; *secus* if Livery had been made on the Day of the Date, because then the Operation of it must have been suspended till the next Day, which the Law will not allow. Moor 637, 759.

Page 345 *Rule* 3. *Within what Time the old Leaſe is to be ſurrendered; and herein of concurrent Leaſes.*

Co.Lit.44.b. 5 Co. 2. Moor, pl. 1084. Another Rule to be obſerved in making of Leaſes upon theſe Statutes is, that if there be an old Leaſe in Being, it muſt be ſurrendered, expired, or ended within a certain Time after the making of the new Leaſe; and ſuch Surrender muſt be abſolute, and not conditional; for then the Intent of the Statute might be eaſily evaded, by ſetting up all ſuch old Leaſes again, upon Breach of the Condition.

Rol.Rep.82. Sir *George Frevil* verſus *Ewebank.* Comp. Incumb. 346. And ſuch Surrender may be ſafely made either to a Corporation Sole or Aggregate, upon their Promiſe to make a new Leaſe; for if any ſingle Perſon, or ſole Corporation makes ſuch Promiſe, and refuſes after to make the Leaſe, an Action on the Caſe ſhall lie againſt them; and if ſuch Promiſe be made by a Corporation Aggregate, tho' no Action will lie againſt them, becauſe being a Corporation they cannot be bound without Deed, yet the Perſon who ſurrendered may ſue in Equity, and compel them to a ſpecifick Performance of their Promiſe, and to make a new Leaſe; but ſuch Suit muſt be againſt ſome of them by Name, as the Dean in particular, and the Chapter of the ſame Place generally; and ſuch Suit in Equity ſeems the beſt Way in caſe the Surrender was made to a ſole Corporation or ſingle Perſon, becauſe in the Action at Common Law, Damages are to be recovered only, but no new Leaſe made, as they will decree in Equity; but now ſince the Statute of Frauds and Perjuries, which requires all Surrenders to be in Writing, it is uſual to have a Covenant from the Perſon or Corporation, to whom the Surrender is made, that they will within ſuch a Time make a new Leaſe under ſuch and ſuch Terms; but, as it ſeems, that Statute does not extend to Surrenders in Law, by taking of a new Leaſe in Writing.

29 Car. 2. c. 3.

The Statute of 32 *H.* 8. *cap.* 28. provides, that ſuch old Leaſe ſhall be expired, ſurrendered, or ended within one Year next after the making the new Leaſe; and the Statute 18 *Eliz. cap.* 11. enacts, that all Leaſes to be made by any of the Eccleſiaſtical, Spiritual, or Collegiate Perſons, or others, within 13 *Eliz. cap.* 10. of any Lands, *&c.* whereof any former Leaſe, *&c.* for Years is in Being, and not to be expired, ſurrendered, or ended within three Years next after the making of any ſuch new Leaſe, ſhall be void, and of none Effect.

Poph. 9. Plow. 106. Comp. Incumb. 345-6. And a Surrender in Law by taking of a new Leaſe, either to begin preſently, or at a Day to come, ſeems a good Surrender within theſe Statutes; for by taking ſuch new Leaſe, though it be to commence at a future Day, the firſt Leaſe is preſently ſurrendered and gone, and ſhall not continue good till the Day on which the ſecond Leaſe is to commence; but by Acceptance of ſuch ſecond Leaſe the firſt is immediately determined; becauſe both Leaſes cannot conſiſt together, and the firſt cannot be diſſolved or ſurrendered in Part, and therefore muſt be ſurrendered for the Whole.

Degg 130. *Small's* Caſe. One *Small* being poſſeſſed of the Manor of *Paddington* by a Leaſe for Years from a Biſhop, the Biſhop made a Leaſe to another for three Lives, and before Livery the Tenant ſurrendered his former Term; and it was held, that this Surrender was made in Time, and the ſecond Leaſe good, becauſe it was no compleat Leaſe till Livery and before that, the firſt Leaſe was ſurrendered and gone.

Comp. Incumb. 343. And this Rule, that if there be any old Leaſe in Being, it muſt be ſurrendered, expired, or ended within the Times before-mentioned, is neceſſary not only when Biſhops, and other ſole Corporations, mentioned in 32 *H.* 8. *cap.* 28. make Leaſes by Authority of that Statute for twenty-one Years, or three Lives, without the Aſſent or Confirmation of others, but

*but alſo when any Spiritual or Eccleſiaſtical Corporation Sole (other than Biſhops) do make ſuch Leaſes, though with the Conſent and Confirmation of thoſe who by Law are to confirm the ſame, and alſo when any Spiritual, Eccleſiaſtical, or Collegiate Corporation Aggregate make ſuch Leaſes whereto no Confirmation of others was ever requiſite: For the better Underſtanding whereof, it will be neceſſary to conſider the Learning of concurrent Leaſes, and what Perſons, upon the ſeveral Statutes before-mentioned are capable of making them, and in what Manner. *Page 346

To begin then with Biſhops; it is to be obſerved, that at Common Law, Biſhops with the Confirmation of their Dean and Chapter might have aliened the Poſſeſſions of their Church for ever, or have made Leaſes for what Term of Years they thought fit; and this would have bound their Succeſſors, though it were for 5000 Years; but a Biſhop without ſuch Confirmation could not have made a Leaſe to bind his Succeſſors, though but for one Year; both of which being great Miſchiefs, were remedied by 32 *H.* 8 *cap.* 28. and 1 *Eliz. cap.* 19. for whereas before 32 *H.* 8. *cap.* 28. Biſhops could not make any Leaſe at all to bind their Succeſſors, unleſs it were confirmed by the Dean and Chapter; now that Statute enables the Biſhops alone, without ſuch Confirmation, to make Leaſes of all or any of their Poſſeſſions, ſo they do not exceed three Lives, or twenty-one Years; but if Biſhops had a mind to make Leaſes or Grants for any longer Term, or in any other Manner, than this Statute warranted, then ſuch Leaſes or Grants were out of the Protection of this Act, and remained perfectly at Common Law, as they were before, and by conſequence muſt have the like Confirmation of the Dean and Chapter, in order to bind the Succeſſor, as they muſt have in all Caſes at Common Law; and becauſe it was found by Experience, that many Biſhops made an ill Uſe of this Power, and choſe to make Leaſes for long Terms of Years, rather than keep within the Bounds this Statute had preſcribed them, and ſometimes to make abſolute Alienations of their Poſſeſſions, and then get the Dean and Chapter to confirm ſuch Leaſes and Alienations, whereby the Succeſſor was oftentimes left without ſufficient to keep up Hoſpitality, or ſuſtain their Dignity; therefore to remedy this Miſchief was the Statute of 1 *Eliz. cap.* 19. made, which makes void all Gifts, Grants, *&c.* or Eſtates of any Honours, Caſtles, Manors, Lands, Tenements, or Hereditaments, being Parcel of the Poſſeſſion of the Biſhoprick, (other than for twenty-one Years, or three Lives,) ſo that now, after this Statute, no Confirmation whatever will make good any Biſhop's Leaſe, if it exceed that Term, becauſe then the Statute makes it void, and by conſequence not capable of receiving any Sanction from a Confirmation: But upon theſe Statutes was the concurrent Leaſe invented, which has generally obtained, and been held good, and is in this Manner.

Moor 107. And. 65. *Fox* and *Collier.* Leon. 36. 3 Leon. 131. Palm. 464, 466, 467. Latch 241. Leon. 59. Co. Lit. 45. Ley 78.

If a Biſhop ſolely makes a Leaſe for twenty-one Years according to the Statute of 32 *H* 8. *cap.* 28. and within four or five Years, or more, before the End of that Leaſe makes a new Leaſe to another for twenty-one Years, to begin from the Making, *&c.* this ſecond Leaſe, if it be confirmed by the Dean and Chapter, and be in every Thing elſe purſuant to the Exception in the 1 *Eliz. cap.* 19 is good as a concurrent Leaſe, for theſe Reaſons: 1. Becauſe ſuch Leaſe, though it be not good within the 32 *H.* 8. *cap.* 28. by reaſon the firſt Leaſe is not ſurrendered or expired within a Year after the making thereof; yet being confirmed by the Dean and Chapter, it remains a good Leaſe at Common Law, and then if it be not void within the Exception of 1 *Eliz cap.* 19. the Succeſſor ſhall be bound; and that it is not void within that Statute, appears both from the Letter and Meaning of the Exception; for the Words are, *other than for twenty-one Years, or three Lives, from ſuch Time as any ſuch Leaſe ſhall begin*; now this ſecond Leaſe does not extend twenty-one Years from the Time it begins, being for twenty-one Years only from the Making, and ſo within the expreſs Words of the Exception. 2. This is not void within the Meaning of

Moor 107. And 65. Leon. 36. 3 Leon. 131. Palm. 464, *&c.* Latch 241.

Page 347 the Exception, becauſe for ſo many Years as were to come of the firſt Leaſe this is good only by Eſtoppel, and not in Intereſt; for the ſecond Leſſee can have no Benefit of it ſo long as the firſt Leaſe endures, and then againſt the Succeſſor there is in effect no more than a Leaſe for twenty-one Years that are to come of the ſecond Leaſe being in effect void for all the Years that are to come of the firſt Leaſe, thoſe Years that are to come of the firſt Leaſe and thoſe that will then remain of the ſecond Leaſe make in all no more than twenty-one Years at one Time, and ſo not againſt the Meaning of that Exception. 3. Such ſecond Leaſe is ſo far from being prejudicial to the Succeſſor, that it is rather for his Benefit; for now he will have the Rent reſerved on the firſt Leaſe during the Reſidue of that Term, and may alſo at the ſame Time recover the Rent reſerved upon the ſecond Leaſe, being only for Years, becauſe the Leſſee is eſtopped to ſay he did not take ſuch Leaſe under ſuch Reſervation; and ſo the Succeſſor will have two Rents inſtead of one; though if the ſecond Leſſee ſhould enter, and be evicted by the firſt Leſſee, this would cauſe a Suſpenſion of the Rent reſerved on the ſecond Leaſe; but however, the Succeſſor ſuffers no Prejudice, becauſe though he cannot diſtrain for the ſecond Rent during the Continuance of the firſt Leaſe, and though the Re-entry of the firſt Leſſee ſhould amount to an Attornment, and give the Rent thereon reſerved to the ſecond Leſſee, yet the Biſhop, or his Succeſſor, may always maintain an Action of Debt againſt the ſecond Leſſee for the Rent, and ſo will in all Events be ſure of one Rent.

10 Co. 60. b. Moor 109. Co. Lit. 45.

But this Leaſe, though it be not either againſt the Letter or Meaning of the Exception in 1 *Eliz. cap.* 19. yet ſince it is not warranted by 32 *H.* 8. *cap.* 28. it muſt be confirmed by the Dean and Chapter, as before the 1 *Eliz. cap.* 19. all Leaſes not purſuant to 32 *H.* 8. *cap.* 28. muſt have been, to bind the Succeſſor, and ſuch Confirmation muſt be in the (*a*) Life of the Biſhop who makes it.

(*a*) But one Book ſays, that Confirmation of ſuch concurrent Leaſe in the Vacation of the Biſhoprick, is good enough. 4 Leon. 78. *Quære.*

Co. Lit. 44 b. Palm. 466, &c. 5 Co. 2. Moor 253. Leon. 59. Latch 241. 2 Brownl. 162. Cro Eliz. 141. And. 193. Ley 78. Cro. Eliz. 111.

But after ſuch Leaſe for Years the Biſhop cannot make a Leaſe for three Lives to be good by way of concurrent Leaſe, though it be confirmed by the Dean and Chapter; but ſuch ſecond Leaſe, whether it be made to begin preſently, or by way of Leaſe or Grant in Reverſion, and Attornment upon it, is againſt the Exception in the 1 *Eliz cap.* 19. and by conſequence ſhall not bind the Succeſſor; for the Words of the Exception are, *other than Leaſes for three Lives, or twenty-one Years*, in the Disjunctive; ſo that there ought to be only one, or only the other in Being at a Time againſt the Succeſſor, and not both together; for which Reaſon alſo, after a Leaſe for three Lives, the Biſhop cannot make a Leaſe for twenty-one Years to bind the Succeſſor, though with the Confirmation of the Dean and Chapter, becauſe then there would be both a Leaſe for three Lives and twenty-one Years in Being at a Time, which that Statute does not allow of; and if the Leaſe in Reverſion for three Lives ſhould be good as a concurrent Leaſe, then would the Succeſſor have no Remedy for the Rent thereon reſerved during the firſt Leaſe; not by Diſtreſs, becauſe the Poſſeſſion was only a Pledge for the Rent reſerved on the firſt Leaſe; not by Action of Debt, becauſe that does not lie for Rent reſerved on an Eſtate of Freehold during the Continuance thereof; nor by Aſſiſe, becauſe he had no Seiſin of it; and though *ex Vi Termini* the Rent is payable, becauſe after the Leaſe for Years determined the Leſſor may diſtrain for all Arrears; yet that is only a Poſſibility or Contingency; for the Leaſe for Years may outlaſt the three Lives, and then they, by reaſon of their Reverſionary Intereſt, having the preſent Rent of the Leſſee for Years, if they all die before the Determination of the Leaſe for Years, the Biſhop and his Succeſſors will loſe all that Rent, and ſo have nothing to maintain Hoſpitality, or ſuſtain

Vide Tit. *Rents.*

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the Dignity of their Sees, which this Statute of 1 *Eliz. cap.* 19. intended chiefly to provide for; and though the firſt Leaſe were for three Lives, and the ſecond only for twenty-one Years, yet that will not bind the Succeſſor; becauſe though an Action of Debt might be maintained againſt the Leſſee for Years for the Rent reſerved on his Leaſe during the Leaſe for Lives, yet ſuch Leaſe for Lives and Years at the ſame Time is againſt the Words of the Exception of 1 *Eliz. cap.* 19. which are in the Diſjunctive; and alſo it may happen that the Leſſee for Years is worth nothing, and then if the three Lives ſhould outlive ſuch ſubſequent Leaſe for Years, the Succeſſor of the Biſhop would loſe all that Rent, and ſo ſuffer in his Revenues, againſt the Deſign and Meaning of the Act; which proves, that the concurrent Leaſe holds place only where *both are for Years*; ſo that the certain Determination of the firſt, and Commencement of the ſecond are known immediately upon the making thereof, and that the Succeſſor will in all Events be ſure of a Remedy by way of Diſtreſs, for the one Rent and the other, as they reſpectively commence; and alſo by Action of Debt or Covenant upon the Contract in the mean Time, if ſuch concurrent Leaſe ſhould be conſtrued to paſs a Reverſionary Intereſt, and intitle him to the Rent reſerved upon the firſt Leaſe by an unwary or wilful Attornment of the firſt Leſſee. And this concurrent Leaſe for Years has not eſcaped the Cenſure of ſome learned Men, though being adjudged at firſt in the *Exchequer Chamber*, by a Majority of ten Judges, it has been ever ſince allowed for Law; but my Lord Chief Juſtice *Vaughan* ſays, that this concurrent Leaſe is neither within the Letter or Meaning of the Statute 1 *Eliz. cap.* 19. the Words of which are, *other than for twenty-one Years, or three Lives*, and in that Caſe there is another Leaſe *in Eſſe* than for twenty-one Years, or three Lives; for there are two Leaſes *in Eſſe*, and ſo more than the Statute warrants; and that the Statute intended, when the firſt Leaſe expired, the Biſhop who ſhould then be, ſhould have the Advantage to make a new Leaſe, which by allowing ſuch concurrent Leaſe may be prevented perpetually, except by way of Remainder; and as for the Intent of the Statute, he ſaid, though the Party is eſtopped in pleading, yet the Jury are not, but may find the Truth of the Caſe; and if the Party dies to whom ſuch concurrent Leaſe is made, neither his Executors nor Adminiſtrators are eſtopped; for otherwiſe they would pay a Rent for nothing, which would be in their own Wrong, and againſt the Right of the Teſtator.

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Keb. 378. Degg. 111.

It appears by the Caſes before-mentioned, how and in what Manner Biſhops may make concurrent Leaſes, not being reſtrained therefrom by the 1 *Eliz. cap.* 19. In the ſame Manner likewiſe might Deans and Chapters, Maſters and Fellows of any College, and other Perſons mentioned in the 13 *Eliz. cap.* 10. not being reſtrained therefrom by that Statute; but that being found a great Miſchief, was remedied and qualified by 18 *Eliz. cap.* 11. which makes all Leaſes by any of the ſaid Eccleſiaſtical, Spiritual, or Collegiate Perſons, or others of any of their Eccleſiaſtical, Spiritual, or Collegiate Lands, Tenements, or Hereditaments, whereof any former Leaſe for Years is in Being, not to be expired, ſurrendered, or ended within three Years after the making of any ſuch new Leaſe, to be void, and of none Effect; ſo that within theſe Bounds they may likewiſe make concurrent Leaſes for Years.

Comb. Incumb. 243.

The Dean and Chapter of *Norwich*, 8 *Eliz.* made a Leaſe to *A.* for ninety-nine Years, to begin after the End of a former Leaſe then in Being, and which happened 35 *Eliz.* afterwards in 42 *Eliz.* the Dean and Chapter made a Leaſe to the Plaintiff for three Lives, rendering the antient Rent Quarterly, and covenanted to acquit and ſave harmleſs the Plaintiff and the Lands demiſed to him, during the Leaſe, by reaſon of any Leaſe made by them, or any of their Predeceſſors; and Livery was made upon it; but it did not appear whether it was the ſame Dean that made the Leaſe to *A.* nor that *A.* had then entered; and now the

2 Brownl. 134, 158, 164. Moor 875. Co. Lit. 45. b.

*Page 349 *Plaintiff being evicted by the Aſſignee of *A.* brought his Action of Covenant againſt the Dean and Chapter, and had Judgment by reaſon of the expreſs Covenant; and alſo, becauſe it did not appear that the Dean, who was Party to the Plaintiff's Leaſe, was dead; for it was agreed, that the Leaſe to the Plaintiff would be void againſt the ſucceeding Dean by the 18 *Eliz. cap.* 11. becauſe there were then above three Years of the firſt to come; but *Coke* held, that though there were four or five, or more, Years of a former Leaſe to come, yet if that former Leaſe were ſurrendered within three Years after the making of a ſecond Leaſe for Years, ſuch Surrender would make good the ſecond Leaſe; but if the firſt Leaſe were for Years, and the ſecond for Lives, then, though there were but two Years to come of the firſt Leaſe, yet the ſecond would be void, which perhaps may be for the Reaſons mentioned in the concurrent Leaſes by Biſhops; but if ſo, then what my Lord *Coke* ſays in the ſame Caſe muſt be a Miſtake, that if the Plaintiff (whoſe Leaſe was for three Lives) had procured *A.* within three Years to have ſurrendered his Leaſe to him, that this would have made good his own Leaſe, which cannot be if what he ſaid before be true; *ideo Q.*

Comb. Incumb. 344. But for ſuch Houſes, and ſo much Land, as by 14 *Eliz. cap.* 11. they may let for forty Years, they cannot make Leaſes in Reverſion or concurrent Leaſes, becauſe that Statute expreſly forbids Leaſes in Reverſion thereof; and the 18 *Eliz. cap.* 11. relates only to the 13 *Eliz cap.* 10. as appears by the following Caſe.

Cro. Eliz. 564. *Hunt* and *Singleton.* In Treſpaſs upon Special Verdict it was found that the Dean and Chapter of *Paul's* made a Leaſe for forty Years, of a Houſe in *London*, to begin preſently, there being then ten Years of a former Leaſe to a Stranger to come; and the Court held this ſecond Leaſe merely void by 13 *Eliz. cap.* 10. and not warranted by 14 *Eliz cap.* 11. which makes good Leaſes of Houſes in Market-towns for forty Years, ſo they be not made in Reverſion; and this Leaſe, though it be made to begin preſently, yet there being another Leaſe *in eſſe*, is a Leaſe in Reverſion; for ſo much as remains of the former Leaſe; and ſo it was reſolved in *C. B.* 14 *Car.* 2. in the Caſe of *Wynn* and *Wild*, of a Leaſe of the Dean and Chapter of *Weſtminſter*; and though this was properly a concurrent Leaſe, yet being a Leaſe in Reverſion, it is forbidden within the expreſs Words of the 14 *Eliz c.* 11. and ſo void againſt the Succeſſor.

Vent. 246. Carter 9.

Vent. 24. 2 Lev. 61. 3 Keb. 46, 107, 193. *Bayly* verſ. *Murin.* A Vicar having made a Leaſe for Years of a Houſe in a Market-town, and of Lands thereunto appertaining, *Anno* 1672, when there were but two Years of that Leaſe to come, let it to another for twenty-one Years from *Michaelmas* then next, reſerving the ancient Rent during the Term, payable at the four moſt uſual Feaſts, or within ten Days after, and this Leaſe was confirmed by the Archbiſhop, (Patron of the Vicarage) and the Dean and Chapter of *Canterbury*; if the ſucceeding Vicar was bound by this Leaſe, was the Queſtion. And adjudged by all the Court, that he was not. 1. It was adjudged, that the Death of the Vicar, by eighty Days, did not make ſuch Non-reſidence as would avoid the Leaſe within the Statute of Non-reſidence. 2. That though the Rent were reſerved at the uſual Feaſts, or within ten Days after; and therefore as it was urged, the Term ending at *Michaelmas*, would be expired before the laſt Day of Payment; though for the other Days it was agreed to be for the Succeſſor's Advantage, becauſe the Predeceſſor might die within the ten Days, and then the Succeſſor would have that whole Quarter's Rent; yet the Court reſolved that the Reſervation was good in the whole, and that being reſerved during the Term, there ſhould be no ten Days given to the Leſſee for the laſt Payment, according to *Barwick* and *Foſter's* Caſe, *Cro. Jac.* 227, 233. 3. It was adjudged that this was a Leaſe in Reverſion, and ſo not warranted by 14 *Eliz. cap.* 11. which, as to Houſes in Market-towns, repeals the 13 *Eliz. cap.* 10. but excepts Leaſes in Reverſion; and this Leaſe being to commence at *Michael-*

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mas next * was properly a Leaſe in Reverſion, and differs from a Grant of a Reverſion; and alſo they all, but *Hale*, held, that if this Leaſe, in this Caſe, had been made to commence preſently, yet it would have been void, there being another Leaſe in Being, ſo that for ſo many Years as were to come of the former Leaſe, it would be a Leaſe in Reverſion; and they held, that the 18 *Eliz. cap.* 11. which permits concurrent Leaſes, ſo that there be not above three Years of the former Leaſe, *&c.* extends only to 13 *Eliz. cap.* 10. and recites that, but not the 14 *Eliz. cap* 11. nor makes any Alteration thereof; but *Hale* doubted of this, and inclined rather contrary, that if the Leaſe had been made to commence preſently, it had been good; becauſe there were not then three Years of the former Leaſe to come, and he thought the 18 *Eliz. cap.* 11. was a Qualification as well of Leaſes upon the 14 *Eliz. cap.* 11. as upon 13 *Eliz. cap.* 10 1. Becauſe the 14 *Eliz. cap.* 11. is an Appendix to 13 *Eliz. cap.* 10. and only enlarges it as to Houſes in Cities and Market-towns; and therefore the 18 *Eliz. cap.* 11. reciting the 13 *Eliz. cap.* 10. does, by conſequence, recite alſo the 14 *Eliz. cap.* 11. 2. Becauſe there is ſuch a Connection between all the Statutes concerning Eccleſiaſtical Perſons, that they have been generally taken in the Conſtruction of one another; and that though 32 *H.* 8. *cap.* 28. is not recited either in the 1 *Eliz. c.* 19 or 13 *Eliz. c.* 10 yet a Leaſe is not warranted by thoſe Statutes, unleſs it hath the Qualifications required by 32 *H.* 8. *cap.* 28. 3. From the great Rummage it would make in Leaſes, if they ſhould be void, when there was ever ſo little of a former Leaſe unexpired.

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The Preſident and Scholars of *Magdalen College* in *Oxford* made a Leaſe of a Houſe, *&c.* for twenty Years, and ten Years before the Expiration thereof made a Leaſe to another for twenty Years, to begin after the Expiration of the firſt Leaſe; though this be, in ſtrict Propriety, a Leaſe in Reverſion, yet it was ſaid to be good, and to ſtand well within 14 *Eliz. cap.* 11. becauſe theſe Contracts or Leaſes do not intermix, but the one ſtands well with the other, and both together do not exceed the forty Years compriſed in the Statute, which doth not hinder Leaſes to be made from a Day to come; but this Opinion is (*a*) denied to be Law, and ſeems alſo to be expreſly againſt the foregoing Caſes, where ſuch Leaſe to begin at a Day to come, there being then another Leaſe *in eſſe*, is condemned, though both did not exceed the Term of forty Years in the Whole.

Poph. 8.

(*a*) 1 Vent. 246. 3 Keb. 107. Carter 12, 15.

Rule 4. *That ſuch Leaſes are not to exceed three Lives or Twenty-one Years.*

A fourth Rule to be obſerved for making theſe Leaſes good in Law, is, that they do not exceed three Lives, or twenty-one Years, from the making thereof; therefore if a Biſhop makes a Leaſe for four Lives, and one of them dies in the Life of the Biſhop, ſo that at his Death there are but three Lives in Being, yet the Leaſe is void againſt the Succeſſor, becauſe being void by 1 *Eliz. cap.* 19. at the Time when it was made, no ſubſequent Accident can make it good.

10 Co. 61. b. 62. a.

So if a Leaſe be made for three Lives in this Manner, *viz.* to one for Life, Remainder to a ſecond for Life, Remainder to a third for Life, this Leaſe is void againſt the Succeſſor; becauſe, otherwiſe the two firſt would be diſpuniſhable of Waſte during their Lives, by reaſon of the intermediate Remainder; and ſo Dilapidations, and other Miſchiefs, which the Statutes intended to provide againſt, would be let in †.

Cro Car. 95. *Owen* and *Apprice*. Hetley 22.

† Qu. Nevertheleſs, if the two firſt would not be puniſhable for Waſte? See *infra*, 366.

So if an Archdeacon makes a Leaſe for three Lives, according to the Statutes, and the Leſſees make a Leaſe for 100 Years, which is confirmed by the Archdeacon, Biſhop, Dean and Chapter, yet ſuch Leaſe ſhall not bind the Succeſſor; or if a Biſhop makes a Leaſe for three Lives,

Lev. 74. *Biſhop of Hereford's* Caſe. 5 Co. 15. a.

*Page 351 * Lives, reſerving the ancient Rent, and they make a Leaſe for 100 Years, if three Men ſo long live, which is confirmed by the Biſhop and Chapter; yet may the Succeſſor avoid this Leaſe, and yet theſe are out of the Words of the Statutes; but if they are not to be conſtrued to be within the Meaning thereof, the Statutes would ſignify nothing, and all Eccleſiaſtical Perſons, by ſuch Evaſions, might get out of the Acts, and make what Alienations they pleaſed.

Cro. Jac. 76. *Baugh* verſus *Hains.* If a Leaſe be made to *A.* for the Lives of *B. C.* and *D.* this is a good Leaſe; for a Leaſe to one for the Lives of three others, and a Leaſe to three for their Lives, is all one, within the Intent of theſe Statutes; for three Lives are the Meaſure of the Eſtate, which is all the Statutes require; but a Leaſe for ninety-nine Years, determinable on three Lives, ſeems not good within the Statute of the 1 *Eliz. cap.* 19. & 13 *Eliz. cap.* 10. which make void all Eſtates, Gifts, Grants, &c. (other than for three Lives, or twenty-one Years) ſo that a Leaſe for ninety-nine Years, determinable on three Lives, being neither of thoſe, falls within the Diſability and Voidance of the firſt Part of thoſe Acts.

Cro. Car. 22. *Smith* verſus *Trinder.* But a Leaſe by Huſband ſeiſed of Lands in Right of his Wife, or jointly with his Wife, of an Eſtate of Inheritance for ſixty Years, if they ſhould ſo long live, was held ſufficient to bind the Wife ſurviving, within the 32 *H.* 8. *cap.* 28. and no Queſtion made of it; the only Diſpute there being, Whether the Wife ought to have joined in the Indenture of Leaſe; and that ſuch Leaſes for ninety-nine Years, determinable on three Lives, are good within that Statute, appears from the Reaſoning in (*a*) *Whitlock*'s Caſe; where it is adjudged, that if a Man has Power to make Leaſes abſolutely or generally (as the ſeveral Perſons compriſed in the Statute of 32 *H.* 8. *c.* 28. have) and a Proviſo or Reſtraint comes after, (as in that Act it does) that ſuch Leaſes ſhall not exceed the Number of twenty-one Years, or three Lives at the moſt; there a Leaſe for ninety-nine Years, determinable on two or three Lives, is good within the firſt Part of the Act, and not made void by the laſt Part thereof, becauſe it does not exceed the three Lives thereby allowed, though it be not directly for three Lives; but now a Leaſe for ninety-nine Years, determinable on three Lives, upon the Statutes of 1 *Eliz. cap.* 19 & 13 *Eliz. cap* 10. is juſt the Reverſe of this; for the firſt Part of theſe Acts makes void all Eſtates, Gifts, Grants, &c. by the Perſons therein mentioned, and the laſt Part ſaves only Leaſes for twenty-one Years, or three Lives, &c. ſo that this Leaſe being void by the firſt Part of theſe Acts, and not within the Saving of the laſt Part, being neither for twenty-one Years, or three Lives, ſhall not bind the Succeſſor within theſe Acts; *ſed Quære de hoc.*

(*a*) 8 Co. 70. & *vide* 3 Keb. 595.

Leon. 306. 5 Co. 6. b. 8 Co. 70. b. But though theſe Statutes provide that theſe Leaſes ſhall not exceed twenty-one Years, or three Lives, yet ſuch Leaſes for fewer Years, or Lives, are good; for the Intent of the Statute was only to abridge the Power of making long and unreaſonable Leaſes, by reducing them to ſuch a determinate Number of Years or Lives, which they ſhould not exceed, but might be made as much under as the Parties pleaſed.

Rule 5. *Of what Things Leaſes may be made to bind the Succeſſor.*

Co. Lit. 44. b. 47. a. 142. a. 144. a. 7 Co. 51. Leon. 333. Bro. Tit. *Leaſes*, 17, 21. Tit. *Grant*, 44, 59. A fifth Rule to be obſerved in making of Leaſes upon theſe Statutes to bind the Succeſſor, is, that they muſt be made of Lands or Tenements Corporeal and Manurable, whereto Reſort may be had for the Rent reſerved thereout by way of Diſtreſs; for otherwiſe the Succeſſor may be without any Remedy for the Rent, and ſo Dilapidations, Poverty, and all the other Miſchiefs the Statutes intended to provide againſt, be let in; therefore Leaſes of Fairs, Markets, Liberties, Franchiſes, Advowſons,

* ſons, Commons, Piſcaries, Offices, Hundreds, Tithes, or any other incorporeal Inheritance, though with Confirmation of the Dean and Chapter, or other Perſons required by Law to confirm the ſame, will not bind the Succeſſor. *Page 352

For the better underſtanding of this Rule, it will be neceſſary to take notice of ſome Diſtinctions, which plainly ariſe out of the Books.

1. All the Books agree that a Leaſe for three Lives of Tithes, or other incorporeal Inheritances before-mentioned, will not bind the Succeſſor, though the ancient Rent be reſerved, and the Leaſe or Grant confirmed; the Reaſon whereof is, that if ſuch Leaſe or Grant ſhould be good againſt the Succeſſor, he would then be without the Tithes, &c. and have no Remedy for the Rent thereon reſerved; for diſtrain he could not; becauſe there would be no Place wherein to take any Diſtreſs, the Things leaſed or granted being perfectly incorporeal and inviſible; an Aſſiſe he could not have, becauſe either he had not Seiſin, or, if he had, yet there would be nothing to put in View of the Recognitors; and an Action of Debt he could not maintain during the Leaſe, becauſe, being for three Lives, that is an Eſtate of Freehold, which will endure no Action of Debt ſo long as it continues; and ſo the Succeſſor would, in ſuch Caſe, have no Manner of Remedy for the Rent reſerved, which would be againſt the expreſs Proviſion and Intent of the ſeveral Acts. 5 Co. 3. *Jewel's* Caſe. Cro. Jac. 111, 173. Moor 778. Palm. 175. 2 Sand. 303. Hard. 326.

2. It is held likewiſe in ſome Books, that a Leaſe for twenty-one Years of ſuch incorporeal Inheritances, though they have been uſually demiſed, and the ancient Rent be thereout reſerved, that yet this is voidable by the Succeſſor within theſe Statutes; becauſe though the Rent reſerved be good by way of Contract between the Leſſor and Leſſee, and that Debt may be maintained for Recovery thereof; yet, they ſay, it is not ſuch a Rent as is incident to the Reverſion, nor ſhall paſs with it to the Succeſſor; and therefore the Succeſſor having no Remedy for the Rent, ſhall not be bound by the Leaſe. 5 Co. 3. Co. Lit. 44. b. 47. a.

But this Point ſeems to have been ſhaken by contrary Reſolutions ſince *Jewel's* Caſe, for ſome Books expreſly hold ſuch Leaſe for Years to be good againſt the Succeſſor; becauſe, they ſay, he has Remedy for the Rent by Action of Debt, and ſay, it has been ſo adjudged, and take the Diverſity between ſuch Leaſe for Years and a Leaſe for Life; alſo they ſay, that the Rent iſſues out of the Tithes in point of Render, though not in point of Remedy, becauſe no Diſtreſs can be taken for it; but that is ſupplied by the Action of Debt which lies for ſuch Rent, and ſhall devolve on the Succeſſor; and that ſuch Rent does not lie only in Privity of Contract, as a Sum in groſs, but is incident to the Reverſion, otherwiſe the Succeſſor could not have it, being only privy to the Eſtate, not to the perſonal Contracts of his Predeceſſor; and to this Opinion the Court inclined, but thought it a Point of great Conſequence, and therefore, to avoid it, gave Judgment on another Point which was clear. Cro. Jac. 112. Moor 778. Ley 76. Palm. 105. Hard. 326. Raym. 18. Lev. 108. 2 Sand. 304. Keb. 63. 2 Keb. 727.

3. All the Books agree that a Leaſe for three Lives, or twenty-one Years, of a Manor, with the Advowſon appendant, or of Lands or Houſes, and of Tithes uſually let therewith, reſerving the ancient Rent, &c. is good, and ſhall bind the Succeſſor within theſe Statutes; for though the Rent does not iſſue out of the Advowſon, Tithes, &c. in point of Remedy, yet the Rent is greater in reſpect thereof, and the Succeſſor has his Remedy for the whole Rent upon the Lands, or other Corporeal Inheritances let therewith; *ſed Quære*, if the Tithes ſhould be worth 2 or 300 *l. per Ann.* and the Lands not above 4 or 5 *l.* &c.) and *Vaughan* proves this from the expreſs Words of 13 *Eliz. cap.* 10. which are, That all Leaſes, by any Spiritual or Eccleſiaſtical Perſons, having any Lands, Tenements, Tithes or Hereditaments, (other than for twenty-one Years, or three Lives, &c.) ſhall be void; ſo that the Statute Cro. Jac. 453. Moor 201. 5 Co. 4. 2 Rol Abr. 451. Vaugh. 203, 204. 2 Sand. 303. Leon. 333. The Doubt and Difficulty here ſet forth is now remedied by Stat. 5. Geo. 3. c. 17. which ſee.——[By this Stat. Leaſes made, or to be made, by Eccleſiaſtical Perſons of Tithes, or other incorporeal Hereditaments, for Lives or Years, are declared good in Law.—And by ſ. 2. of the ſame Stat. Maſters and Fellows of Colleges, &c. are diſabled from granting Leaſes for longer Terms than their Statutes allow.]

plainly

*Page 353 *plainly ſhews, that ſome Way or other Tithes may be leaſed for twenty-one Years, or three Lives; and if they cannot be leaſed ſingly, it muſt be with Lands uſually letten therewith.

Lev. 333. *Corbet* and *Cleer*, cited. Therefore where the Dean and Chapter of *Norwich* leaſed a Parſonage and Common of Paſture, rendering Rent, and 1 *E.* 6. ſurrendered their Poſſeſſions to the King, and afterwards the King granted the Parſonage, without ſpeaking of the Common of Paſture; and it was held, that the Patentee of the Parſonage ſhould have all the Rent, and no Apportionment ſhould be in reſpect of the Common; becauſe all the Rent iſſued out of the Parſonage, and nothing out of the Common.

Cro. Eliz. 690. *Armiger* ver. *Biſhop of Norwich* and *Holland.* A Biſhop, having an Advowſon appendant to a Manor in Right of his Biſhoprick, grants the Advowſon for twenty-one Years, and this was confirmed by the Dean and Chapter, yet held within the Reſtraint of 1 *Eliz. cap.* 19. and void againſt the Succeſſor; becauſe, as was ſaid, it was not ſuch an Hereditament whereout a Rent could be reſerved; but a better Reaſon ſeems to be, becauſe no Rent was at all reſerved, and then, to be ſure, neither the Predeceſſor nor Succeſſor could have any Benefit thereof by way of Contract, or otherwiſe; nor did it appear to have been uſually letten.

Palm. 174. *Biſhop of Oxford's* Caſe. Co. Lit. 47 a. 142. a. 186. b. The Biſhop of *Oxford*, having *primam Veſturam ſive Tonſuram* of certain Lands, after 1 *Eliz cap.* 19. lets it to the Plaintiff for three Lives, rendering the antient Rent, and dies, and his Succeſſor, the now Defendant, enters upon him, and takes the Hay; and it was urged, that this was not like the Leaſe of a Fair, becauſe this concerned Land, and was to be taken upon the Land, and ſo the Succeſſor was not without Remedy, becauſe he might diſtrain the Graſs when it was cut; but *per Curiam* it was held, that if the Biſhop had had *Veſturam*, or *primam Veſturam*, or *Tonſuram*, from ſuch a Day to ſuch a Day, this had been ſuch an Hereditament as might have been leaſed; for there the Biſhop, or his Leſſee might have mowed, and after fed it, during that Time, and then the Succeſſor might have diſtrained the Cattle; but here the Biſhop had only *primam Veſturam*, *viz.* only the cutting of the Graſs once within ſuch a Time, and then his Intereſt is at an end, and he cannot after feed it; ſo that it is no Hereditament within the Statute, whereof any Leaſe can be made to bind the Succeſſor.

5 Co. 15. a. 10 Co. 60. b. Cro. Eliz. 207, 440. And. 241. Mod. 204. 2 Mod. 56. If a Biſhop, Dean and Chapter, or any other Perſon reſtrained by theſe Statutes, grant the next Avoidance of any Church which they have in Right of their Biſhoprick, Deanry, *&c.* though with Confirmation of all Perſons intereſted therein, yet the Succeſſor ſhall avoid it; for this is ſuch an Hereditament as the Statutes intended to reſtrain them from binding their Succeſſors by, and no Rent can be reſerved out of it; for ſuch Grant of the next Avoidance can bring no manner of Benefit to the Succeſſor.

4 Co. 24. Ley 80. Comp. Incumb. 253. *& vide* 3 Co. 7. Moor. pl. 276. It hath been ſeveral Times held, that Biſhops, or other Eccleſiaſtical Perſons, are not reſtrained either by the 1 *Eliz. cap.* 19. or 13 *Eliz. cap.* 10. from making Grants of Copyhold Lands in Fee, in Tail, or for Lives, or for any Number of Years, according to the Cuſtom of the Manor, and that no Confirmation is neceſſary to make ſuch Grants good, though they are made by a ſole Corporation, as by a Biſhop, Prebendary, *&c.*

Sav. 66. Leon. 4. 4 Leon. 117. *Heydon's* Caſe.

Dyer 370. b. 10 Co. 61. 5 Co. 15. Hob. 97. Rol. Rep. 164, 171. Cro. Car. 49. 11 Co. 69. The Biſhop of *Wincheſter*, 5 *Eliz.* with Confirmation of the Dean and Chapter, granted an Annuity or annual Rent out of Lands, Parcel of the Poſſeſſions of his Biſhoprick, with Clauſe of Diſtreſs to it, *pro Conſilio impenſo & impendendo pro Termino Vitæ ſuæ*, and dies; the Grantee brought Debt againſt the Executors of the Biſhop for Arrears incurred in his Life-time; and the only Queſtion was, Whether upon the 1 *Eliz. cap.* 19. this Grant was void againſt the Succeſſor, ſo that the Grantee could not maintain a Writ of Annuity againſt him, but only an Action of Debt againſt

*againſt the Executors of the Grantor; the Caſe does not appear to be adjudged, but it is cited in ſeveral Books, that the Annuity was determined by the Death of the Grantor; for though this was not Parcel of the Poſſeſſions of the Biſhoprick, but only iſſuing out of them, yet if the Succeſſor ſhould be charged with it, this would tend to his Prejudice and Impoveriſhment, which the Statutes intended to prevent. *Page 354

So where a Writ of Annuity was brought againſt the Succeſſor upon a Grant made by his Predeceſſor, and Confirmation by the Dean and Chapter, yet it was adjudged that it would not lie, becauſe it was not averred that it had been uſually granted, though it was averred to be reaſonable; and it appears by theſe Caſes, that if to avoid this Act a Writ of Annuity were brought againſt a Parſon or Vicar, who prayed in aid of the Patron and Ordinary, and upon Default Judgment is given for Plaintiff, this likewiſe is within the Equity of the ſaid Act, and void againſt the Succeſſor; ſo if a Writ of Annuity were brought againſt a Biſhop upon Title of Preſcription, or otherwiſe, and Judgment given againſt him by Verdict or Confeſſion, yet this is reſtrained by 1 *Eliz. cap.* 19 becauſe the Biſhop is charged with the Annuity in reſpect of the Biſhoprick; and therefore the Succeſſor would be charged with the Arrears incurred in the Life of the Predeceſſor, as it is held 48 *E.* 3. *cap.* 26. and ſo tend to the Diminution of the Revenues, and Impoveriſhing of the Church. 10 Co. 61. *Biſhop of Cheſter's* Caſe, cited 30 Eliz. *Rot.* 346. Ley 72. Bridg. 30. S. C. cited.

So if a Rent-charge be granted by any Corporation reſtrained by theſe Statutes, though this Rent-charge be not Parcel of their Poſſeſſions, yet it is againſt the Equity of the Statutes, and void againſt the Succeſſor; for if Biſhops, and other Eccleſiaſtical Perſons, were at liberty to grant what Rent-charges they thought fit, and that theſe ſhould be good and binding upon the Succeſſor, he might have his Poſſeſſions ſo clogged and incumbered, as not to be able to keep up Hoſpitality, or ſuſtain the Dignity of his Function, and ſo the good Deſign of theſe Acts be wholly eluded. 5 Co. 15. a. Rol. Rep. 171.

In Covenant Plaintiff declared of a Leaſe by the Predeceſſor of the Defendant, in which was a Covenant, that he and his Succeſſors would pay all Taxes during the Term, and aſſigns for Breach, that ſuch a Tax was made by Parliament for the Royal Aid, and that the Plaintiff was forced to pay it, the Defendant refuſing to diſcharge it, *unde Actio accrevit, &c.* and the only Queſtion was, whether this were ſuch a Covenant as ſhould bind the Succeſſor as incident to the Leaſe by 32 *H.* 8. *cap.* 28. for it is clear, if the Biſhop had made a Covenant or Warranty, this had not bound the Succeſſor at the Common Law, without the Conſent of the Dean and Chapter; and if it ſhould now be taken that every Covenant would bind the Succeſſor, the Statute of 1 *Eliz. cap.* 19. would be of no effect: But it was held, this Covenant would not bind the Succeſſor; 1. Becauſe it is not averred that ſuch Covenants had been uſed in former Leaſes, as it ought to have been, to prove it an ancient Covenant. 2. If this Covenant had been in former Leaſes, yet it could not bind to pay this new Tax by Parliament; but it muſt have been intended only of ſuch as were then in uſe, *viz.* Synodals, Penſions, Tenths granted by the Clergy, Procurations, *&c.* but it was held however, that this Covenant would not avoid the Leaſe. Vent. 225. 2 Lev. 68. 3 Keb. 69. *Davenant* ver. *Biſhop of Saliſbury.*

Of Grants of Offices by Biſhops, *&c.* within theſe Statutes, *vide* Tit. *Offices.*

*Page 355 * *Rule* 6. *What ſhall be ſaid a uſual Letting to Farm upon the ſeveral Statutes, and by what Perſons.*

A ſixth Rule to be obſerved in the Conſtruction of Leaſes upon theſe Statutes ariſes upon the Words of 32 *H.* 8. *cap.* 28. that *that Act ſhall not extend to any Leaſe of any Manors, Lands, Tenements, or Hereditaments which have not moſt commonly been letten to Farm, or occupied by the Farmers for the Space of twenty Years next before ſuch Leaſe thereof made.* The firſt Conſtruction that prevailed was, that this letting to Farm within the twenty Years ought to be by ſome Perſon who had an Eſtate of Inheritance therein; and therefore if the Heir in Tail were in Ward of the King for twenty Years, and during that Term the King, or his Grantee, made Leaſes of Lands of the Ward which had not been uſually letten or occupied in Farm for twenty Years before, this letting them to Farm by the King, or his Grantee, during the twenty Years Wardſhip, is not ſuch a letting to Farm within the Intent of the Statute, as will enable the Heir in Tail, when he comes of Age, to make a Leaſe for twenty-one Years, or three Lives, of thoſe Lands, to bind his Iſſue. So if ſuch Leaſe were made by Tenant by the Curteſy, Tenant in Dower, or the like, of Lands which before that Time had not been moſt uſually letten to Farm for twenty Years, their letting to Farm of ſuch Lands for the greater Part of twenty Years, will not impower the Iſſue in Tail, when he comes into Poſſeſſion, to make a binding Leaſe of ſuch Lands within the Intent of the Statute; for the Intent of the Statute was only to make good Leaſes of ſuch Parts of the Land as had been before uſually letten by thoſe who were Owners of the Inheritance, and beſt knew what was moſt proper to be let out, and what not, and therefore did not intend to eſtabliſh Leaſes made of any other Poſſeſſions than thoſe, which the Owners of an Eſtate of Inheritance therein had, for the greater Part of twenty Years, thought fit to leaſe to Farm; for if the Leaſes of Tenant in Dower, Tenant by the Curteſy, Guardian by Knight's Service, or ſuch like, who, having only a particular Eſtate therein, would be for making Money of it all, and letting out the Whole for Rent; if Leaſes made by ſuch for eleven or twelve Years, or more, according to the Time they lived or had Intereſt therein, ſhould be a letting to Farm within this Statute; then might the Iſſue in Tail, when he came into Poſſeſſion, make a Leaſe for twenty-one Years, or three Lives, of the Capital Meſſuage or Manſion-Houſe, or, perhaps, of the whole Eſtate, becauſe thoſe particular Tenants had ſo done for eleven or twelve Years, or more; and then if ſuch Tenant in Tail ſhould die the next Day, his Iſſue would not have a Houſe to put his Head in; which never was the Intent of the Statute.

Co. Lit. 44. b. Dyer 271. Degg 106.

So where the Temporalties of a Biſhoprick come into the Hands of the King, and he keeps them twenty Years, or more, and during that Time lets to Farm for eleven Years, or more, Lands which had not been before accuſtomably letten, and then appoints a Succeſſor, and reſtores him the Temporalities, he cannot by any Leaſe bind his Succeſſor, for thoſe Lands, which had no other Warrant for his leaſing thereof, than only that the King, whilſt the Temporalties were in his Hands, had let them to Farm for eleven Years or more; and he might have let the Biſhop's Palace, or the Demeſnes about it; and then if the Succeſſor might likewiſe make a binding Leaſe thereof for twenty-one Years, or three Lives, and ſhould die, or be removed ſoon, the Miſchief intended to be remedied by the Statute, in giving the Farmers a ſecure and laſting Poſſeſſion during their Leaſes, would introduce a much greater upon the Succeſſor, by ſhutting him out of all the Houſes and Lands belonging to the Biſhoprick for twenty-

Palm. 175-6. Biſhop of *Oxford*'s Caſe.

twenty-one Years, or three Lives; and ſo, inſtead of maintaining Hoſpi- *Page 356
tality, as the Books ſpeak, would occaſion nothing but Quarrels and Contentions; ſo, for the ſame Reaſon, a Letting to Farm by a Diſſeiſor or any other who has not a rightful Eſtate of Inheritance, though it be for the greater Part of twenty Years, is not a letting to Farm by ſuch a Perſon as will enable the Tenant in Tail, Biſhop, or other Perſon intended to be provided for by this Statute, to make any binding Leaſe of Lands which were not accuſtomably letten to Farm for the greater Part of Twenty Years, by thoſe who had a rightful Eſtate of Inheritance therein.

But as the Miſchief would be great, on the one Hand, to conſtrue the Statute in ſuch a Manner, as would impower the Perſons beforementioned to determine of what Parts and Poſſeſſions Leaſes might be made good and binding againſt the Succeſſors, Iſſues in Tail, and other Perſons intended to be bound by the Act; ſo, on the other Hand, a Conſtruction not leſs hurtful to them ſeems to have obtained upon the ſame Words of the Statute; which provides, *That it ſhall not extend to any Leaſe of any Manors, Lands, Tenements, or Hereditaments which have not moſt commonly been letten to Farm, or occupied by the Farmers for the Space of twenty Years next before ſuch Leaſe thereof made*; upon which Words it is held, that the Lands to be leaſed within that Statute muſt be ſuch, and ſuch only, as have been letten to Farm, or occupied for eleven Years, or more, at one or ſeveral Times within the twenty Years next before the Leaſe for twenty-one Years, or three Lives, to be made; ſo that if Lands have been formerly let to Farm never ſo long, or often, yet if the Tenant in Tail, or Biſhop, ſhould keep them in his own Hands fifteen or twenty Years, theſe Lands cannot be leaſed for twenty-one Years, or three Lives, to bind the Iſſue or Succeſſor, till they have undergone a Probation of twenty Years longer, and within that Time have been letten to Farm, or occupied by Farmers for eleven Years, or more; ſo if the Temporalties come to the Hands of the King, and he ſhould keep the Lands uſually letten in his own Hands forty or fifty Years, more or leſs, and then reſtore the Temporalties to the Succeſſor, he muſt then begin to let them to Farm, till they have run out in Farmers Hands eleven Years at leaſt, otherwiſe he can make no Leaſe for twenty-one Years, or three Lives, within this Statute. So if a Diſſeiſor after a Leaſe for twenty-one Years, or three Lives, expired, enter upon the Biſhop, or Tenant in Tail, and hold the Lands twenty Years, or more, and then the Biſhop, or Tenant in Tail, or their Iſſue or Succeſſor, enter, though theſe Lands were demiſeable, and actually demiſed, within the Statute, but juſt before the Diſſeiſor entered, yet now they cannot be again leaſed for twenty-one Years, or three Lives, till they have been in Farmers Hands for eleven Years at leaſt; and ſo it is in the Power of the King, the Diſſeiſor, nay of the Biſhop, or Tenant in Tail himſelf, to evade and elude the Intent of the Act, by keeping the Lands ten or twelve Years in their Hands; and though they die, or are removed preſently, yet the Succeſſor or Iſſue can have no Benefit of the Statute till after eleven Years at leaſt.

Co Lit. 44. b. Cro. Eliz. 708. *Mallet* and *Mallet*. Sir *John Mervyn*'s Caſe.

Theſe Reaſonings and Inſtances were preſſed and urged in a (*a*) Caſe by *Twiſden* and Chief Juſtice *Keeling*, againſt *Windham* and *Moreton*, and they thought them ſo conſiderable, that it put them upon finding out a more eaſy and natural Conſtruction.

(*a*) Where the Caſe was, that the Archbiſhop of *York* in 1604, made a Leaſe for three Lives, rendering the ancient Rent, in 1630, this Leaſe was ſurrendered, and the Lands remained unlet till 1662, when the Archbiſhop made a Leaſe thereof to the Plaintiff's Leſſor, rendering the ſame Rent as was reſerved in 1604, and died, and the then Archbiſhop entered, and let to the Defendant; and whether theſe Lands, not having been let ſince 1630, could be leaſed again, was the Queſtion; and *Twiſden* and *Keeling*, for the Reaſons herein mentioned, held they might. Lev. 212. Sid. 316, 416. Raym. 165. 2 Keb. 213. *Pemble* verſus *Stern*.

For

*Page 357 * For they held, that the Clauſe conſiſted of two Parts in the Diſjunctive, and if either of them were obſerved, it was ſufficient to warrant the Leaſing for three Lives, or twenty-one Years, within the Intent of the Statute; the Words are, that *that Act ſhall not extend to any Leaſe of any Manors, Lands*, &c. *which have not moſt commonly been letten to Farm*; this is the firſt Part of the Diſjunctive, and is general; the other Part is, *or occupied by the Farmers thereof by the Space of twenty Years*, &c. and they thought this the moſt natural and genuine Meaning of the Words, that the Lands to be leaſed muſt either be ſuch as have been moſt commonly letten, that is, ſuch as are not reputed Part of the Demeſnes of the Biſhoprick, or ſuch as have been occupied by the Farmers thereof by the Space of twenty Years, &c. that is, if the Biſhop has let out Part of his Demeſnes to Farm, and the Occupation of the Farmer has been approved for twenty Years together, as not any ways inconvenient to the Biſhop, the Statute will preſume that they are Lands fit to be let; and for the Authorities againſt this Opinion *Twiſden* ſaid, in *Mallet*'s Caſe, that Point came in unneceſſarily; and *Keeling*, that it came in on a fooliſh Argument, and therefore was of no great Weight; and ſo in Sir *John Mervin*'s Caſe, the Point never came in Queſtion, but only *dictum fuit pro Lege*; and for my Lord *Coke*, (though he were a grave and learned Man) yet he was not infallible, nor did he deſire to be accounted ſo, and this Opinion of his was not judicial, that if it had come to an Argument he might poſſibly have thought otherwiſe; for *Keeling* ſaid himſelf was of that Opinion, till he came to conſider the Caſe, and weigh the Inconveniencies of that Conſtruction; and it was ſaid, that Queen *Elizabeth* kept the Temporalties of the Biſhop of *Ely* above twenty Years in her Hands, and yet no Queſtion of his Leaſes after; and they ſaid likewiſe, that the Lord *Coke*'s Inference was falſe, and not warranted by the Statute, *viz.* that if it had been leaſed for eleven Years it would be ſufficient; for the firſt Part of the Statute, as to Leaſing, ſeems to refer to a more antient Time; alſo it was held, that if the other Conſtruction prevailed, theſe Lands, or any other which continued unlet for eleven Years, could never after be let again for twenty-one Years, or three Lives, becauſe they were not moſt accuſtomably letten, &c. by the Space of twenty Years, which makes it the more reaſonable to reject ſuch Conſtruction; *ſed Quære* if by letting them again to Farm for eleven Years, or more, the Power given by the Statute to leaſe for twenty-one Years, or three Lives, be not ſet up again; but *Quære* whether ſince as it appears before, the letting to Farm by the King, or a Diſſeiſor, &c. is not ſufficient within this Statute, whether likewiſe their keeping it in their Hands for eleven Years, or more, be of any Prejudice to the Biſhop, or his Succeſſors, or to the Tenant in Tail, or his Iſſue; for if the Statute only intended letting to Farm by the Biſhop or Tenant in Tail himſelf, then all the Objections before-mentioned ſeem to loſe their Force, unleſs where the Biſhop, or Tenant in Tail, keep the Lands undemiſed in their own Hands for eleven Years or more.

Cro. Eliz. 874. *Biſhop of Hereford* and *Story*. A Leaſe made by the Predeceſſor of the Plaintiff for three Lives, rendering Rent, and confirmed by the Dean and Chapter, and the Defendant claiming under it avers, that it was the uſual and antient Rent, and the Land uſually demiſed; the Plaintiff replies, that it was uſually before that Leaſe retained in the Hands of his Predeceſſors for Hoſpitality, and traverſes *abſque hoc, quod fuit magis uſualiter dimiſſa*, &c. and it was held a good Traverſe; for ſince 32 *H.* 8. *cap.* 28 appoints that the ancient Rent ſhall be reſerved, it is thereby implied that the Land ſhould have been uſually demiſed, otherwiſe the antient Rent cannot be reſerved.

Co. Lit. 44. b. 6 Co. 37. b. Cro. Jac. 76. 2 Jon. 29. Moor 759. Another Thing required by the Statute is, that theſe Leaſes be made of Lands uſually letten to Farm, &c. upon which Words it hath been adjudged,

Raym. 167. Sav. 66. Leon. 4. 4 Leon. 117.

* adjudged, that a Demiſe by Copy of Court-Roll is ſufficient; for that is in Judgment of Law but an Eſtate at Will; and without Queſtion, Lands demiſed at Will by thoſe who have the Inheritance, rendering Rent, are Lands accuſtomably letten to Farm within the ſaid Act; and ſo it was ruled 7 *Eliz.* in Sir *James Mervin*'s Caſe, where Tenant in Tail let a Copyhold by Indenture, rendering the ſame Rent as before, and held a good Leaſe within 32 *H.* 8. *cap.* 28. and *Williams* ſaid, he had known it thrice ſo adjudged in his Time, in the Caſe of Tenant in Tail. *Page 358

But where Tenant in Tail had Power, by a particular Act of Parliament, to make Leaſes for Life, Lives, Years or at Will, after the Cuſtom of the Manor, yielding the true and ancient Rent, *&c.* and he made a Leaſe both of Freehold and Copyhold by a Deed at Common Law, reſerving ſuch a Rent; this was held not to be warranted by the Statute as to the Copyhold, becauſe the Statute ſpeaks of Leaſes at Will by the Cuſtom of the Manor; which imports, that the Statute did not intend that Copyholds ſhould be demiſed otherwiſe than they were before the Statute, and that was by Copy of Court-Roll, not by a Leaſe for Years, and the Rent to be reſerved thereon was cuſtomary Rent, not Rent upon a Leaſe for Years at Common Law. Moor 199. 5 Co. 5. b. Lord *Mountjoy*'s Caſe.

Rule 7. What Rent is to be reſerved: And herein,

1. That there muſt be a Rent reſerved †.

† See *ante* 328, 9.

As to this the Statute is expreſs that a Rent muſt be reſerved; and therefore where the College of *All Souls* in *Oxford* made a Leaſe without Reſervation of any Rent, though it was but to try a Title, yet it was held void, the Statute being expreſs and poſitive; and therefore no Conſtruction or Pretence can be urged to avoid the Statute; but in that Caſe it did not appear that no Rent was reſerved, but only the Plaintiff had not ſhewn that there was any reſerved, and yet there might be, in the Leaſe; and if not, the Defendant ought to ſhew it; and ſo the Exception diſallowed. Moor 593. Leon. 306. *Carter* verſus *Claypole*. Sav. 128.

2. That this Rent muſt continue due, and be payable to the Leſſors and their Succeſſors.

This alſo is ſo ſtrictly required by the Statute: that it hath been held, that if a Biſhop, Tenant, in Tail, *&c.* make a Leaſe of Land, the ancient Rent whereof was 10*l.* and reſerve but 5*l.* *per Annum* during his Life, and 10*l.* *per Annum* after his Death, to the Iſſue or Succeſſor, yet this Leaſe ſhall not bind, becauſe the Rent originally reſerved was not purſuant to the Statutes; though there can be no Pretence of Prejudice to the Iſſue or Succeſſor, more than if the Biſhop, or Tenant in Tail, *&c.* ſhould releaſe the Rent, or any Part of it, during their own Lives, which ſurely they may do; *ideo Quære.*——[And yet perhaps the Determination is more conſonant to the Statute, and more advantageous to the Leſſor, than by a different Conſtruction, permitting to take a Fine, which he may ſoon ſquander away, and leave himſelf without an adequate Income.] 5 Co. 6. a.

3. That

*Page 359 3. That ſuch Rent muſt be the ſame, or more in Quantity than hath been reſerved within twenty Years next before ſuch Leaſe made: And herein,

1. What ſhall be ſaid to be the antient Rent, where Variety of Rents have been reſerved, or ſomething formerly reſerved now omitted or varied.

Hard. 325, 326. *Morice* ver. *Antrobus per Hale.*

As to this, where Variety of Rents have been reſerved, as formerly 10*l.* then 20*l.* then 30*l.* and laſtly 40*l. per Ann.* or *e contra* formerly 40*l.* then 30*l.* then 20*l.* and laſtly 10*l. per Ann.* the 10*l.* in the one Caſe, and the 40*l. per Ann.* in the other Caſe, are the Rents to be reſerved on any new Leaſe to be made; but with this Diverſity between Leaſes made by virtue of the ſeveral Statutes before-mentioned, and Leaſes by virtue of Powers in private Conveyances and Settlements; for upon Leaſes made by virtue of the ſeveral Statutes before-mentioned, this was the Meaſure immediately after theſe Acts paſſed, and muſt continue ſo ſtill; becauſe the ſame Acts being to warrant every ſucceſſive Leaſe as well as the firſt, there can be no Variation of the Rent in any other Leaſe to be made from the Rent, that, upon Conſtruction of thoſe Statutes, was in the firſt Leaſe, made by virtue thereof, ſettled to be the ancient and accuſtomed Rent, and conſequently the Variety of Rents in ſuch Leaſes muſt have been only before the Statutes; but upon Leaſes made by virtue of Powers in private Conveyances and Settlements at this Day, reſerving the old and accuſtomed yearly Rent, or the moſt ancient and accuſtomable yearly Rent, there the Rent reſerved on any Leaſe then in Being, or upon the Leaſe made laſt before ſuch Settlement or Conveyance, ſeems to be the Meaſure of the Reſervation upon any Leaſe after to be made by virtue thereof; for the Intent of ſuch Power, as well in ſuch Settlements as upon the ſeveral Acts before-mentioned, was only that they, who were to make Leaſes by virtue thereof, ſhould not put the Eſtate in any worſe Condition than it was at the Time of ſuch Settlement, or of thoſe Acts made, but keep it in the ſame Plight and Condition as it then reſpectively was; and the Rent reſerved laſt before the making of ſuch Settlement, or of thoſe Acts, may well be called old or ancient in reſpect of the new Rent to be reſerved on ſuch Leaſe, to be made after ſuch Settlement, or after thoſe Acts; but the Lord *Cowper*, in the Caſe of Lord (*a*) *Mohun* and *Orby*, ſeemed to make a Doubt of this Conſtruction of the Words *ancient and accuſtomable Rent*, and thought the laſt Rent no certain Rule to go by; for ſuppoſe it were leaſed once at a greater, and twice at a leſſer Rent, he thought the antient Rule muſt be that reſerved on the firſt Leaſe, for the two laſt may be made by a Tenant in Fee, who was not bound to reſerve the antient Rent, but might let it for nothing, if he pleaſed; but upon the 32 *H.* 8. *cap.* 28. or the ſame Words in private Powers, *viz.* ſo much yearly Rent, or more, as hath been moſt accuſtomably yielded or paid within twenty Years next before ſuch Leaſe thereof made; if a greater Rent had been reſerved before the twenty Years, yet the Reſerved within the twenty Years, though it were leſs, muſt be the Meaſure of the Reſervation upon Leaſes to be made by virrue of that Statute, or of private Powers, worded in the ſame Manner; but if within the twenty Years it had been let once at a greater, and twice at a leſſer Rent, then the Queſtion will remain, which of the Reſervations will be the Meaſure of the Rent to be reſerved on any two new Leaſes to be made: and how far the Opinion of my Lord Chancellor *Cowper* will outweigh the Opinions of my Lord Ch. Juſt. *Hale* and *Holt* is conſiderable, though their

(*a*) 2 Vern. 531, 542. Preced. Chan. 257. S. C.

Opinions

* Opinions ſeem to fix a ſtanding Rule to go by, whereas his leaves it at great Uncertainty, from which no Rule can be formed; for it may have been let twice formerly at a leſs Rent, and once on the laſt Leaſe, at a greater; and if the firſt Reſervation in this Caſe, being greater, ſhall be the Rule, why ſhould not the two firſt, in this Caſe, though they are leſſer; for his Reaſon ſeems to turn upon the Propriety and Antiquity of the Rent, ſo that the firſt Rent, according to his Opinion, and the laſt Rent, according to their two Opinions, are to be the Meaſure of the Reſervation. *Page 360

In ſome Caſes, Leaſes, by virtue of theſe Statutes, will be good, though there be an Omiſſion of Things formerly reſerved, or a Variation in the Rent reſerved in point of Time; therefore where the Dean and Chapter of *Worceſter*, were ſeiſed of the Manor of *H.* in Fee, in right of their Church, of which Manor one *G.* was Copyholder for Life, under the antient Rent of 8*s.* and 8*d.* payable at the four Quarter-Days of the Year, and heriot-able at the Death of the Tenant, and the Copyholds of that Manor were grantable by Cuſtom for three Lives; the Dean and Chapter 24 *Eliz.* by Indenture under their common Seal, demiſe the ſaid Lands to *G.* and his Aſſigns for the Lives of *A. B.* and *C.* and the Survivor of them, rendering 8*s.* and 8*d.* Half-yearly, and without Reſervation of any Heriot; and after this Leaſe made the Dean dies, and his Succeſſor and the Chapter enter to avoid this Leaſe upon 13 *Eliz. cap.* 10. (among other Reaſons,) 1. Becauſe the antient Rent was not reſerved by reaſon of the Loſs of the Heriot. 2. Becauſe the Rent was not payable, as it uſed to be; for before it was payable Quarterly, and now it is reſerved payable Half-yearly, which is not ſo beneficial to the Succeſſor; but it was adjudged, that notwithſtanding theſe Objections the Leaſe was good, and ſhould bind the Succeſſor; for the 13 *Eliz. cap.* 10. does not avoid any Leaſe, if the accuſtomed Rent or more, be reſerved; and here the accuſtomed Rent is reſerved, and the Omiſſion, or Loſs of the Heriot, is not material, becauſe that was not a Thing annual or depending upon the Rent, but perfectly caſual and accidental. 2. That though the Rent was formerly reſerved Quarterly, and now Half-yearly, yet the Leaſe is good, and ſo would have been if it had been reſerved only Yearly; for the Words of the Act are, *whereupon the accuſtomed yearly Rent, or more, ſhall be reſerved*; ſo that if the Rent be reſerved yearly, the Words of this Act are ſatisfied, and this Word *yearly*, not being in *Mountjoy*'s Caſe, makes the Difference; and yet this Rent had not all the beneficial Qualities the other Rent had; for whilſt it continued Copyhold, the Lord might have entered for a Forfeiture upon the Denial or Non-payment of the Rent, which now, upon this Leaſe thereof, at Common Law, he cannot do.

6 Co. 37. Cro. Jac. 76. Co. Lit. 44. b. Moor 759. Dean and Chapter of *Worceſter*'s Caſe.

5 Co. 4. b. 5. b.

If the Rent was antiently payable in Gold, and it is now reſerved payable in Silver, this Leaſe ſhall not bind the Succeſſor; for the Variation may be prejudicial to the Heir or Succeſſor, or by the Fall of Silver; and though the ſame may be ſaid were it reſerved in Gold, as it uſed to be, yet by continuing the Species of Reſervation formerly made, they have uſed all the Precaution the Statute required, and the accidental Fall after can be no ways imputed.

5 Co. 4. b. 5. b.

But if a Quarter of Corn was antiently reſerved, and now a Leaſe is made, reſerving eight Buſhels of Corn, this is good; for the Reſervation is the ſame both in Quality, Value and Nature, and differs only in Words.

5 Co. 4. b.

A Precentor or Chanter of St. *Paul's*, being ſeiſed of the Parſonage of *S.* in *Jure Cantariæ*, leaſed a Portion of Tithes for two Years, rendering 8 *l. per Ann.* and reſerving Paſturage for a Colt in the Land of the Leſſee, and the Leaſe being expired, his Succeſſor made a Leaſe for twenty-one Years of the ſaid Portion of Tithes, rendering 8 *l. per Ann.* but omitted the Running of the Colt; yet the Leaſe was held good, be-

Palm. 106. *Euſden* and *Dennis*.

cauſe

* Page 361 * cauſe it was a Thing reſerved out of the Lands of the firſt Leſſee only, which the Succeſſor could not reſerve, ſuch firſt Leſſee not being his Tenant of the Tithes; otherwiſe perhaps if the Reſervation had been general.

2. In what Manner ſuch Reſervation is to be made.

All that ſeems neceſſary here to be obſerved is, that there muſt be a particular Mention or Specification of the Sum intended to be reſerved, as well upon Leaſes to be made by virtue of theſe Statutes, as upon Leaſes by virtue of Powers in private Conveyances and Settlements; for otherwiſe the Heir, or Succeſſor, would be put to infinite Trouble, Vexation and Expence, if the Reſervation might be allowed to be made in the ſame or as general Terms, as the Power itſelf was; and the Neceſſity of averring and proving what was the antient and accuſtomable Rent to lie upon them.

Cro. Car. 95. *Owen* ver. *Thomas.* 3 Keb. 380. Therefore where a Biſhop was ſeiſed, in Right of his Biſhoprick, of three Manors which had been uſually let together at the Rent of 32 *l. per Ann.* and made a Leaſe of the ſaid three Manors, except ſuch and ſuch Parts thereof, rendering the antient uſual accuſtomed yearly Rent, and the Rents and Services at the Days and Times uſually accuſtomed, without ſpecifying any Rent or Sum in particular; it was adjudged that this Leaſe ſhould not bind the Succeſſor, becauſe the uſual and accuſtomed Rent was 32 *l. per Ann.* where all the ſaid three Manors had been let without any Exception; whereas now Part being excepted, that which was the uſual and accuſtomed Rent for the Whole, cannot be ſaid the uſual and accuſtomed Rent for Part; or when Part is excepted; and then the Reference being general to the ancient and accuſtomable Rent, nothing at all is reſerved, and by conſequence the Succeſſor not bound by ſuch Leaſe. This appears to be the Reaſon in the Book for the Avoidance of that Leaſe, and being ſufficient for the Purpoſe, there needed no other: But it will appear by the following Caſe, that if the whole three Manors had been let without any Exception, yet the Reſervation in ſuch general Terms would have been ſufficient to have avoided the Leaſe.

Trin. 1706. *in Canc.* Lord *Mohun* and *Orby.* Eq. Abr. 343. pl. 5. 2 Vern. 531, 542. Gilb. Eq. Rep. 45. Preced. Chan. 257. 3 Chan. Rep. 102. 10 Mod. 473. *Fitton Gerard*, Tenant for Life, the Power to make Leaſes for twenty-one Years, or three Lives, ſo as upon every Leaſe of ſuch Lands as have been uſually letten, and Fines taken for them, the old accuſtomed Rent, or more, be yearly reſerved, and ſo as upon every Leaſe of other Lands not uſually letten, or Fines taken for them, there be reſerved the beſt improved Rent that can be gotten for the ſame, and the Leſſees to execute Counterparts thereof. *Fitton* by Indenture 21 *Decemb.* 1702, demiſes to the Defendants all ſuch Lands as have been uſually letten, and Fines taken for them, for ninety-nine Years, if three Perſons ſhould ſo long live, with a Reſervation in theſe Words, *Yielding* and *Paying* therefore *the reſpective old and accuſtomed yearly Rents*; and if this Reſervation was purſuant to the Power, was the Queſtion; and my Lord Chancellor *Cowper*, being aſſiſted with the two Chief Juſtices *Holt* and *Trevor*, decreed, that this Leaſe was not good to bind the Remainder Man; but my Lord Chief Juſtice *Holt* differed in Opinion, and held this Leaſe good. 1. Becauſe the Reſervation being in the very Words of the Power, if the Power was good, the Reſervation muſt be ſo too, for the ſame Words muſt have the ſame Meaning in both; and if a Sum certain had been reſerved, yet it muſt have been averred to have been the antient and accuſtomable Rent, or more; and therefore this Reſervation, in the Words of the Power, may be helped by ſuch an Averment, and conſequently is good. 2. That if any of the Lands compriſed in this Leaſe had not been antiently let, tho' the Reſervation in ſuch Manner

as

* as to them, would be void, yet the Leaſe would remain good as to the others. 3. Though all the Lands were compriſed in this one Deed of Leaſe, yet the Remainder Man, who is to have all the Deeds in his Cuſtody, might eaſily diſtinguiſh them, as well as if they had been let by ſeveral Leaſes, as they were formerly. But my Lord Chancellor and *Trevor* held this Leaſe void againſt the Remainder Man, and not purſuant to the Power. 1. Becauſe it was never intended that the Words of the Power ſhould be turned *verbatim* into a Reſervation in Leaſes; and to ſay, that if the Words in the Power are good, they cannot be bad in the Reſervation, is a ſtrange Poſition. Suppoſe in the Power to make Leaſes it were provided, that in every ſuch Leaſe there ſhould be inſerted ſuch Covenants as are uſual in Leaſes in that County, and a Leaſe were made in the very Words of the Power, would this be good? Certainly not; nor could it be aided by any Special Verdict, finding the Covenants uſual in that County. 2. The Queſtion in this Caſe is not between the Leſſor and Leſſee, (between whom perhaps the Leaſe may be good, and the Rent recoverable;) but the Queſtion is, as to the Remainder Man, whoſe Remainder and Inheritance is to be charged by a Power which is to be taken ſtrictly, and is not purſued; for the Intent thereof was, that a certain Rent might be reſerved upon every Leaſe to be made, ſo that he in Remainder may know how to come at it, and form his Action for the Recovery thereof, which, as this Reſervation is, he cannot do, but will be involved in perpetual Controverſy and Uncertainty; for he muſt not only aver and avow that the Sum he diſtrains for is the antient Rent, but muſt alſo prove it; for if the Tenant can ſhew another more antient Rent, then he may nonſuit the Remainder Man, and ſo *toties quoties* he diſtrains or avows for any Rent, the Tenant by ſhewing that another Rent has been reſerved, may baffle him and keep the Land in ſpite of his Teeth, without any Rent at all, till he is ſo lucky as to hit upon the true Sum reſerved upon every ſeveral Leaſe, which will be very difficult for him in Remainder to do, and is no ways agreeable to the Power; but if a certain Sum had been reſerved, and the Counterpart ſhewn under the Tenant's Hand, he muſt either ſhew a more antient Rent, or it will be preſumed for the Plaintiff; and if he ſhould ſhew one more antient, the Conſequence of that will be the avoiding of his own Leaſe, which, to imagine he ſhould attempt, is abſurd; and without defeating of the Leaſe he can never avoid Payment of the Rent when it is reſerved in Certainty; but as it is reſerved here, it is wholly uncertain: and my Lord Chancellor ſaid it was the firſt Attempt that ever was made to delegate the Power generally that was to have been executed particularly, and was a new Invention tending to introduce Perjury, Forgery and Frauds, and therefore was not to be countenanced. * Page 361

So in the ſame Caſe, where Tenant for Life had made a Leaſe of the Lands not uſually letten, reſerving therefore the beſt and moſt improved Rents for the ſame, according to the Words of the Power; this was held ſo utterly uncertain, that nothing was offered to ſupport it. Lord *Mohun* ver. *Orby*.

But a Caſe was therein cited, where Mr *Venables* of *Cheſhire* had Power, by a Settlement, to make Leaſes of Lands antiently demiſed, reſerving, at leaſt, 12 *d.* for every *Cheſhire* Acre; and he made a Leaſe of all the Lands antiently demiſed, *reſerving all the Rent intended to be reſerved*; and though theſe Words were very general and uncertain in themſelves, the Reſervation was held good, becauſe it might eaſily be aſcertained by the Reference of 12 *d.* at leaſt, for every *Cheſhire* Acre, becauſe it is known what a *Cheſhire* Acre is; and that may by Admeaſurement be at all Times aſcertained, and depends not upon uncertain Evidence. *Lewſon* ver. *Piggot*.

A Precentor of St. *Paul's* made a Leaſe of Lands, the antient Rent whereof was 40 *l.* and a Couple of Capons, and he now reſerves only the 40 *l.* and takes a Covenant from the Leſſee to pay yearly, over and above Hard. 325-6. *Morrice* and *Antrobus*.

*Page 363 * the 40 *l.* a Couple of Capons, or 6 *s.* and 8 *d.* yet this was held such a Covenant as amounted to a Reservation, and therefore the Lease good against the Successor; but the Truth was, the Lease there was made to Baron and Feme, and the Baron only covenanted in that Manner, which would not bind his Wife if she survived; and for that Reason neither would the Successors be bound.

3. Where the Addition of more Land, with or without the Addition of more Rent, shall avoid such Leases.

Ley 74. 77. Cro. Eliz. 340, 341. *Tanfield* ver. *Rogers.* Tenant in Tail, or any Spiritual Person, in Right of the Church, seised of a Manor whereof the Copyholds and Services have not usually been let, but only the Freehold Demesnes, and they make a Lease of the whole Manor, reserving such a Sum only as amounted to the antient Rent; this Lease shall not bind the Issue or Successor; but the Reservation in that Case was several, *viz.* reserving the antient Rent in Certainty for the Lands antiently let, and another distinct Rent for the Copyhold and Services, not usually before letten; and therefore the Lease was good as to the Lands antiently let, because for them the antient Rent was reserved.

Cro. Jac. 458. 3 Bulst. 290. *Smith* ver. *Bele.* A Prebend usually let, with Exception of all Crab Trees, *&c.* at 17 *l. per Ann.* was now let for three Lives at that Rent, without the Exception, and adjudged that the Lease was void to bind the Successor, because there was more let than had been antiently; for by the Exception of the Trees, the Fruits and Boughs, and Soil itself, were excepted, which now by this Lease pass to the Lessee; and so more being let than formerly, it is not warranted by 32 *H.* 8. *cap.* 28. and then the Rent thereout reserved cannot be said to be the antient Rent, and by consequence is made void against the Successor by 13 *Eliz. cap.* 10.

5 Co. 5. Moor 197. Lord *Mountjoy*'s Case, [*vide infra* 365.] Co. Lit. 44. b. Tenant in Tail by special Act of Parliament having Authority to make Leases, *&c. Reddendo verum & antiquum Redditum*, makes a Lease of Lands antiently demised, and of an Acre of Waste not before demised, reserving the antient Rent, and so much more as the Acre of Waste was worth; and yet held, that this Addition of Acre of Waste spoiled the whole Lease, because the Rent being intire in the Reservation issued out of the Whole, and out of every Part thereof, and the Acre of Waste being never demised before, it could not be said *verus & antiquus Redditus*, which issued out of that which never before yeilded any Rent at all.

5 Co. 4, 5. Co. 139. Cro. Car. 23. 3 Keb. 380. If two Farms have usually been let severally, the one for 20 *l.* and the other for 10 *l.* and a Bishop Tenant in Tail, *&c.* makes a Lease of both together, rendering 30 *l. per Ann.* and dies, *&c.* this Lease shall not bind the Issue or Successor, for the antient Rent issuing formerly out of the two Farms severally, according to the aforesaid Proportion, now issues wholly out of each, and out of every Part of each; and where before the Rents were several, now they are entire; and it was said to be but Wantonness, to save Parchment and Paper, to join them together in one Lease, when they were usually, and ought to have been, let severally; and there was no Necessity or Colour of Convenience to join them in one Lease; and if he might join two, he might as well join twenty, which would be very prejudicial to the Successor, since it is a kind of Seignory and Prerogative to have several Tenants; therefore if 40 *l. per Ann.* had in that Case been reserved for the two Farms, which is 10 *l. per Ann.* more than the antient Rent of both; yet this shall not bind, not because more is reserved than the antient Rent, (for that the Statute allows,) but because by their being joined, if the Tenant should prove insolvent, the Loss would be greater upon the Issue or Successor.

Devisee

* Deviſee for Life, with Power to make Leaſes, whereupon the old and accuſtomed yearly Rent ſhall be reſerved, entered and built a new Houſe upon the Land, and then made a Leaſe for twenty-one Years, reſerving only the antient Rent, &c. and argued, that this could not be ſaid to be the antient Rent, becauſe Part of it is iſſuing out of the new Houſe; but the Juſtices would not ſuffer it to be argued, but held the Rent to be well enough reſerved. *Page 364 Leon. 147, 148. *Read* and *Naſh.*

4. Where a Reſervation of the whole Rent, or only *pro Rata* on a Leaſe of Part, ſhall be good.

On a ſpecial Verdict the Caſe was in Subſtance no more than this; A Biſhop ſeiſed of two Manors in Right of his Biſhoprick, which had uſually been let for 67 *l.* 1*s.* 5*d.* *per Annum*, now makes a Leaſe for twenty-one Years of one of thoſe Manors only, reſerving the whole Rent; and if this was a good Leaſe within the Statute 1 *Eliz. cap.* 19. was the Queſtion: The Objections againſt it were; 1. That the Remedy for the Rent was not ſo ample and beneficial as it was before; for before the Rent iſſued out of both, now out of one only, and the Statute is to be taken ſtrictly, to prevent Dilapidations and Decay of Spiritual Livings. 2. That this was not the old accuſtomed Rent, becauſe it did not iſſue out of the ſame Lands, but out of leſs; and if that be allowed, you may leave but a Moiety or Quarter Part, or but one or three Acres, to anſwer 100*l.* *per Annum*. 3. It was objected, that now the Biſhop could not leaſe the other Manor at all; for if for the antient Rent, perhaps it is not worth ſo much; if for leſs, it is not the antient Rent; or ſuppoſing he could leaſe the other Manor for leſs Rent, yet the antient Rent, which the Statute chiefly deſigned to provide for, will not be at all the better ſecured; for now being reſerved out of one Manor only, that will be the only Fund to anſwer it for the future; and if the Value of Lands ſhall fall, as probably they may, there will be no ſufficient Security or Diſtreſs for the old Rent, though perhaps the new Rent, being leſs, will be abundantly ſecured; and of this Opinion was *Vaughan* and *Ellis*; but *Atkins* and *Windham* held it a good Leaſe; and after the Death of *Vaughan*, *North* being of the ſame Opinion, it was adjudged a good Leaſe, and this Judgment affirmed in *B. R.* upon a Writ of Error; for the antient Rent being reſerved, the Statute is ſatisfied, and what is not in Leaſe is in the Biſhop's own Hands; and though the Diſtreſs for the antient Rent be not ſo large, yet the Biſhop cannot complain, having the Reſidue of the Lands in his own Hands, or out upon another Leaſe; and by *Wyndham*, if a Biſhop ſhould enlarge a Garden or Orchard, it would be unreaſonable ſo to tie him up, as to force him to hold the Reſidue of the Tenancy in his own Hands, and never ſuffer him to demiſe it again, becauſe he cannot reſerve the antient Rent, as that iſſued out of every Part of the old Land; but he agreed, that if the Biſhop in this Caſe had made a Leaſe of both Manors, reſerving the antient Rent out of one of them only, this would not have been good to bind the Succeſſor, becauſe he departed with the whole Land chargeable with the antient Rent, and yet confined the Succeſſor's Remedy for ſuch Rent to Part of the Lands only; but in this Caſe he having the Reſidue of the Lands in his own Hands, it is clearly out of the Miſchief of the Statute. Mod. 203. 2 Mod. 57. 3 Keb. 192, 372, 583, 595. *Threadneedle* ver. *Lynam.* 2 Vern. 411, 431, 596, 711, 746. Comyns 37. pl. 25. Wil. Rep. 655. pl. 187. Preced. Chan. 124. 3 Mod. 249, 252. 12 Mod. 249, 486. Gilb. Eq. Rep. 45, 64. 2 Stra. 1201. Ld. Raym. 267. 2 Salk. 537. pl. 1. 5 Mod. 244, 378. Carth. 427.

If Lands uſually let at ſuch a Rent deſcend to two Coparceners in Tail, each may let her own Part, reſerving Rent *pro Rata*; for it would be unreaſonable that the Frowardneſs or Perverſeneſs of one Siſter, in not complying to join in a Leaſe with the other Siſter, ſhould hinder them both from making Leaſes at all; and the Deſcent, which cauſed the Coparceny, was an Act of Law, which they could not prevent or 5 Co. 5. 6.

Page 365 hinder, and the Acts of Law do no Injury to any one. So if a Manor was uſually let at 10*s. per Annum* Rent, and a Tenancy eſcheats, and then a Leaſe is made of the whole Manor, reſerving 10*s. per Annum*, this is good, though the Rent iſſues alſo out of the Tenancy, and that never was in Leaſe before; but the Eſcheat was the Act of Law, and by that the Seignory being extinct ought not to turn to the Prejudice of the Lord; but if the Lord had purchaſed the Tenancy, he could never have leaſed it within 32 *H.* 8. *cap.* 28. or the other Statutes, becauſe the Purchaſe was his own Act, and therefore the Tenancy having never been leaſed before, no antient Rent can be reſerved thereout, no more than a Manor which had never been leaſed can now be leaſed by virtue of any of thoſe Statutes.

Co Lit. 44 b. 3 Keb. 379, 380. 5 Co. 4, 5.

The Books are not agreed, whether a Biſhop, Tenant in Tail, or any Spiritual Perſon, &c. of Lands uſually let for a certain Rent, may make a Leaſe of Part thereof, reſerving Rent *pro Rata*; but the better Opinion ſeems to allow of ſuch Leaſing, becauſe this in Effect is the antient Rent; and otherwiſe, perhaps, they could not Leaſe at all, if they had not a Power of dividing the great Farms; and *Mountjoy's* Caſe, which is contrary, they ſay, was adjudged upon a private Act of Parliament for enabling a particular Tenant in Tail to make Leaſes, which neither his Eſtate nor the Law would allow of (as the Leaſe there was for 300 Years,) but upon the other Statutes, if all the Circumſtances thereby required are obſerved, a Leaſe of Part, rendering a proportionable Rent, ſeems to have no Inconvenience in it, or be any ways againſt the true Meaning of the Statutes.

Rule 8. *That ſuch Leaſes muſt not be made without Impeachment of Waſte.*

Co. Lit. 44. b. 45. a. 6 Co. 37. a. *Dean and Chapter of Worceſter's* Caſe. Palm. 468. Comp. Incumb. 357.

The laſt Rule to be obſerved in making of Leaſes upon theſe Statutes is, that they muſt not be made without Impeachment of Waſte; and though this is expreſsly provided for in the 32 *H.* 8. *cap.* 28. only, yet it hath been reſolved upon the 13th *Eliz. cap.* 10. and held upon 1 *Eliz. cap.* 19. that the ſeveral Perſons therein reſpectively mentioned are by the Equity thereof reſtrained from making Leaſes diſpuniſhable of Waſte; for if, as the Preamble ſpeaks, long and unreaſonable Leaſes are the chiefeſt Cauſes of Dilapidations, and the Decay of all Spiritual Livings and Hoſpitality, much more would they be ſo if they were made diſpuniſhable of Waſte; and therefore thoſe Statutes being made to prevent ſuch unreaſonable Leaſes for the future, muſt by conſequence prohibit their Power of committing or ſuffering Waſte; but if Biſhops ſhould not be reſtrained by 1 *Eliz. cap.* 19. from making ſuch Leaſes, yet they muſt at leaſt be confirmed by the Dean and Chapter, otherwiſe they will be void by 32 *H.* 8. *cap.* 28.

11 Co. 49, 98 b. 3 Bulſ. 91. Moor 917. *Zaker's* Caſe. 2 Rol. Abr. 813. Hob. 36. *Drury* v. *Kent.* 3 Inſt. 304. Godb. 259. 2 Bulſ. 279.

And although they are confirmed, yet if the Leſſee ſhould go about to commit Waſte, he may be ſtopped by Prohibition, and attached if he perſiſt in it; for ſo may the Biſhop himſelf, or any Eccleſiaſtical Perſon, if they commit Waſte, either in cutting down the Timber Trees, or pulling down or defacing of the Houſes or Poſſeſſions of the Church; and ſuch Waſte is alſo a good Cauſe of Deprivation; and as the Biſhop or other Eccleſiaſtical Perſon, cannot juſtify the doing of ſuch Waſte, other than for Reparations, Fuel, or ſuch like Neceſſaries, no more can their Tenants or Leſſees, who derive under them.

Sid. 152. Lev. 107. Keb. 557. Count *de Rutland's* Caſe.

But where a Prohibition was moved for, to hinder a Parſon from digging of Lead and Coal-mines in his Glebe, the Court denied it, becauſe he having the Fee in him in as high a Manner as ever any Body will have it, if he cannot open the Mines, they will never be opened at all; nor is this

* this Opening of Mines any Cauſe of Deprivation by the Canon Law; and the Reaſon of prohibiting the cutting down of Trees in the Church-yard by 35 *E.* 1. *ſtat.* 2. is, becauſe they were planted in Defence of the Church, and alſo becauſe ſuch cutting them down is Waſte †; and it is ſaid in one Book, that the Parſon hath ſuch an Eſtate in him, that he may maintain an Action of Waſte, for Waſte in cutting down Trees by his Termors. *Page 366

† They may be cut down for the Repair of the Chancel or of the Church, by the Stat.

Note; Leaſes may be made without Impeachment of Waſte two Ways; 1. Expreſly by Words in the Leaſe, declaring the ſame: Or, 2. Impliedly by Conſtruction of Law; as if a Leaſe be made for Life, the Remainder for Life, this is diſpuniſhable of Waſte, and ſo not warranted by the Statutes; becauſe in Waſte the Place waſted is to be recovered, as well as treble Damage, which the Reverſioner in this Caſe cannot do, without deſtroying the intermediate Eſtate for Life. 6 Co. 37. Cro. Car. 95.

But if a Leaſe be made to one for three Lives, this Leaſe is good, becauſe it is not diſpuniſhable of Waſte, and the Occupant, if any happen, ſhall be puniſhed for Waſte within the Statute of *Glouceſter*, *cap.* 5. which gives an Action of Waſte againſt any one that held in any Manor for Term of Life or Years; and an Occupant in this Caſe holds for Term of Life. 6 Co. 37.

(F) Of Leaſes by Parſons, Vicars and others, with reſpect to other Qualifications.

AS to Leaſes made by Parſons, Vicars and others, having Benefices or Promotions with Cure of Souls, theſe Things are to be obſerved:

1. That Parſons and Vicars are expreſly excepted out of 32 *H.* 8. *cap.* 28. ſo that they are not, as other ſole Corporations, enabled by that Statute to make any Leaſes to bind their Succeſſors without the Confirmation of the Patron and Ordinary, but remain as they did perfectly at Common Law, for any Thing in that Statute. 2. That they are not reſtrained by 13 *Eliz.* *cap.* 10 from making Leaſes for twenty one Years, or three Lives; but then ſuch Leaſes muſt not only be confirmed by the Patron and Ordinary, but muſt alſo be made with Conformity to the eight Rules or Qualities mentioned, otherwiſe they will not bind the Succeſſor. 3. They, as well as others, are reſtrained by 13 *Eliz.* *cap* 10. from making Leaſes for any longer Time, notwithſtanding any Confirmation or Conformity to the Rules before-mentioned. Co. Lit. 44. Comp Incub. 359.

But it is neceſſary that the Leſſor be a Prieſt; for if a mere Layman be inſtituted and inducted to a Benefice, and make a Leaſe for twenty-one Years, or three Lives, which is confirmed by the Patron and Ordinary, and then the Incumbent is deprived *quia mere Laicus*; yet the Leaſe remains good, and ſhall bind his Succeſſor, becauſe it was made by a *Parſon de Facto pro Tempore*, whereof the Law takes Cognizance by the Solemnity of his Inſtitution and Induction; and the People can take notice of no other. So if the Parſon were after deprived for contracting of Matrimony when the Law was that Prieſts could not marry, or for not reading the Articles within two Months, *&c.* yet their Leaſes being confirmed by the Patron and Ordinary remain good againſt the Succeſſor, as well ſince the Statutes before-mentioned, as they did at Common Law before the making thereof, becauſe being made by a lawful Incumbent *pro Tempore exiſtente*, they ought not to be impeached by any ſubſequent Act or Neglect of the Parſon. Moor, pl. 836. Cro. Eliz. 775. Rol. Abr. 476. Dyer 292, 293.

But

*Page 367 Cro. Jac. 552. Palm. 22. Biſhop of *Oſſory*'s Caſe.

* But if he who makes ſuch Leaſe be but a ſuppoſed Incumbent, or be in a Church by a Super-Inſtitution, or the like ſeeming Title, and ſo be reputed the legal Incumbent, he cannot make a Leaſe to bind after his Death, or the Death of the true Incumbent; therefore where *A.* was made lawfully Biſhop of *Oſſory* in the Time of *Edw.* 6. and after, in the Time of Queen *Mary*, *B.* was conſecrated Biſhop of that Dioceſe, living *A.* who was not deprived, and then *B.* made a Leaſe of Parcel of the Poſſeſſions of the Biſhoprick, and then *A.* died, and *B.* ſurvived him about three Years; yet after his Death it was adjudged, that this Leaſe ſhould not bind the Succeſſor, becauſe it was a voluntary Act, and tended to the impoveriſhing of the Succeſſor, and *A.* not being deprived, continued Biſhop ſtill; ſo that the Conſecration of *B.* was a mere Nullity, and never made him Biſhop of that Dioceſe; but yet they held, that all judicial Acts done by *B.* as Inſtitutions, Certificates, *&c.* were good, becauſe they were neceſſary, and could then be performed by no other.

Bro. Tit. *Leaſes* 68.

So if one were appointed Biſhop of a Dioceſe, but never ordained or conſecrated, (as, it is ſaid, in the Time of *Ed.* 6. ſome were not) then Leaſes made by ſuch Biſhops, though confirmed by the Dean and Chapter, will not bind their Succeſſors, becauſe for want of Ordination and Conſecration they are no Biſhops at all, and conſequently their Acts null and void in themſelves; but if one were lawful Biſhop at the Time of making ſuch Leaſe, no Deprivation after will avoid the Leaſe, becauſe there was nothing wanting when it was made, and the Deprivation after ſhall not impeach that which was good in itſelf before.

Bro. Tit. *Age* 80.

If the Incumbent, be he Clerk or Layman, were under the Age of twenty-one Years at the Time of making a Leaſe, yet ſhall not his Succeſſor avoid it for this Cauſe, if there was nothing elſe wanting; for though he ought not to have been admitted under Age, yet after ſuch Admiſſion he continued rightful Parſon till deprived, and then all Acts done by him in the mean Time continue good and unavoidable; alſo in his Politick Capacity, as Parſon, his Age is not material nor imputable.

Though Leaſes made by Parſons or Vicars be in all Reſpects well made, yet by Non-reſidence they become void by virtue of the Statute 13 *Eliz. cap.* 20. which is as followeth; *viz.* "That the Livings appointed for "Eccleſiaſtical Miniſters may not by corrupt or indirect Dealings be "transferred to other Uſes, be it enacted, That no Leaſe hereafter to be "made of any Benefice or Eccleſiaſtical Promotion with Cure, or any Part "thereof, and not being impropriated, ſhall endure any longer than while "the Leſſor ſhall be orderly reſident, and ſerving the Cure of ſuch Benefice, "without Abſence above eighty Days in any one Year, but that every "ſuch Leaſe immediately upon ſuch Abſence ſhall ceaſe and be void, and "the Incumbent ſo offending ſhall for the ſame loſe one Year's Profit of "his ſaid Benefice, *&c.* and that all Chargings of ſuch Benefices with Cure "with any Penſion or Profit out of the ſame to be yielded or taken, other "than Rents upon Leaſes to be made according to the Meaning of this "Act, ſhall be utterly void: Provided, that every Parſon, by the Laws "of this Realm allowed to have two Benefices, may demiſe the one of "them, upon which he ſhall not be then moſt ordinarily reſident, to his "Curate only that ſhall there ſerve the Cure for him; but ſuch Leaſe ſhall "endure no longer than during ſuch Curate's Reſidence without Abſence "above forty Days in any one Year.

2 Rol. Abr. 465. Yelv. 106. 1 Brownl. 208.

This Statute, though it extends only to thoſe who have the Cure of Souls, yet by reaſon of the Multiplicity of Parſonages and Vicarages in *England*, hath been held to be a general Law, whereof the Judges are bound to take Notice, without pleading of it.

4 Co. 120. Yelv. 106. Brownl. 208. *Jenning* ver. *Haithwait.*

Upon an Action of Treſpaſs brought, and Not guilty pleaded, the Jury found the Defendant Vicar of *D.* and that he ſuch a Day leaſed his Vicarage to *J. S.* for three Years, rendering Rent, which *J. S.* aſſigned

one

*one Acre, Parcel thereof, to the Plaintiff, and that the Defendant was abſent ſeveral Quarters in one Year, *viz.* ſixty Days in ſeveral Quarters, and it was adjudged for the Defendant, that this was ſuch an Abſence as avoided his own Leaſe within that Statute. *Page 368

So it is ſaid to have been adjudged, that if a Parſon be abſent at ſeveral Times, *viz.* ten Days at one Time, and twenty Days at another, and ſo till eighty Days be fulfilled in one Year, that this is ſuch a Non-reſidence within the Statute as ſhall avoid his Leaſe. Noy 116. *Sidner* ver. *Calvert.*

And yet where it was found by Special Verdict, that a Parſon made a Leaſe of his Glebe and Tithes, and was abſent by the Space of eighty Days in a Year; yet becauſe it was alſo found that he did upon all Occaſions reſort to his Pariſh, and performed Divine Service in the Church four Days in a Week, and duly ſerved the Cure thereof, though he lived in another Pariſh, which was a Non-reſidence within the Statute *H.* 8. † yet this was not ſuch a Non reſidence as ſhould avoid his Leaſe within the Statute of 13 *Eliz. cap.* 20. for that they held muſt be a Non-reſidence for eighty Days together at one Time in the Year. Bulſ. 111. *Sheppard* ver. *Twanlie.* † V. 21 H. 8. c. 13. & 28 H. 8. c. 13. Alſo, 25 H. 8. c. 16 & 33 H. 8. c 28.

By this it appears, the ſureſt Way to avoid the Leaſe (if the Caſe will bear it) is to alledge the Abſence for eighty Days together, becauſe then the Cure muſt moſt certainly be neglected; but ſince it alſo appears, that if the Cure were not neglected, though the Abſence were for eighty Days in a Year at ſeveral Times, that this ſhould be no Avoidance of the Leaſe; therefore the other Caſes, which hold the Abſence at ſeveral Times, till eighty Days be accompliſhed in a Year, ſufficient to avoid the Leaſe, muſt be intended ſuch an Abſence as was accompanied with the Neglect of the Cure; otherwiſe the Caſes will not be conſiſtent and uniform. Degg. 126.

And note; Where any Leaſe becomes void for Abſence above eighty Days, no Confirmation of the Patron and Ordinary can ſave it. Degg. 126.

If an Information be brought on the Statute 13 *Eliz. cap.* 20. or if that Statute be pleaded to avoid a Leaſe, Bond or Covenant, for the Enjoyment thereof, it ought to be ſaid, not that the Incumbent was abſent, but alſo that he was abſent eighty Days & *ultra*; for to ſay eighty Days, and nothing more, is not ſufficient within this Statute, which ſays above eighty Days; for he may be abſent eighty Days, and come again in the Night of the 80th Day; and if ſo, he is no Offender within this Statute, and therefore it ought to be expreſly alledged, and not by Implication. Cro. Eliz. 88. *Goſnal* and *Kindlemarſh.* Cro. Eliz. 490. Earl of *Lincoln* ver. *Hoſkins.*

So it muſt alſo be ſaid, that he was abſent eighty Days & *ultra* in a Year; otherwiſe it will not be good, for ſo is the Statute expreſly. 3 Bulſ. 202. *Rudge* and *Thomas.*

Alſo it muſt be ſhewed that the Incumbent was voluntarily abſent; for if he were abſent, or did not ſerve the Cure, by reaſon of Sickneſs, Suſpenſion, or becauſe he was inhibited by the Ordinary from ſerving the Cure, or was ejected by any out of the Parſonage Houſe, or upon the Account of any other Reſtraint, this is no ſuch Abſence as will avoid any Leaſes, &c. within theſe Statutes. Cro. Eliz. 590. Moor 540. 6 Co. 21. *Butler* and *Goodal.* Cro. Eliz. 100. *Collins* ver. *Vaughan.*

Theſe laſt Caſes prove the Unreaſonableneſs of the Conſtruction that has been made of this Statute in the following Caſe; where a Parſon, after 13 *Eliz. cap.* 20. made a Leaſe to one, for twenty-one Years *a die confectionis*, of Lands uſually letten, rendering the antient Rent, and this was confirmed by the Patron and Ordinary; then the Parſon died; and the Queſtion was, if his Death was ſuch a Non-reſidence as that eighty Days after being incurred ſhould avoid the Leaſe. *Moor* reports this Caſe, that the Judges were divided in it, and that though Judgment was given againſt the Deſendant, Under-Leſſee of *A.* in an Action of Debt brought by *A.* for the Rent; yet the Reaſon of it was for his Miſrecital of the Statute, whereby he would have avoided the Leaſe to *A.* and conſequently the Under-Leaſe to himſelf; but *Cro.* reports the Caſe to be adjudged, that Cro. Eliz. 123. Moor 270. *Mott* and *Hales.*

the

*Page 369 *the Death of the Parſon was a Non-reſidence within that Statute to avoid his Leaſes; for they ſaid, the Intent of the Statute was to provide againſt Dilapidations, and for Maintenance of Hoſpitality, and therefore muſt be intended to avoid Leaſes, not only for Non-reſidence, but alſo by the Death or Reſignation of the Parſon, for otherwiſe Dilapidations would be in the Time of the Succeſſor, and he could not maintain Hoſpitality; and *Hale* ſays, this was adjudged, as it is reported by *Cro* by the Opinion of three Judges againſt one, but, ſays it was a hard Opinion; and therefore (*a*) where the ſame Point came in Queſtion, it was adjudged that the Death of the Parſon was not ſuch a Non-reſidence as ſhould avoid a Leaſe duly made. 1. Becauſe the Intent of the Statute was only to oblige the Parſons to Reſidence, by impoſing a Forfeiture upon them of a Year's Value of their Benefices if they did not reſide, which could not be, if Death were a Non-reſidence within that Statute; for immediately, upon the Death of the Incumbent, all the Profits of the Living, except for Supply of the Cure in the Vacation, belong to the Succeſſor; how then could the Biſhop ſequeſter them for the Uſe of the Poor, for a whole Year, as the Statute directs. 2. It is plain the Statute meant a wilful Negligence, becauſe it ſays, *the Party ſo offending*; but Death is involuntary, and cannot be puniſhed; and a Perſon who is dead cannot be abſent, for he is not *in eſſe*. 3. The Statute of 14 *Eliz. cap.* 11. which allows Leaſes of Houſes in Market-Towns for forty Years, would be of no Effect, if Death ſhould be interpreted a Non-reſidence to avoid them. 4. The Confirmation of the Patron and Ordinary would be to no Purpoſe, and their Permiſſion to make Leaſes for twenty-one Years or three Lives, with ſuch Confirmation, would be vain and idle, if ſuch Leaſes ſhould continue no longer than during the Parſon's Life, for he might have made them good during his own Life, without any ſuch Permiſſion or Confirmation. 5. Theſe Caſes above cited prove that the Non-reſidence, within this Statute, muſt be ſuch as is voluntary; and therefore Sickneſs, Inhibition by the Ordinary, *&c.* which are involuntary, are a good Excuſe of Non-reſidence within this Statute, and ſo have been allowed.

(*a*) 2 Lev. 61. Vent. 244. 3 Keb. 46, 107, 193. *Bayly* and *Munday*.

(*b*) 14 Eliz. c. 11. ſ. 15, 16. But for as much as ſeveral Evaſions were found out to fruſtrate and elude the true Intent of the ſaid Statute of 13 *Eliz. cap.* 20. therefore by another (*b*) Act of Parliament it was provided as followeth, *viz.* "That where ſundry evil diſpoſed Perſons have defrauded the true "Meaning of the laſt mentioned Statute, by Bonds and Covenants, of "ſuffering other Perſons to enjoy Eccleſiaſtical Livings, and the Fruits "thereof, for that ſuch Bonds and Covenants are not in Law taken to be "Leaſes, although indeed they amount to as much; be it therefore enacted, That all Bonds, Contracts, Promiſes and Covenants hereafter to "be made, for ſuffering or permitting any Perſon to enjoy any Benefice "or Eccleſiaſtical Promotion, with Cure, or to take the Profits or Fruits "thereof, (other than ſuch Bonds and Covenants as ſhall be made for "Aſſurance of any Leaſe heretofore made) ſhall, to all Intents and Purpoſes, be adjudged of ſuch Force and Validity, and not otherwiſe, as "Leaſes by the ſame Perſons, made of ſuch Benefices and Eccleſiaſtical "Promotion, with Cure; and be it further declared and enacted, That "all Leaſes, Bonds, Promiſes and Covenants, of and concerning Benefices "and Eccleſiaſtical Livings with Cure, to be made by any Curate, ſhall "be of no other or better Force, Validity or Continuance, than if the "ſame had been made by the beneficed Perſon himſelf, that demiſed, or "ſhall demiſe the ſame to any ſuch Curate.

(*c*) 43 Eliz. c. 9. And by another (*c*) Act for Continuance of the ſaid Statutes of 13 *Eliz. cap.* 20. and 14 *Eliz. cap.* 11. there is another Clauſe, by way of Addition, "That all Judgments to be had, for the Intent to have "and enjoy any Leaſe contrary to the ſaid Statutes, ſhall be deemed

"void

"void, in ſuch ſort as Bonds and Covenants are appointed to be void *Page 370
" for that Purpoſe."

The Statute of 13 *Eliz. cap.* 20. as appears by the expreſs Words thereof, extends only to Leaſes to be made after that Statute; therefore where a Parſon made a Leaſe for ſixty Years before the 13 *Eliz.* which was confirmed by the Patron and Ordinary, and then the Parſon died, and his Succeſſor, after the Statute of 14 *Eliz. cap.* 11. gave a Bond that the Leſſee ſhould enjoy the Leaſe during the Term, and after became Non-reſident for above eighty Days in one Year, and ſo would have avoided both the Leaſe and the Bond; yet in an Action of Debt brought thereupon, it was adjudged that neither of them were within either of thoſe Statutes; for as to the Leaſe, that being made and duly confirmed before 13 *Eliz. cap.* 20. was good at Common Law; and then the Bond given for Enjoyment of ſuch Leaſe, though it were given after 14 *Eliz. cap.* 11. yet it was neither within the Words nor Intent of that Statute, which extends only to Bonds given after that Statute, for Enjoyment of Leaſes, contrary to 13 *Eliz. cap.* 20. which this Leaſe, that was made before, cannot be ſaid to be; nor could the Succeſſor himſelf avoid this Leaſe, and then the Bond given for the Enjoyment thereof cannot be unlawful.

Alſo the ſaid Statute of 13 *Eliz. cap.* 20. extends only to avoid Leaſes for Non-reſidence or Abſence for above eighty Days in one Year, and the Statutes of 14 *Eliz. cap.* 11. and 43 *Eliz. cap.* 9. avoid only Bonds, Covenants, Promiſes and Judgments, made or given for Enjoyment of Eccleſiaſtical Livings or Benefices, become void for ſuch Non-reſidence or Abſence, and not where the Living, *&c.* became void by Death, Reſignation or Deprivation, *&c.* which are Voidances at Common Law. Comp. Incumb. 361, 264.

Therefore where a Parſon covenanted with *A.* that he ſhould have his Tithes for thirteen Years abſolutely, without ſaying, if he ſhould ſo long live, and continue Incumbent, and afterwards, before the Expiration of the Term, reſigned his Benefice, and ſo became abſent or non-reſident for above eighty Days; and his Succeſſor, after Induction, ouſted *A.* of the Tithes, upon which he brought an Action of Covenant againſt the firſt Parſon, who pleaded the Statute of 14 *Eliz. cap.* 11. in bar; but it was adjudged by *Coke*, *Dodderidge* and *Haughton*, that though this Leaſe was void by the Reſignation, yet the Action well lay upon the Covenants in the Leaſe, for the 13 *Eliz. cap.* 20. avoids Leaſes only where the Parſon becomes abſent or non-reſident for above eighty Days in a Year; and the 14 *Eliz. cap.* 11. as appears by the Preamble, intended only to avoid Bonds, Covenants and Promiſes, made or given for the Enjoyment of Eccleſiaſtical Livings, or the Fruits thereof, upon Pretence that they were not Leaſes within the ſaid Statute 13 *Eliz. cap.* 20. and enacts, that they ſhall be of ſuch Force and Validity, and not otherwiſe, as Leaſes by the ſame Perſons would have been, and ſo extends to Avoidance thereof for Abſence, or Non-reſidence, for above eighty Days only, as the other Act did the Leaſes themſelves; but this Reſignation was an immediate Voidance of the Leaſe at Common Law, and an Action thereby attached in the Leſſee, immediately for Breach of the Covenant before the Avoidance, by Abſence or Non-reſidence for above eighty Days, by force of the Statute had incurred; and theſe Statutes did not intend to intermeddle with Avoidances at the Common Law, but left them as they were before, and by conſequence this Reſignation, which defeated the Intereſt of the Leſſee at Common Law, was a Breach of the Covenant, for which the Action well lay; ſo they held if the Parſon had died, or been deprived, *&c.* which would alſo in conſequence have defeated the Intereſt of the Leſſee; yet an Action of Covenant would have well lain againſt him or his Executors, becauſe the Covenant was abſolute, and this Avoidance of his Intereſt was an Avoidance at the Common Law, and not by force of either of theſe Statutes; and then 3 Bulſ. 202. Rol. Rep. 403. *Thomas* ver. *Rudge.*

at

*Page 371 * at Common Law ſuch Leaſe or Covenant is good, and the Parſon, at his Peril, is to take care that the Leaſe or Covenant be made good according to his Agreement; as if Tenant for Life covenants that another ſhall enjoy his Lands for Twenty-one Years, and afterwards commits a Forfeiture, yet he ſhall be bound by his Covenant.

Brownl. 125. *Wheeler* and *Heydon*, *per Haughton*. But if a Parſon makes a Leaſe for thirty or forty Years, if he ſo long live, with Covenants for Enjoyment thereof accordingly, this ſo qualifies the Leaſe and Covenant, that though his Death will determine the Leaſe, yet it will be no Breach of the Covenant; but yet by ſuch Leaſe and Covenant he takes upon him to do no other Act whereby to avoid the Leaſe; therefore if he reſigns, or otherwiſe voids the Living, an Action of Covenant will lie againſt him; but if this Clauſe were added, *viz.* and ſhall ſo long continue Parſon, then this Clauſe leaves him at liberty to avoid it by Reſignation, Non-reſidence, or otherwiſe, becauſe it qualifies the Leaſe to continue no longer than whilſt he continues Parſon, and in the mean Time leaves it in his Election how long or ſhort a while that ſhall be.

Moor 641. *Webb.* ver. *Hargrave*. A Clerk entered into an Obligation, the Condition of which was, that he being preſented, inſtituted and inducted to a Benefice then void, ſhould, upon Requeſt of the Patron, reſign; and he afterwards made a Leaſe to the Patron, and then became abſent for above eighty Days together, whereby the Leaſe became void; and then being requeſted by the Patron to reſign, which he refuſed, the Patron brought an Action of Debt upon the Bond, to which the Defendant pleaded the Statutes of 13 *Eliz. cap.* 20. & 14 *Eliz. cap.* 11. (*ante* 369.) and that after his Induction he let the Leaſe to his Patron the Plaintiff, and then was abſent above eighty Days together, and averred that the Obligation was made for the enjoying of the Benefice let by the ſaid Leaſe, and to the Intent to compel him not to avoid the Leaſe by Abſence, for fear of being required to reſign, and demanded Judgment, *&c.* upon which the Plaintiff demurred; and the whole Court held the Plea good, and the Averment to be very apt, becauſe the Obligation being made generally to reſign upon Requeſt, might well be averred to be for this particular Purpoſe, and ſo void.

Cro. Eliz. 88, 490. This Caſe fully proves, that the Bonds which have been attempted and taken from Parſons upon making Leaſes, with Condition that they ſhould duly ſerve the Cure, and not being abſent from their Benefice by the Space of eighty Days, when they appear, or can be averred to be given for Security of Leaſes made by ſuch Parſons, will be void within theſe Statutes, and no Recovery allowed thereupon; but Bonds, with Condition not to reſign, or do any other Act which ſhould cauſe an Avoidance at Common Law, though they are made for Security of ſuch Leaſes, yet they will be good and binding, unleſs the Parſon can ſhew an Avoidance by Abſence for above eighty Days, and alſo aver that the Bond was given to prevent ſuch Avoidance; for otherwiſe, if the Leaſe becomes void by Reſignation, or other voluntary Act of the Parſon, (except ſuch Abſence for above eighty Days) the Bond is preſently forfeited at Common Law; and the Statutes will no more relieve upon account of any Abſence after, than they would againſt a Covenant for that Purpoſe; but if ſuch Bonds were given, with a Condition in the Diſjunctive, not to be abſent above eighty Days, nor to reſign or do any other Act, which ſhould cauſe an Avoidance of the Leaſe at Common Law, *Quære*, whether the whole Bond be abſolutely void, or if it ſhall be good or bad, according as the Avoidance firſt happens to be either upon theſe Statutes or at Common Law.

4 Leon. 38, 9. pl. 104. Degg. 128. Comp. Incumb. 364. A Parſon let his Rectory for three Years, and covenanted that the Leſſee ſhould have and enjoy it during the ſaid Term, without Expulſion, or any Thing done or to be done by the Leſſor, and was alſo bound in an Obligation to the Leſſee for Performance of Covenants, and afterwards, for not reading the Articles, was *ipſo facto* deprived by the Statute

* Statute 13 *Eliz. cap.* 12. whereby the Leaſe became void; yet it was the Opinion of all the Juſtices, that the Bond was not thereby forfeited, becauſe the Leſſee was not ouſted by any Act done by the Leſſor, but rather for a Nonfeaſance, and ſo out of the Compaſs of ſuch Covenant; as if one be bound not to do any Waſte, permiſſive Waſte is not within the Danger of it; but otherwiſe it would have been, if the Leſſor had covenanted not to omit the doing of any Thing whereby the Leaſe ſhould become void. *Page 372

So if one be bound by Obligation to make ſuch a Leaſe for twenty-one Years, this is good, and ſhall bind him; but then it ſeems, that if this Leaſe becomes afterwards void for Non-reſidence, and the Bond be put in Suit, if it be averred that Bond was given for Security of ſuch Leaſe againſt Non-reſidence, this will avoid the Bond alſo. 3 Bulſ. 203. Comp. Incumb. 364.

If the Parſon's Leſſee aſſigns over his Leaſe to another, and the Parſon be abſent above eighty Days in a Year, the Leſſee may alſo plead the Statutes of 13 *Eliz. cap.* 20. & 14 *Eliz. cap.* 11. for the avoiding of his own Aſſignment and Agreement with the Aſſignee, becauſe if he aſſigned over no more than what the Parſon demiſed to him, ſuch Aſſignment muſt be ſubject to the ſame Determination the original Leaſe itſelf was; and if that be determined, he who claims under the Parſon, may as well ſhew it in avoidance of his own Aſſignment, as the Parſon might in avoidance of his own Leaſe. Bulſ. 111. Comp. Incumb. 364.

It hath been held, that if a Parſon makes a Leaſe for Years, which after becomes void by the Statutes for Non-reſidence, and there is an Obligation for Performance of Covenants, although there be ſome Covenants which do not concern the Leaſe comprized in the Indenture, yet is the Bond intirely void; otherwiſe all the Meaning of the Statute would be defrauded by putting in a lawful Covenant into the Indenture. Cro. Eliz. 529, 30. *Lee & Ux' ver. Caſebill.*

Though the Statutes aforeſaid make void Leaſes, Bonds, &c. where the Parſon is Non-reſident, and neglects to ſerve the Cure for above eighty Days together, yet ſuch Leaſes or Bonds, &c. are not void *ab initio*, but only from the Time that ſuch Abſence of eighty Days ſhall be compleated; for the Words of the Statute are, *ſhall endure no longer but while the Leſſor ſhall be ordinarily reſident*, (therefore ſo long it ſhall endure) *and ſerve the Cure without Abſence above eighty Days in one Year, but that every ſuch Leaſe, immediately upon ſuch Abſence, ſhall ceaſe and be void*; therefore till ſuch Abſence of above eighty Days be accompliſhed, the Leaſe is good and in Being. Comp. Incumb. 364. Degg. 124.

Accordingly it hath been adjudged, that if ſuch Leaſe by Indenture be made, containing Covenants on the Leſſor and Leſſee's Part, and after by Abſence for above eighty Days before the Leaſe and Covenants do become void; yet an Action of Covenant doth well lie for the Leſſor or Leſſee, for any Covenant broken before the End of the eighty Days Abſence; but if he was abſent for above eighty Days, though Part of the Time incurred pending the Action, and before Plea pleaded, yet it is a ſufficient Abſence, and may be pleaded in Avoidance of the Leaſe. Cro. Eliz. 78. *Wallis* and *Cox.* Cro. Eliz. 245. 3 Leon. 102.

Therefore if in ſuch Caſe an Action of Covenant be brought, the Defendant muſt not only plead the Statutes, which make the Leaſe and Covenants void, but muſt alſo plead the Performance of Covenants to the Time of the eighty Days Abſence expired. Dyer 372. a. b.

If thoſe Statutes are pleaded to avoid any Action, Care muſt be taken not only to alledge the Abſence or Non-reſidence fully, but alſo that the Statutes be truly recited; therefore where the Statute of *Eliz.* was recited with this Clauſe, *tam diu* (where the Words are *tam cito) quam*, &c. *aut aliqua pars inde venerit ad aliquam poſſeſſionem, vel uſum inhibitum vel*, &c. (which Words, by 14 *Eliz. cap.* 11. are repealed and appointed to be omitted) Judgment was given againſt the Party for this Miſrecital, without any Regard to the Matter in Law. Cro. Eliz. 490. Earl of *Lincoln* ver. *Hoſkins.*

Though

*Page 373 * Though the Statute of 13 *Eliz. cap* 20. doth allow a Parſon or Vicar that hath Benefices to demiſe the one of them, upon which he ſhall not be ordinarily reſident, to his Curate, yet it is thought from 14 *Eliz. c.* 11. that if ſuch Curate leaſe the ſame over to another, though he himſelf is not abſent above forty Days in any one Year, if the Incumbent or Parſon be abſent above eighty Days in the ſame Year, that this ſhall avoid the Curate's Leaſe; becauſe 14 *Eliz. c.* 11. ſays, that all Leaſes, Bonds, *&c.* of Benefices and Eccleſiaſtical Livings with Cure to be made by any Curate ſhall be of no other nor better Force, Validity or Continuance, than if the ſame had been made by the beneficed Parſon himſelf that demiſed or ſhall demiſe the ſame to anyCurate; yet by *Tanfield*, when a Parſon leaſeth to hisCurate, who leaſeth over, the Statute doth not make the Leaſe void by any Abſence of the Parſon, but of the Curate only for forty Days; for otherwiſe, as he held, the Intent of the Statute might be eaſily fruſtrated, which was, that he that ſerved the Cure ſhould be the Occupier of the Glebe and Tithes belonging to the Church, and none other; but *Quære.*

Comp. Incumb. 362. Leon. 100. *St. John* ver. *Pettit.*

Comb. Incumb. 362. But admitting that the Parſon's Abſence for above forty Days ſhould not avoid the Curate's Leaſe, yet we muſt diſtinguiſh who ſhall be ſaid a ſufficient Curate for that Purpoſe; and that is only one who is legally admitted by the Ordinary of the Place, according to the Laws of the Land; for otherwiſe he is no Curate, although he ſerves the Cure, and is reſident; ſo that if the Parſon ſhould make a Leaſe of the Glebe and Tithes to ſuch a nominal Curate, yet by the Parſon's Abſence for above eighty Days the Leaſe will be avoided; and if they ſhould be ſequeſtered, in this Caſe, according to the Statute, the Parſon cannot plead that they are let to his Curate, becauſe he is no Curate in Law, and his having a Curate there is an Offence againſt the Law, of which it is not reaſonable that either the Incumbent or Curate ſhould take advantage.

Comp. Incumb. 362. Rol. Rep. 202, 203. 4Co. 23, 24. *Note*; It has been held, that a Parſonage may be a Manor; as if before the Statute *Quia Emptores Terrarum*, the Parſon, with the Patron and Ordinary, had granted Parcel of the Glebe to divers Perſons to hold of the Parſon by divers Services; this makes the Parſonage a Manor; and if the ſame be a Copyhold Manor, then, notwithſtanding all the Statutes before rehearſed, Parſons and Vicars, as well as all other Eccleſiaſtical Perſons, may grant Copies for Life, in Tail or in Fee, according to the Cuſtom of the Manor: For the Copyholder doth not derive his Eſtate out of the Eſtate or Intereſt of the Lord only, but from the Cuſtom, and is ſaid to be in by Cuſtom, without any Regard to the Perſon of the Grantor; and theſe Grants by Copy are good without the Confirmation of the Patron and Ordinary, and are not avoided by Non-reſidence or Death, *&c.* of the Parſon; neither do any of the Statutes aforeſaid extend or relate to Rectories and Tithes that are impropriated and become Lay-Fee, and remain in the Hands of Laymen, but that they may do with them as with any other Inheritance whereof they are ſeiſed; but Appropriations in the Hands of Biſhops, Colleges, or other Eccleſiaſtical Perſons are liable to the aforeſaid Statutes and Rules, as other Inheritances whereof they are ſeiſed; and ſo are Impropriations, if by Preſentation, *&c.* the Vicarage be reſtored to the Church out of which it was endowed; for by ſuch Preſentation they are become for ever after preſentable, and the Impropriation is deſtroyed.

3Leon. 102. *Exet's* Caſe. In Debt upon Bond to perform Covenants in a Leaſe made by the Defendant, the Parſon, to the Plaintiff, the Defendant pleads 14 *Eliz. cap.* 11. and Abſence for above eighty Days, *&c.* and held a good Plea in Avoidance, *&c.* but then Exception was taken to the Pleading, becauſe the Defendant ſays, that the ſaid Church is a Parochial Church, *cum Cura Animarum*, but does not ſay, that it was ſo at the Time of the Leaſe and Obligation made; for it may be, that at the Time of the Leaſe there was a Vicar,

* Vicar, and then it was not *cum Cura Animarum*; and upon that Exception Judgment was given for the Plaintiff. *Page 374

Debt upon a Bond with Condition to pay such a Sum, the Defendant pleads the Statute 14 *Eliz cap.* 11. that all Covenants, Bonds, *&c.* made for the enjoying of Leases made of Spiritual Livings by Parsons, *&c.* should be void, and avers that this Bond was made for the enjoying of such a Lease; but because the Condition was expresly for Payment of Money, the Justices held it clear for Law, that the Bond was good, and out of the Statute; and so by this Case it appears, that such Averment will not hold good against an express Condition to another Purpose; and this differs from *Hargrave* and *Webb*'s Case, which was only to resign generally on Request, and therefore might well and consistently be averred to be to the Intent to compel, not to avoid the Lease by Absence, for fear of being required to resign. Godb. 29. pl. 38. *Marrow*'s Case.

(G) Of the Consent or Confirmation of others to Leases made by Ecclesiastical Persons: And herein,

1. Where Confirmation is necessary either in respect of the Leases or Estates made, or of the Persons making the same.

AS to this it is to be observed, that no Confirmation whatever of any Lease or Estate made by Ecclesiastical Persons not conformable to the eight Rules or Qualities before-mentioned, will bind the Successor, except only in the Case of the concurrent Lease; for that not being construed to be within the Restraint either of the 1 *Eliz. cap.* 19. or 13 *Eliz. cap.* 10. remains as it did before at Common Law; and as at Common Law Confirmation was necessary to make such Lease good against the Successor, not being warranted by 32 *H.* 8 *cap.* 28. (unless the old Lease were surrendered or expired within one Year after the making of the new Lease,) so it is still, and with Confirmation will bind the Successor; this seems to be the chief, if not the only Use of Confirmation, as to any Persons allowed to make Leases within 32 *H.* 8. *cap.* 28. But there appears this Difference between concurrent Leases made by Archbishops or Bishops upon the 1 *Eliz. cap.* 19. and concurrent Leases made by other Ecclesiastical Persons on the 13 *Eliz. cap.* 10. for upon the 1 *Eliz. cap.* 19. the concurrent Lease is not restrained to any certain Time before the Expiration of the first Lease, but may be made three, four, five Years, or more, before the Expiration thereof, so that both Leases in the Whole do not exceed twenty-one Years, upon the Construction before taken notice of, that the second Lease is void, or at least good by Estoppel only, for so many Years as are then to come of the first Lease; but concurrent Leases to be made by any of the Ecclesiastical Persons within the Restraint of 13 *Eliz cap.* 10. will not be good to bind the Successor, unless the former Lease for Years be surrendered or expired within three Years next after the making of such new Lease; but this is expresly provided for, not by the 13 *Eliz. cap.* 10. but by the 18 *Eliz. cap.* 11. as hath already been shewn. Comp. Incumb. 366. Co. Lit. 44, 45.

We are next to consider where Confirmation was necessary at the Common Law, and where it continues so at this Day, in respect of the Persons making any Leases or Grants of their Ecclesiastical Possessions: The Persons who were restrained by the Common Law from making any Leases, Grants or Estates to bind their Successors without Confirmation, were only Sole Corpora- 3 Co. 75. 10 Co. 62 a.

*Page 375 * Corporations, as Biſhops, Abbots, Deans, Parſons, Vicars, Prebends, and ſuch like; for Corporations Aggregate might make what Leaſes they pleaſed, without Confirmation of any other Perſons whatſoever; but the Prudence of the Common Law never thought fit to truſt ſuch ſole Corporations with any Alienation or Diſpoſition of their Poſſeſſions to bind their Succeſſors, without the Concurrence and Confirmation of other Perſons; and though Biſhops and Abbots were conſtrued to have the whole Eſtate and Right of the Land in themſelves, which Parſons, Vicars, Prebends, and ſuch like, had not, yet as to the binding their Succeſſors they had no more Power than the others, without the Concurrence and Confirmation of the Perſons ſubſtituted and appointed by Law for that Purpoſe.

Comp. Incumb. 366. Co. Lit. 44. And where ſuch ſole Corporations make any concurrent Leaſe upon the Statutes before-mentioned, the Law continues the ſame at this Day, and they muſt be confirmed in the ſame Manner as any other Leaſes or Eſtates made by the ſame Perſons muſt have been at the Common Law.

Co. Lit. 44. b. Cro Eliz. 18. Comp. Incumb. 367. So alſo Parſons, Vicars, can make no Leaſe at this Day, though it be with Conformity to the eight Rules before-mentioned, to bind their Succeſſors without Confirmation of the ſame Perſons who by Common Law were required to confirm all Leaſes, Grants or Eſtates made by them; for they are expreſly excepted out of 32 *H.* 8. *cap.* 28. and conſequently continued as they were at Common Law till 13 *Eliz. cap.* 10. impoſed a total Reſtraint on them, as well as all other Eccleſiaſtical Perſons, to make Leaſes to bind their Succeſſors for any longer Term than twenty-one Years, or three Lives; and though by that Statute they are left at liberty, as well as other Eccleſiaſtical Perſons, to make ſuch Leaſes, yet having no Ability by 32 *H.* 8. *cap.* 28. to make them ſolely, as other ſole Corporations had, therefore to make good even ſuch Leaſes againſt their Succeſſors, they muſt have the Confirmation of the ſame Perſons, and in the ſame Manner, as they muſt have had at the Common Law before the making of any of thoſe Statutes.

10 Co. 60. *Vide* Tit. *Offices.* The Grants of antient Offices belonging to Eccleſiaſtical Perſons are not within any of the Statutes before-mentioned, but remain as they did at Common Law, and therefore may be granted with the antient Fee; but then all ſuch Grants muſt be confirmed to bind the Succeſſor, becauſe they muſt have been ſo at the Common Law.

2. What Perſons are to confirm ſuch Leaſes or Eſtates, and in what Manner.

As to the Perſons who are to confirm ſuch Leaſes or Eſtates, we muſt take notice that this varies according to the Nature of the Perſons who make ſuch Leaſes, and the Nature of the Title of the Perſons who are to confirm the ſame.

Co. Lit. 300. b. Bro. Tit. *Leaſes* 64. Co. 153. 11 Co. 19. b. Therefore if a Parſon makes a Leaſe for three Lives, or twenty-one Years, or leſs, obſerving the Rule before-mentioned, this is to be confirmed only by the Patron and Ordinary, and no Confirmation of the Dean and Chapter is required thereto; for they have nothing to do with that which the Biſhop doth, as Ordinary, in the Life-time of the Biſhop.

Bro. Tit. *Leaſes* 64. Co. Lit. 300. b. But if the Biſhop be Patron of the Church in Right of his Biſhoprick and alſo Ordinary, then the Dean and Chapter ought likewiſe to confirm all Leaſes made by the Parſon, becauſe in ſuch Caſe the Advowſon of the Church is Parcel of the Biſhoprick, which he cannot charge to bind his Succeſſor without the Concurrence and Confirmation of the Dean and

*Page 376 * Chapter; and how far the Succeſſor of the Parſon will be bound in ſuch Caſe, will appear hereafter.

So

So where a Prieſt in the Cathedral Church of *Wells* being Parſon Impariſonee of the Church of *W.* made a Leaſe by Indenture for 100 Years before 13 *Eliz. cap.* 10. rendering Rent to him and his Succeſſors; and this was confirmed by the Dean and Chapter only, without any Confirmation of the Biſhop, who was Patron and Ordinary; then the Parſon died, and his Succeſſor accepted the Rent, and after, before 13 *Eliz. cap.* 10. made a Leaſe for forty Years, which was confirmed by the Biſhop, Dean and Chapter; and it was adjudged, that the firſt Leaſe was *ipſo facto* void and determined by the Death of the Parſon who made it, ſo that no Acceptance of the Rent by the Succeſſor after could make it good, for want of the Patron and Ordinary's Conſent. Dyer 239. Benl. 80. *Hodges* verſus *Tucker.*

So where a Prebendary in a Cathedral Church, or an Archdeacon, made a Leaſe for Years of Parcel of their Poſſeſſions, to which Confirmation was requiſite, and this was confirmed only by the Dean and Chapter, without any Confirmation of the Biſhop; it was held, this Leaſe ſhould not bind the ſucceeding Prebendary or Archdeacon, becauſe the Biſhop is Patron and Ordinary of every Prebend, and may be ſo of an Archdeaconry; and therefore, to make good Leaſes by them againſt their Succeſſors, the Biſhop's Confirmation ought likewiſe to be had, as well as the Dean and Chapter's. Dyer 61. b. 106. b. 240. a. Plow. 529. Rol. Abr. 481. Co. Lit. 300. b.

But upon the Books there ſeems a manifeſt Diverſity between the Confirmation of the Biſhop, as Patron and Ordinary, without Confirmation likewiſe of the Dean and Chapter, and their Confirmation without the Biſhop's; as alſo between the Reſignation, Deprivation or Tranſlation; and the Death of the Biſhop, who ſo alone confirmed as Patron or Ordinary; for if any Dean, Archdeacon, Prebendary, Parſon or Vicar, had made any Leaſe for Years at the Common Law, or ſhould make ſuch Leaſe at this Day, whereto Confirmation is requiſite, and the Biſhop, as Patron and Ordinary, confirms ſuch Leaſe, without any Confirmation of the Dean and Chapter, and then the Dean, Archdeacon, Prebendary, Parſon or Vicar dies, or is removed, and the Biſhop collates another as Patron and Ordinary; yet cannot ſuch Incumbent avoid the firſt Leaſe, though it was not confirmed by the Dean and Chapter, becauſe he came in purely by the Collation of the Biſhop, as Patron and Ordinary, without any Aid or Concurrence from the Dean and Chapter; and therefore, as *Littleton* ſays, ought to hold himſelf content, and agree to that which his Patron and Ordinary have done, for he comes in ſubſequent to ſuch Charge: But, as appears by the Caſes before put, the Confirmation of the Dean and Chapter alone, without the Biſhop's Confirmation likewiſe, will not be effectual to bind the ſucceeding Archdeacon, Prebendary, Parſon, Vicar, &c. becauſe he derives no Title under them, nor comes in with their Aſſent or Concurrence; for they have nothing to do with the Collation of any Perſon, but the Biſhop does it abſolutely, and in virtue of his own Power as Patron and Ordinary; and therefore if ſuch Leaſes want his Confirmation, thoſe who come under him may avoid them, notwithſtanding any Confirmation of the Dean and Chapter, under whom they derive no Title; but becauſe ſuch Advowſon or Right of Collation is alſo Parcel of the Poſſeſſions of the Biſhoprick, and to bind the ſucceeding *Biſhop*, the Confirmation of the Dean and Chapter is requiſite; as in all other Caſes where the Biſhop who is a ſole Corporation, makes any Diſpoſition of the Poſſeſſions of his Biſhoprick, therefore without ſuch Confirmation of the Dean and Chapter, the ſucceeding Biſhop, or his Incumbent, ſhall avoid ſuch Leaſe: But here another Diverſity ariſes between the Tranſlation, Reſignation or Deprivation of the Biſhop, and his Death. In the firſt Caſe it is held, that the Leaſes confirmed by him alone, without the Confirmation of the Dean and Chapter, will bind the * ſucceeding Biſhop, and his Incumbent, during his Life; but in caſe of ſuch Biſhop's Death, ſuch Leaſes ſo confirmed by him alone, as Patron Dyer 356. a. b. Leon. 235. Co. Lit. 329. Rol. Abr. 479. 2 Bulſ. 290. 11 H. 6. 9. Lit. ſ. 648. Co. Lit. 343. b.

* Page 377

and

and Ordinary, will not bind the ſucceeding Biſhop or his Incumbent; and a Diverſity is taken where a Biſhop, &c. makes any Eſtate, Leaſe, Grant of a Rent-charge, Warranty, or any other Act which may tend to the Diminution of the Revenues, which ſhould maintain the Succeſſor, there the Reſignation, Deprivation, or Tranſlation of the Biſhop, &c. is all one with his Death; but where the Biſhop is Patron and Ordinary, and confirmeth a Leaſe made by the Parſon without the Dean and Chapter, and after the Parſon dieth, and the Biſhop collateth another, and then is deprived, tranſlated, or reſigns, yet his Confirmation remaineth good; for, ſays my Lord *Coke*, the Revenues that are to maintain the Succeſſor are not thereby diminiſhed; but this ſeems a very precarious Reaſon; and a better Reaſon of the Diverſity ſeems to be this, that when the Biſhop, as Patron and Ordinary, has by Deed under his Hand and Seal ſubſcribed his Confirmation of the Leaſe, this ought to be binding upon him, at leaſt during his own Life; and therefore though he be afterwards tranſlated, deprived, or reſigns, yet ſince theſe are either by his own immediate Acts, or occaſioned by his Default, it is not reaſonable they ſhould be allowed to avoid or derogate from his own Acts, which otherwiſe would have bound during his Life; for the Law never permits any to avoid or derogate from his own Acts; but theſe Reaſons have no Place after the Biſhop's Death, for then his Confirmation is at an end, and can be no longer binding on his Succeſſor, ſince he had no Power to charge the Poſſeſſions of the Biſhoprick any longer than during his own Life, without Concurrence and Confirmation of the Dean and Chapter, who are by Law ſubſtituted and appointed to that Purpoſe.

Dyer 106. b. 221. b. Plow. 528. Bro. Tit. *Leaſes* 64. Tit. *Confirmation* 21, 30.

But yet it is moſt adviſeable to have the Confirmation likewiſe of the Dean and Chapter upon ſuch Leaſes made, and in ſeveral Books their Confirmation is either pleaded or admitted, ſince without it the Leaſe cannot bind any longer than during the Biſhop's Life who ſo confirmed it.

In ſome Caſes the Confirmation of the Patron is neceſſary, and in ſome not; wherein this Diverſity is taken in the Books, that ſuch Sole Corporations, who have not the abſolute Fee and Inheritance in them, as Prebends, Parſons, Vicars, and ſuch like, if they make any Leaſes or Eſtates, there to bind their Succeſſors, the Patron muſt confirm the ſame; but ſuch Sole Corporations who have the whole Eſtate and Right in them, as Biſhops, Abbots, &c. or ſuch Corporations Aggregate who have the whole Fee and Inheritance in them, as Dean and Chapter, Maſter, Fellows, and Scholars of any College, Hoſpital, &c. theſe may make Leaſes to bind their Succeſſors, without any Confirmation of the Patron or Founder, though the Biſhop, Abbot, Dean, Maſter, &c. were preſentable; and the Reaſon of this Diverſity appears in the Nature of the Right with which each is inveſted.

Rol. Abr. 481. Dyer 273.

But if a Parſonage or Vicarage be a Donative, then the Confirmation of the Patron alone is ſufficient to all Leaſes, &c. made by the Parſon or Vicar, and ſhall bind the Succeſſor without the Confirmation of any other.

Co. Lit. 300. b. *Comp. Incumb.* 372.

If there be a Patron paramount, as well as an immediate Patron, Confirmation of the immediate Patron, without the other's Confirmation, is not good; as if a Parſon be Patron of the Vicarage of the ſame Church, and the Vicar makes a Leaſe, confirmed by the Parſon and Ordinary, this is not good without the Confirmation of the Patron of the Rectory alſo, becauſe both have an Intereſt in the Poſſeſſions of the Vicarage.

2 Rol. Abr. 479. *Leigh* and *Hallier*.

If the Biſhop of *A.* be Patron of the Church Preſentative of *B.* which lies within his Dioceſe, and this is the Corps of a Prebend in the Church of

Cro. Eliz. 587. Dr. *Herbert* and *Munday*. Sid. 57. Keb. 280. *Gie* and *Rider*.

of *A.* and the Biſhop of *A.* is alſo Patron of the Church of *C.* which is alſo Preſentative, and lies in the Dioceſe of the Church of *D.* and afterwards the Church of *C.* is lawfully annexed and united by the Aſſent of the Biſhops, Deans and Chapters, of both Dioceſes, to the ſaid Prebend of *B.* and afterwards the Biſhop of *A.* doth collate *J. S.* to the ſaid Prebend, which now by the Union doth conſiſt of both Churches, and doth inſtal him in the Cathedral Church of *A.* and then the Prebendary makes a Leaſe for Years, which is confirmed by the Biſhop, Dean and Chapter of *A.* and not by the Biſhop of *B.* yet this is a good Confirmation, for by the Union the Biſhop of *D.* hath annexed the Church of *C.* to the Prebend of *B.* and ſo hath deprived himſelf of the Power of Confirmation as Ordinary; for after the Union, the Prebendary is inveſted in both Churches by his Inſtalment, without any Preſentment, Admiſſion, Inſtitution or Induction to the Church of *B.* or. *C.* *Page 378

If the Dean of any Cathedral Church makes a Leaſe or Grant of any of his Poſſeſſions, whereof he is ſole ſeiſed, to bind his Succeſſors, and Confirmation be neceſſary thereto, this muſt be confirmed by the Biſhop and Chapter of the ſame Church, and not by the King, although he be the Patron of ſuch Deanery; becauſe, as hath been ſaid, the Dean and Chapter have the whole Fee and Inheritance in themſelves, and then the Patron's Concurrence or Confirmation is not neceſſary; but it ſeems to be a Doubt, whether the Confirmation of the Biſhop be neceſſary to ſuch Grant or Leaſe; and ſeveral Books ſeem to hold, that the Confirmation of the Chapter alone, without the Biſhop, is ſufficient to make good the Dean's Leaſes or Grants that need Confirmation; but yet it is laid down as a Rule in the *Parſon's Counſellor*, that the Biſhop's Confirmation, as well as the Chapter's, is neceſſary to all Leaſes and Grants made by the Dean; and what is ſaid by *Fitz.* that the Biſhop and Chapter are in Law looked upon but as one Body, ſeems alſo to favour this Opinion; for it is reaſonable that the whole Body ſhould conſent to the granting of their Poſſeſſions, and not that the Biſhop, who is the Head of the Body, ſhould be unconcerned therein: alſo the Poſſeſſions of the Dean are ſaid to be derived from and carried out of the Biſhoprick, and the Biſhop *de Jure*, is ſaid to be Patron of the Deanery, which are all ſtrong Arguments to prove the Biſhop's Confirmation neceſſary, though no Book Caſe can be found expreſly to warrant it, but rather the contrary, as appears by the Caſes firſt cited, wherein no Notice is taken of the Biſhop's Confirmation, or that it was neceſſary; *ideo Quære.*

Comp. Incumb. 370. Dyer 40. b. 273. a. b. 349. pl. 18. Plow. 538. Rol. Abr. 478, 481. Degg 120. F.N.B. 194. 3 Co. 75. b. 17 E. 3. 40. Regiſt. Orig. 230.

But if ſuch Deanery be merely Donative, then the King's Conſent and Confirmation, as Patron, muſt be obtained, and that without the Biſhop's Confirmation is ſufficient, as in all other Donatives, wherewith the Biſhop has nothing to do.

Comp. Incumb. 371.

The Dean of *Wells* might antiently have paſſed his Poſſeſſions belonging to his Deanery, with the Aſſent of the Chapter, without the Biſhop's Confirmation; and after this Deanery of *Wells* was ſurrendered by the Dean thereof, with all the Poſſeſſions thereunto belonging, and ſo diſſolved by Act of Parliament; this Diſſolution was confirmed, and a new Deanery erected, and the Nomination of a new Dean, and his Succeſſors, given to the King and his Succeſſors; and it was thereby alſo enacted, that the Dean and his Succeſſors might demiſe, grant or part with any of their Poſſeſſions, in the ſame Manner and Form as the antient Deans might and uſed to do; in this Caſe, if the new Dean made any Leaſe or Grant of any of his Poſſeſſions, the Biſhop's Confirmation is not neceſſary thereto, but only the Chapter's, becauſe that alone was ſufficient before; neither is the Confirmation of the King requiſite, becauſe this is not a mere Donative of the King, though he hath the Nomination of the Dean; and by the Statute the new Deanery is made of the ſame Nature as the old one was, which could not be a Donative, becauſe the

Dyer 373. *Wallround* and *Pallard.* Rol. Abr. 478, 481.

*Page 379 * Dean and Chapter might, without the Conſent or Confirmation of any others, have paſſed away their Poſſeſſions.

3 Co. 75. 10 Co. 60. a 2 Co. 39. 6 Co. 34. b. It has already been ſhewn, that all Leaſes or Grants made by Archbiſhops or Biſhops, whereto Confirmation is neceſſary, are to be confirmed by the Dean and Chapter; for the Law, not thinking fit to truſt the Biſhop alone with the Diſpoſition of his Poſſeſſions to bind his Succeſſors, did for that Reaſon (amongſt others) conſtitute the Dean and Chapter to give their Conſent and Confirmation to all Leaſes or Grants made by him to bind his Succeſſors.

Dyer 58. a. b. 282. b. Noy 94. Co. Lit. 301. Rol. Abr. 477. Leon. 234. But if a Biſhop hath two Chapters, and makes a Leaſe of any of the Poſſeſſions of the Biſhoprick, whereto Confirmation is neceſſary, and this is confirmed only by one Dean and Chapter, this will not bind the Succeſſor of the Biſhop, for both are but one in reſpect of the Biſhop, if the Biſhop is choſen by both. So it is if a Biſhop be Patron of an Advowſon in Right of his Biſhoprick, and collates a Clerk, who makes a Leaſe for Years, and the Biſhop and one Dean and Chapter only confirm it; this will not bind the ſucceeding Clerk of the ſucceeding Biſhop, for want of Confirmation by the other Dean and Chapter; but though both Deans and Chapters have uſed to confirm ſuch Leaſes, yet if one Dean and Chapter have ſurrendered their Poſſeſſions to the King, and then the Biſhop or his Clerk, make a Leaſe, whereto Confirmation is neceſſary, and this is confirmed by the remaining Dean and Chapter only; yet this is good, and ſhall bind the Succeſſor, becauſe by the Surrender the one Dean and Chapter is diſſolved, and are as if they never had been; and although after ſuch Surrender, the Dean and Chapter, who ſo ſurrendered, were again erected, yet Confirmation by the other would be ſufficient; as was held by the greater Part of the Juſtices in *Ireland*, and by five Juſtices in *England*, who certified their Opinion to be ſo into *Ireland*.

50 E. 3. *Statham* Tit. *Aſſiſe*, Biſhop of *Litchfield* and *Coventry*'s Caſe. 12 Co. 71. Latch 237.

12 Co. 71. If two Biſhopricks, that were originally diſtinct, be by lawful Authority united, and the Uſage hath been ever ſince the Union, that the ſeveral Deans and Chapters have made Confirmations ſeverally, *viz.* each Dean and Chapter of the Leaſes of Grants of the Poſſeſſions of their reſpective Biſhoprick, but the Charter of Union is not extant, or cannot be found; ſuch ſeveral Confirmation is good, becauſe it ſhall be intended, by reaſon of the Uſage, that the Union was made Spiritually; and in ſuch a Manner, that, notwithſtanding the ſame, all Leaſes and Grants ſhould ſeverally be confirmed as they were before the Union; and this either to prevent Confuſion, or by reaſon of the Remoteneſs of the ſeveral Deaneries; and then *Modus & Conventio vincunt Legem*, and ſuch Confirmation by the Dean and Chapter of their own original Poſſeſſions, is good; *ſecus* if the Union were made generally, for then both ought to confirm.

Dav. 1. Rol. Abr. 477. If a Biſhop hath no Dean and Chapter, then his Grants are to be confirmed by the Clergy of his Dioceſe, where Confirmation is neceſſary; for the Law will not truſt any ſole Corporation with the Diſpoſition of his Poſſeſſions, as hath been before obſerved.

Comp. Incumb. 367. Whenever a Dean and Chapter are to confirm any Leaſe or Grant, the Dean himſelf muſt join with the Chapter, and Confirmation by his Subdean, Deputy or Proctor, will not be ſufficient; for they have no Power to charge the Poſſeſſions of the Church, neither is any Stranger capable of being a Dean, Subſtitute or Proctor, but only one of the Chapter.

11 H. 4. 48. Bro. Tit. *Corporation* 17. Dav. 47. Palm. 461. Latch 237. Therefore, where upon a Compoſition for Tithes, a Parſon granted an Annuity to the Abbey of *Battel*, and this Grant was confirmed by the Biſhop, Dean and Chapter, being Patrons: but in the Deed of Confirmation it appeared that the Dean was abſent, and did not put his Seal thereto, but that the Chanter, who was his Commiſſary, did it for him; and there it was held, that though the Dean might have a Commiſſary

or

* or Deputy to exerciſe his Spiritual Juriſdiction, yet that ſuch Deputy or Commiſſary cannot charge the Poſſeſſions of the Church. *Page 380

A Leaſe was made by the Free Chapel and College of *Windſor* under the common Seal, but the Dean or Warden himſelf was not Party to the Leaſe, but one who was his Deputy in his Abſence; and upon a Suit in Chancery, to ſet aſide the Leaſe, a Statute of the College was ſhewn for the Authority of the Deputy to exerciſe and perform the Office of Dean in all Things *in Perſon'*, & *Collegium*, &c. yet the Judges held, that the Confirmation by the Deputy was not good, for that he had no Authority to confirm this Leaſe by the College Statute provided; for that by the Word *Collegium*, all the Poſſeſſions of the College were not to be underſtood, but only the Site and Circuit of the College, or Place of its Situation; which Caſe ſeems to prove, that if by the Statutes of a Church or College, the Deputy Dean may confirm Grants and join in the making of Leaſes, as if the Dean himſelf was preſent and joined therein, that then ſuch Confirmation will be good; for the Founder or Patron may make what Law he pleaſes for the Regulation of the Corporation, and when he has inveſted the Deputy-Dean with ſuch Power, this has the ſame Sanction that any other Laws for the Regulation of that Corporation have. Dyer 233. b. Comp. Incumb. 308. Latch 251. Palm. 480.

As a Deputy-Dean, generally ſpeaking, cannot confirm Leaſes, ſo neither can he who is but a mere Commendatory Dean, *viz.* a Dean by *Recipere in Commendam*; for though he may take the Profits, becauſe that was one End of his having the Deanery *in Commendam*, and may, with the Chapter, chuſe a Biſhop, and alſo exerciſe Spiritual Juriſdiction, and ſue or be ſued by that Name, becauſe thoſe Acts are of Neceſſity, &c. and for the Advantage of the Deanery; yet cannot he confirm Leaſes, for this is merely a voluntary Act, and ſuch commendatory Dean is but *Depoſitarius*, and not a Dean compleat; but if a Dean be elected Biſhop, and before his Conſecration obtains a Diſpenſation to hold his Deanery *in Commendam*, ſuch Dean may well confirm Leaſes, &c. and if he be tranſlated to another Biſhoprick, and after his Election, and before Conſecration, obtains a Diſpenſation to hold the ſame Deanery *in Commendam* with his ſecond Biſhoprick, his old Title remains; and Confirmations, and other Acts done by him as Dean, are as good in Law as if he had never been made Biſhop; for there is a great Difference between a *Recipere in Commendam*, and *Retinere in Commendam*; the one comes in purely by virtue of the Diſpenſation, and has no other Title; the other comes in legally at firſt as Dean, and by virtue of the Diſpenſation is only enabled to continue ſo ſtill, for that gives him no original new Title, as in the other Caſe, and therefore he is as much Dean as he was before; and the ſame Diſtinction holds between *Recipere* and *Retinere in Commendam*, in caſe of Biſhops; for a mere Commendatory Biſhop in the *Recipere* cannot confirm Leaſes, &c. but in ſuch Caſe the Archbiſhop is to do it; alſo the Guardian of the Spiritualties cannot confirm Leaſes; for ſuch Confirmation, being a mere voluntary Act, and being to transfer a Right to another, none are capable of it but thoſe who have the Eſtate and Right in themſelves, which ſuch Commendators in the *Recipere*, Subſtitutes, Rectors, Deputies, and Guardians of the Spiritualities have not. Noy 94. Palm. 460, 480. Latch 237, 250, Jon. 158.

Where there is a mere Commendatory Dean in the *Recipere*; *Quære*, whether the Biſhop's Leaſes and Grants are not to be confirmed by the Clergy of the Dioceſe, in caſe where there is no Dean and Chapter, or by whom elſe.

All Leaſes or Grants, which need Confirmation of a Dean and Chapter, are to be confirmed by the Dean and major Part of the Corporation, and being ſo confirmed are good, though ſeveral of the particular Members diſſent, or are not preſent; for the Dean and major Part of the Chapter make the Corporation, and the others have no Negative Voice to hinder Comp. Incumb. 368.

Page 381 ſuch Majority from doing any Corporate Act; for otherwiſe, by the Corruption or Perverſeneſs of one or two Members, the whole Corporation might ſuffer; and that this was the Law, appears by the following Act of Parliament.

33 H.8. cap. 27. "Albeit that by the Common Laws of this Realm of *England*, all Aſ-
"ſents, Elections, Grants and Leaſes had, made and granted, by the
"Dean, Warden, Provoſt, Maſter, Preſident, or other Governor of any
"Cathedral Church, Hoſpital, College, or other Corporation, by whatſo-
"ever Name they be incorporated or founded, with the Aſſent and Con-
"ſent of the more or greater Part of their Chapter, Fellows or Brethren of
"ſuch Corporation, having Voices of Aſſent thereunto, be as good and
"effectual in the Law, to the Grantees or Leſſees of the ſame, as if the
"Reſidue of the whole Number of ſuch Chapter, Fellows and Brethren of
"ſuch Corporation, having Voices of Aſſent had thereunto conſented and
"agreed; yet the ſaid Common Law, notwithſtanding divers Founders of
"ſuch Deaneries, Hoſpitals, Colleges and Corporations within the ſaid
"Realm, have, upon the Foundations and Eſtabliſhment of the ſame
"Deaneries, Hoſpitals, Colleges, and other Corporations, eſtabliſhed and
"made, amongſt other their peculiar Acts, local Statutes and Ordinances,
"that if any one of ſuch Corporation, having Power and Authority to
"aſſent or diſſent, ſhould and would deny any ſuch Grant or Grants, that
"then no ſuch Leaſe, Election or Grant, ſhould be had, or leaſed or
"granted; and for the Performance of the ſame have been, and be daily
"thereunto ſworn; and ſo the Reſidue may not proceed to the Perfection
"of ſuch Elections, Grants and Leaſes, according to the Courſe of the
"Common Laws of this Realm, unleſs they ſhould incur the Danger of
"Perjury; for the avoiding whereof, and for the due Execution of the
"Common Law univerſally within this Realm, and every Place, in one
"Conformity of Reaſon to be uſed, be it ordained, eſtabliſhed and enacted,
"by the Authority of this preſent Parliament, That all and every parti-
"cular Act, Order, Rule and Statute, heretofore made, or hereafter to be
"made, by any Founder or Founders of any Hoſpital, College, Deanery
"or Corporation, at or upon the Foundation of any ſuch Hoſpital, College,
"Deanery or Corporation, whereby the Grant, Leaſe, Gift or Election,
"of the Governor or Ruler of ſuch Hoſpital, College, Deanery or Cor-
"poration, as have or ſhall have Voice or aſſent to the ſame, at the Time
"of ſuch Grant, Leaſe, Gift or Election, hereafter to be made, ſhould be
"in anywiſe hindred, or let by any one, or more, being the leſſer Num-
"ber of ſuch Corporations, contrary to the Form, Order and Courſe of
"the Common Law of this Realm of *England*, ſhall be from henceforth
"clearly fruſtrate, void, and of none Effect, with an Abrogation of all
"Oaths heretofore taken to ſuch Effect, and a Penalty of 5 *l.* on any
"Perſon who ſhould for the future give ſuch Oath."

When the Dean and Chapter are to confirm any Leaſe, there ought not only to be a Majority of them, but they ought alſo to be perſonally preſent, and *Capitulariter Congregati* in one Place; which, with other Circumſtances relating to the Manner of their Confirmation, will appear by the following Caſe, which was thus:

Dav. 42, 43, *&c. Dean and Chapter of Fernes's* Caſe. Dyer 145. Rol. Abr. 479.

The Biſhop of *Fernes* makes a Leaſe for Years, the Chapter conſiſting of eleven Perſons, *viz.* the Dean and ten Prebends, confirm it in this Manner, *viz.* The Dean makes one *J. S.* a mere Layman, his Proctor or Subſtitute, to give his Aſſent to all Leaſes and Grants; this Proctor, and three of the Prebends only meet together, and fix the Chapter Seal to the Confirmation of this Leaſe, which Confirmation was made in the Name of the Dean and Chapter; after that three others of the Prebends, at ſeveral Days, by themſelves, ſubſcribe their Names to the ſaid Confirmation; and after the Death of the Biſhop, his Succeſſor enters upon the Leſſee; and it was adjudged lawful, for that the Leaſe was void after the Death of the Biſhop who made it, for want of Confirmation; 1. Becauſe no Confirmation was made by the

* the Dean himſelf, but only by the Proctor, which was not ſufficient; for he was merely a Stranger to the Chapter, and not capable of ſuch Procuration; and therefore all he did is void both by the Canon and Common Law; for in the Canon Law the Rule is, *Abſens non poteſt demandare Votum ſuum, niſi uni de Capitulo*; and there is another Rule, *Oportet quod Procurator ſemper inſtitutus ſit de Collegio*; and another *Votum dari non poteſt per Literas*; and agreeable to this is the Rule of the Common Law; for in the Parliament the Peers may give their Vote by Procurator or Proxy, but their Proctors muſt be Barons, and Members of the ſame Houſe; and a Stranger is not capable of being a Proxy; and admitting he were, yet where a Corporation paſſes any Intereſt, the Members thereof cannot give their Aſſent by Proctors or Subſtitutes; and ſo the Doubt in *Dyer* ſeems to be reſolved. *Page 382 Dyer 145.

2. It was adjudged, that though the Deed of a Corporation needs no Delivery, as the Deed of a natural Perſon does, but that the Fixing of the Corporation Seal gives Perfection to it, yet the major Part of the Corporation ought to be preſent when the Seal is ſo affixed; for the major Part of the Chapter make the Corporation, and their Act is the Act of the Corporation, though the others do not agree; but here was only the Proctor of the Dean and three of the Chapter preſent when the Seal was affixed, which is not ſufficient; for there ought then to be a Majority preſent, otherwiſe it may be ſaid to be *cum Aſſenſu*, but not *Conſenſu*, and it ought to be *cum Aſſenſu & Conſenſu* of the Dean and Chapter; for no more than a Body Natural can do any perfect Act, if it be diſmembered, the Head in one Place, and the Hands in another, no more can a Body Politic; and therefore they ought to be *Capitulariter congregati* in a certain Place; though it was agreed, that they are not confined to meet in their Chapter-Houſe, but might meet at any other Place; but at ſuch Meeting and Sealing there ought to be a Majority then preſent; for if they ſet their Names at ſeveral Times, and in ſeveral Places, after, this makes it not to be the Act of the Corporation, but *Factum Singulorum* in their ſingular and private Capacity, and ſo ſhall not bind; alſo it was held, that the major Part of the Members being aſſembled, ought to give their Voices and Conſents ſingly and diſtinctly, and not in a confuſed and uncertain Manner, as in the Choice of Knights of the Shire; and when the major Part doth ſo conſent, their Conſent ought to be expreſſed by their fixing of the Seal to the Deed of Confirmation or other Grant. Dav. 47, 48, &c. 2 Roll. Abr. 23. Show. Par. Caſes 29.

The Corporation of the Mayor, Bailiffs and Burgeſſes of *Windſor* made a Leaſe for Years, one Bailiff only aſſenting; and this was held a void Leaſe, if there were two Bailiffs, becauſe then one is not a Majority; but as to the Burgeſſes, it was held, that if the greater Part of them aſſented, this would be ſufficient, though they were not preſent at the Sealing, if their Aſſent was had before; but *Quære*; for the foregoing Caſe ſeems to be an Authority that there muſt be a Majority preſent at the Time of the Sealing; for that is the Act which expreſſes their Conſent; and unleſs there be a Majority then preſent, no Aſſent at any other Time can make that good, which, for want of a Majority, was void when it was done; but in that Caſe it appears, that the Conſent of the Majority was not had till after the Sealing; whereas in this Caſe the Conſent of the Majority was before the Sealing, though ſuch Majority was not preſent at the Sealing; and therefore *Quære* if this makes any Difference. Dyer 282. b. in Margin.

But here a material Difference is to be obſerved between a real Intereſt and a bare Authority or Power only, as to the Manner of concurring in ſuch Leaſes; for if a Dean be ſeiſed of Lands in Right of him and his Chapter, or Maſter or Warden of an Hoſpital or College in Right of himſelf and the Brothers and Siſters or Fellows of the ſame College, or a Mayor in Right of himſelf and the Commonalty, and the Dean, Maſter, Warden, Dyer 40, *Chafin's* Caſe. Plow. 199. Roll. Abr. 478. 8 H. 7. 7, 8. 2 Leon. 176. 4 Leon. 11. *Clerk's* Caſe.

*Page 383 * Warden or Mayor, make a Leaſe by Indenture between the Dean and Chapter, Maſter or Warden, and the Brothers and Siſters or Fellows of the ſame Hoſpital or College, or between the Mayor and Commonalty of the one Part, and *J. S.* of the other, whereby the Dean with the Aſſent and Conſent of the Chapter, or the Maſter with the Aſſent of the Brothers and Siſters, or the Warden with the Aſſent of the Fellows and Scholars, or the Mayor with the Aſſent of the Commonalty, leaſe ſuch Lands to *J. S.* and with ſuch Aſſent or Conſent put thereto their Common Seal; this is a void Leaſe, for the Chapter, Brothers and Siſters, Fellows and Scholars, or Commonalty, are equally ſeiſed, and have an equal Right and Intereſt in the Lands with the Dean, Maſter, Warden, or Mayor, and therefore ought to join in the Leaſing or Granting Part of the Deed, and not only to give their Aſſent, for they all make but one Perſon in Law; and a Body cannot be diſtinct, ſo as that one Part may aſſent to the Acts of the other; but if the Dean were ſole ſeiſed of the Lands in Right of his Deanery, the Maſter or Warden in Right of their Maſter or Wardenſhip, or the Mayor in Right of his Mayoralty, then the Leaſe of the Dean, Maſter, Warden, or Mayor alone, with the Aſſent and Conſent of the other Perſons before-mentioned, is ſufficient; becauſe the Dean, Maſter, Warden or Mayor only are ſeiſed and have a real Intereſt, and the other Perſons before-mentioned have no Intereſt at all, but only a bare Right or Power of aſſenting to the Leaſes or Grants of their reſpective Heads, and therefore their Aſſent or Conſent is ſufficient, without joining in the Leaſing or Granting Part. So if an Abbot or Prior be ſeiſed of Lands in Right of the Abby or Priory, yet becauſe the Monks are all dead Perſons in Law, and not capable of having any Lands, of being impleaded, and ſuch like Acts; therefore though they, together with the Abbot or Prior, conſtitute and make up but one Body, yet the Abbot or Prior only have the Power of Leaſing, and the Aſſent or Conſent of the Convent muſt be had and expreſſed by affixing their Common Seal, in the ſame Manner as where the Chapter, having no Intereſt in their own Right, are to aſſent to the Leaſes of their Dean. So likewiſe where a Parſon makes a Leaſe for Years, he only is to grant or leaſe the Lands, and the Patron and Ordinary are only to give their Conſent by affixing their reſpective Seals, and expreſſing their Conſent or Aſſent in the Body of the Deed; for the Parſon is the principal Grantor, and the others have not any real Intereſt in the Lands, though the Law has thought fit to require their Aſſent to all Leaſes or Eſtates to be made by the Parſon.

Dyer 40. b. in Margin. A Dean, ſeiſed of Lands in Right of him and his Chapter, made a Leaſe for Years, the Chapter confirmed this Leaſe by a diſtinct Deed, and it was held not good, becauſe their Deeds being ſevered cannot operate at all, ſince they are but one intire Body, and therefore cannot ſever in their Acts; but if after ſuch Leaſe they had all joined in a Confirmation, this had amounted to a new Leaſe, and been good as to the joint Act of them all, as the original Leaſe it ſelf would have been, if all had joined in the Leaſing Part.

1 Leon. 134. 4 Leon. 85. Provoſt of Queen's College, *Oxon.* A Leaſe for Years was made in this Manner; *Præpoſitus, Socii & Scholares Collegii Reginalis in Oxonia*, Guardianus *Hoſpitalis*, &c. and Exception taken that it ought to have been *Guardiani*, in the Plural Number, for the College conſiſts of many Perſons, and each of them is capable, and therefore not like an Abbot or Convent; but *per Curiam* it was held good, and the College is but one Body, and as one Perſon, and therefore *Guardianus* is ſufficient to deſcribe it by.

5 Co. 15. *Newcomb's* Caſe. Cro. Car. 38. Roll. Rep. 361. As a Patron may confirm explicitly by his Deed or Writing, ſo may he alſo confirm by conſequence of Law; for if a Perſon makes a Leaſe for Years to the Patron, who grants or aſſigns it over to another, this amounts to a Confirmation in Law by the Patron, becauſe a Confirmation being nothing

Co. Lit. 301. Roll. Abr. 481.

* nothing but an Aſſent under the Hand and Seal of the Party confirming, ſuch Aſſent in this Caſe ſufficiently appears by his aſſigning over the Leaſe to another; but without ſuch Aſſignment, the Ordinary's Confirmation will not make good the Leaſe to the Patron to bind the Succeſſor, becauſe in the Acceptance of the Leaſe the Patron was only paſſive, and executed nothing under his Hand and Seal which could amount to a Confirmation, as in the other Caſe, where he makes an actual Aſſignment over; but in caſe of ſuch Confirmation in Law, the Patron ought to be abſolutely ſeiſed of the Advowſon; otherwiſe it will bind only according to the Eſtate he hath therein, as will appear hereafter; but *Quære*, if the Aſſignment in this Caſe were without Writing, if that would be good, or could amount to a Confirmation. * Page 384

Another Difference obſervable in the Manner of confirming ſuch Leaſes as we are treating of, is, as to their Duration or Continuance; for if a Parſon makes a Leaſe for twenty-one Years at this Day, and the Patron and Ordinary confirm his Eſtate therein for ſeven Years, or, reciting the Leaſe, confirm *Dimiſſionem prædict'*, *& etiam Indenturam eidem ſcripto Confirmationis annexam, & omnia in eadem content', quoad ſeptem Annos ſolummodo, & non ultra*, yet is the Eſtate or Leaſe well confirmed for the twenty-one Years; for when they confirm the Eſtate of the Leſſee, that is intire, and cannot be divided: So where a Prebendary made a Leaſe of a Rectory, Parcel of his Prebend, for ſeventy Years before the Statutes, and the Biſhop, reciting the Demiſe, confirmed the *ſaid Demiſe or Leaſe* for fifty Years, and no more, and the Dean and Chapter likewiſe confirmed the ſame in the ſame Manner, it was held by all the Juſtices, that they might confirm ſeverally, and that their Confirmation was extendible to the whole ſeventy Years; for when they confirm *Dimiſſionem prædict'*, they confirm that Demiſe or Leaſe, which comprehends and includes the whole Term of ſeventy Years, and then the Words *pro Termino* fifty only, *& non ultra*, come too late, and are repugnant to the Confirmation of *Dimiſſionem prædict'*, which included the whole Term of ſeventy Years; but it was agreed, that if after ſuch Recital of the Demiſe they had confirmed the *Land* to the Leſſee for fifty Years only, this had been a good Confirmation for fifty Years only, and no ſuch Repugnancy in the Confirmation; and ſo if the Demiſe had been of thirty Acres, they might have confirmed the Leaſe as to one or more Acres, or might have confirmed all, or Part, on Condition; and a Diverſity was taken between a bare Aſſent without any Right or Intereſt, and an Aſſent coupled with a Right or Intereſt; for the Termor, who is to perfect an Act by his Attornment, cannot aſſent for a Time, nor upon Condition, nor for Part of the Thing granted, but it ſhall enure abſolutely to all, becauſe he having but a bare Right cannot qualify or apportion it; but the Biſhop, who is Patron, and the Dean and Chapter, have an Intereſt in the Parſonage or Prebend, and every Part of it; for the Patron hath *Jus conferendi*; and a Releaſe to the Patron of an Annuity in the Time of Vacation is good, and the Patron and Ordinary may charge the Glebe in the Time of Vacation, and therefore having an Aſſent clothed with an Intereſt may qualify it as they pleaſe. Another Difference was taken in the Caſes before-mentioned between a Leaſe for Years and an Eſtate of Freehold or Inheritance; for if a Parſon or Prebendary make a Leaſe for Years, Confirmation may be made of the *Land*, as has been ſaid, for a leſſer Number of *Years*, or of the *Leaſe* for a leſſer Number of *Acres*; for the Years or Acres are ſeveral, although the Leaſe of Term, or Land are one; ſo that if a Leaſe be made for five Years, rendering 20*l. per Annum* Rent, the Years are ſeveral, ſo that an Action of Debt will lie for the Rent every Year; but if a Parſon or Prebendary before the Statutes had made a Leaſe for Life, a Gift in Tail, or a Feoffment in Fee, and Confirmation had been made of the *Land* to the Leſſee, Donee or Feoffee for an Hour, this is good for ever;

Dyer 52, 338. Cro. Eliz. 447, 472. 5 Co. 81. Co. Lit 297. Moor 479, 481. Co. Lit. 300. Bendl. 238. And. 47. Hetley 75.

Cro. Eliz. 79. 21 H. 7. 41. F. N. B. 49. Co Lit. 343. b.

*Page 385 * ever; for the Freehold or Inheritance paſſing by one and the ſame Livery, is intire, and then the Confirmation, which is an Act of leſs Notoriety, cannot break or divide it; for ſuch Confirmation being an Aſſent to an Act which paſſed the Whole, muſt extend to the Whole which paſſed by the Act.

3. What Eſtates they who make ſuch Confirmation are to have.

Comp. Incumb. 372. As to the Eſtate they who make ſuch Confirmation ought to have, to make the Leaſe effectually binding upon the Succeſſors, this regards chiefly the Patron, whoſe Advowſon, or Right of Patronage, being a Temporal Inheritance, and conſidered as ſuch, is to be governed by the ſame Rules as other Temporal Inheritances are; and therefore his Confirmation, being in nature of a Charge upon the Advowſon, is to be directed by the Eſtate which he hath in the Advowſon, and can can continue no longer than that endures.

Co. Lit. 300. Rol. Abr. 480. Rol. Rep. 361. Bridg. 95. Leon. 234. Therefore if the Patron be but Tenant in Tail, or Tenant for Life, his Confirmation ſhall bind only ſuch Incumbents as come into the Church during his own Life; and accordingly it was agreed, by *Coke* and *Dodderidge*, that if a Parſon makes a Leaſe for Years, which is confirmed by the Patron and Ordinary, the Patron being Tenant in Tail, and the Patron and Parſon both die, and the Iſſue in Tail doth preſent another, his Preſentee ſhall hold the Rectory diſcharged of ſuch Leaſe; and alſo they agreed, that although the Iſſue in Tail, after a Preſentation, levies a Fine, yet the Preſentee of the Conuzee, when the Church becomes void again, ſhall hold it diſcharged; becauſe the Confirmation was defeated by the Preſentation of the Iſſue in Tail before the Fine levied; but if the Patron, Tenant in Tail, diſcontinues the Eſtate-Tail, the Leaſe confirmed by him ſhall ſtand good during the Diſcontinuance; or if the Eſtate-Tail be barred, it ſhall ſtand good for the whole Term; for now the Eſtate of the Patron, in reſpect whereof the Eſtate was only voidable by the Preſentee of the Iſſue in Tail, is become an abſolute and unavoidable Fee.

Co. Lit. 300. b. So if the Patron had a conditional Eſtate in the Advowſon, and he confirms a Leaſe of the Parſon's, and after the Condition is broken, this defeats alſo his Confirmation, ſo that the ſucceeding Incumbent ſhall not be bound by it, for his Confirmation, which was in virtue of, and derived out of his Eſtate in the Advowſon, could not be more laſting than that Eſtate itſelf was.

Dyer 252. Rol. Abr. 480. If the Chaplain of a Chantry or Free Chapel, that was a Donative, had made a Leaſe for Years before the Diſſolution of Chantries, and the Patron of the Chapel, being ſeiſed of the Patronage in Tail, had confirmed it, this ſhould not have bound the Chaplain of the Iſſue in Tail; becauſe the Tenant in Tail could not, by any Act of his, bind the Iſſue in Tail after his Death; and in ſuch Caſe, if the Patronage of the Donative came to the King, by the Statute of Chantries, neither the King, nor his Clerk, ſhould be bound by the ſaid Leaſe; but if the Donor had levied a fine after the Confirmation, by which the Iſſue in Tail was bound from avoiding the Leaſe, the King alſo ſhall be barred; and as the Iſſue in the other Caſe would not have been bound, no more would the King, who comes in ſubject to all the Advantages or Diſadvantages the Iſſue in Tail was capable of, or liable to.

Rol. Abr. 842. If Tenant in Tail of an Advowſon, and the Son and Heir apparent, join in a Grant of the next Avoidance, and after the Tenant in Tail dies, the Son ſhall avoid the Grant, becauſe he had nothing in the Advowſon at the Time of the Grant made.

*Page 386 * A Parſon makes a Leaſe for Years, and there being three Coparceners or Tenants in common, who are Patrons, all ought to join in the Confirmation, elſe it will not bind the next Incumbent; becauſe they are all but one Patron;

Dyer 72. b. in Margin. Leon. 234. *Lan. after* verſus *Lucas.* *per*

per Coke: But if there be a Compoſition to preſent by Turns, *Quære*, if a Leaſe confirmed by him, that hath the next Turn when the Church voids, ſhall not be good to bind his Preſentee. But in the firſt Caſe it is held, that if one of the Patrons, and the Ordinary, confirm the Leaſe, and the Parſon dies, and then the Ordinary collates by Lapſe, this Confirmation by the one Patron is good, and that the Collatee ſhall not avoid it; and this ſaid there to be adjudged upon long and good Argument, and the Caſe cited for it is *Lancaſter* and *Lucas*; which does not appear to be adjudged in *Leonard*, but is there ſaid to be adjourned; *ergo Quære Cauſam*; for the Ordinary hath no Intereſt, but preſents in Right of the Patron, and therefore his Clerk ſhall be ſo far bound, and no farther, than the Clerk of him who ſuffered the Lapſe ſhould have been; but *Popham* argued, that this Title of Lapſe was an Intereſt in the Ordinary, and not an Authority only, and then all who come in under that Intereſt ſhall be bound by the Ordinary's Confirmation of the firſt Leaſe; and he ſaid, that at the Beginning the Patron was not reſtrained to any Time to preſent his Clerk, but the ſix Months was appointed, at the Inſtance and Suit of the Ordinaries, by a Canon confirmed in the Council of *Lateran*; before which Time the Ordinaries had not any Lapſes; but after the ſaid Canon they had an Intereſt, which the Civilians call *Intereſſe caducum & conditionale*; and it is ſuch an Intereſt, that if the Biſhop dieth before Collation or Preſentment, ſo as the Temporalties come to the King, the King ſhall preſent. *Quære* of this.

If the Huſband and Wife, Patrons of a Church in Right of the Wife, confirm a Leaſe made by the Patron, yet this ſhall not bind the Preſentee of the Wife, if ſhe ſurvives her Huſband, nor her Heirs, nor their Preſentees, after her Death, becauſe the Deed was void *quoad* the Wife, being a Feme Covert, and the Huſband had nothing but in her Right, which died with him. Dyer 133. a. Rol. Abr. 479.

Though he who confirms as Patron hath a Fee-ſimple of the Advowſon in him, yet if, before he confirms, he hath granted away the next Avoidance, his Confirmation of the Preſentee's Leaſe will not be good to bind the Preſentee of the Grantee of the next Avoidance, unleſs ſuch Grantee doth alſo confirm; and if the Preſentee of him that hath the next Turn doth enter and avoid ſuch Leaſe (as he well may) and then dies, and the Patron of the Fee preſents a new Incumbent, who is admitted, inſtituted and inducted, this new Incumbent ſhall hold the Benefice diſcharged of the Leaſe, as his Predeceſſor ſhould have done, though he came in by the Preſentation and Admiſſion of the Patron and Ordinary, who confirmed that Leaſe: So if the Biſhop were Patron in Right of his Biſhoprick, and after ſuch Leaſe, made by the Parſon, the Biſhop, Dean and Chapter had granted the next Avoidance to another, and then after they had all confirmed the Leaſe; yet upon the Incumbent's Death, if the Grantee of the next Avoidance preſents, and the Clerk is admitted, inſtituted, and inducted, and avoids the Leaſe, it ſhall never take place againſt any ſubſequent Incumbent, though he come in by the ſame Patron who confirmed ſuch Leaſe. The Reaſon of theſe Caſes is, becauſe the Grantee of the next Avoidance, and his Preſentee, come in by Title paramount the making or perfecting of ſuch Leaſe; and the Preſentee, or Parſon, having the whole Fee in him, when he had once defeated the Leaſe, it ſhall never after revive or take place againſt any ſubſequent Incumbent; and though *Littleton* ſeems to be of Opinion, that the Parſon hath not the Right of the Fee-ſimple in him, yet he explains himſelf to mean as to the bringing of a Writ of Right; for otherwiſe it is the Act of the Parſon which charges or gives, and the Patron and Ordinary do only aſſent, and then the Leaſe being avoided by him who hath the Fee-ſimple of that Land which was ſo leaſed it can never after be ſet up again, being * totally defeated by his Title Paramount. Another Reaſon may be, that having granted the next Avoidance before ſuch Leaſe made or perfected, the Grantee is now become the preſent Patron, and ought to concur in all Acts whereby Moor 67, 481. Dyer 72. b. 133. a. Cro. Car. 582. Jon. 454. Rol. Abr. 480. Co. Lit. 46. a. 7 Co. 36. Hob. 7. *Page 387

whereby the Poſſeſſion ſhould be charged; for as before ſuch Grant, the Patron's Confirmation, who had the whole Fee in him, would have been ſufficient; ſo now, having granted away Part of that Fee, the Grantee ought to join likewiſe, and ſo the Confirmation may be by all who have any Intereſt in the Parſonage, as well thoſe who have the preſent and poſſeſſionary Intereſt, as thoſe who have the future and reverſionary Intereſt; ſince otherwiſe the Confirmation is not compleat, and the Leaſe is then liable to Avoidance for want thereof.

Rol. Abr. 477. 9 H. 6. 34. If a Church be full of a Parſon, and after another is made Parſon and inducted, and he makes a Leaſe for Years, which is confirmed by the Patron and Ordinary, yet the Leaſe is void; becauſe he who made it was not Parſon, the Church being full before.

Rol. Abr. 477. 9 H. 6. 34. 10 H. 6. 11. Degg. 120. So if a Church be void, and one enters and occupies of his own Wrong, without any Preſentation or Inſtitution, and occupies as Parſon, and makes a Leaſe for Years, which is confirmed by the Patron and Ordinary; yet this is void, becauſe the Leſſor was no Incumbent; for none can be Parſon or Incumbent without Preſentation or Collation, and ſo he had nothing in the Parſonage; ſo a Leaſe by a Parſon, Vicar, Prebend, *&c.* before Induction or Inſtalment, though confirmed, ſhall not bind the Succeſſor, becauſe till then they have nothing in the Temporal Poſſeſſions.

9 H. 6. 33, 34. Rol. Abr. 480. But if a Church be void, and one preſents by Uſurpation, and the Incumbent of the Uſurper, after Admiſſion, Inſtitution and Induction, makes a Leaſe for Years, which is confirmed by the Uſurper as Patron, and by the Ordinary, and after, in a *Quare Impedit*, the true Patron recovers, and removes the Incumbent; yet it ſeems the Leaſe ſhall ſtand, becauſe there was a Patron *de facto*, who made and confirmed ſuch Leaſe, and the Parſon coming in by all the Solemnities of Law when the Church was void, the People could take notice of no other, and therefore all Acts done by him, and legally confirmed, are good; but *Rolle* cites this Caſe, that the Succeſſor of the rightful Patron, after Recovery, ſhall avoid ſuch Leaſe, becauſe it was not made or confirmed by a rightful Parſon or Patron; *ideo Quære.*

Dyer 244. Plow. 400. Co. Lit. 352. Co 155. a. 10 Co. 48. a. King *Ed.* 6. being Patron of a Church full of an Incumbent, by his Letters Patent grants the Advowſon to the Biſhop of *Coventry* and *Litchfield*, and his Succeſſors, and grants that after the Avoidance of the Church by Death, Reſignation, or otherwiſe, that the ſaid Biſhop, and his Succeſſors, ſhould hold the ſaid Church *in Proprius Uſus*; the Biſhop after, by Indenture, makes a Leaſe for forty Years, to begin at ſuch a Time as the ſaid Parſonage ſhould come to the Hands of him, or his Succeſſors, by Death, Reſignation or otherwiſe; and this is confirmed by the Dean and Chapter; the Biſhop dies, then the Incumbent dies, and the Succeſſor of the Biſhop enters, and makes a Leaſe for twenty-one Years, *&c.* And by the Juſtices it was held, that the firſt Leaſe was abſolutely void; for the Leſſor had nothing in the Parſonage Impropriate during the Life of the Incumbent, and he ſurvived the Leſſor, and therefore it could never take effect; and it could not be good by Eſtoppel; becauſe the Truth of the Caſe appeared in the Indenture of Leaſe itſelf, that he had nothing during the Incumbent's Life; which Caſe further proves that the whole Fee is in the preſent Incumbent; and, as in the Caſes before-mentioned, the Avoidance of a Leaſe by the preſent Incumbent ſhall be an Avoidance of it for ever; ſo in this Caſe for want of the preſent Incumbent's joining, the Leaſe ſhall never ariſe.

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* 4. At what Time ſuch Confirmation is to be made.

Co. Lit. 300. b. As to the Time of Confirmation, generally ſpeaking, it is not material, whether it be before or after the making of the Leaſe, which is to be ſo confirmed, ſo it be made in the Life-time of the Parties who make the Leaſe;

Leaſe; for the Confirmation is but an Aſſent or Agreement by Deed to the making ſuch Leaſe or Grant, and not a Confirmation of the Eſtate itſelf, as will appear more fully by the following Caſes and Diverſities.

If a Diſſeiſor makes a Charter of Feoffment to *A.* with a Letter of Attorney to deliver Seiſin, and, before Seiſin given, the Diſſeiſee confirms the Eſtate of *A.* or the Deed made to *A.* this is clearly void, though Livery be made after; for this muſt enure as a Confirmation of the Eſtate, which cannot be good before the Eſtate paſſed, which before Livery it did not; but if a Biſhop had made a Charter of Feoffment before the Statutes with a Letter of Attorney, and the Dean and Chapter, before Livery, confirm the Deed, this is a good Confirmation, and Livery made after is ſufficient; ſo if the Biſhop had granted a Reverſion, the Dean and Chapter might confirm the Deed or Grant before Attornment. Co. Lit. 301. a. 3 Leon. 17. 4 Leon. 223. *Biſhop of Rocheſter's* Caſe.

So if a Biſhop at the Common Law had granted Lands by Deed to the King, and, before Inrolment, the Dean and Chapter, by their Deed, confirm the Deed of the Biſhop, and after the Deed of the Biſhop is inrolled, this is a good Grant and Confirmation; becauſe, as to the Biſhop, it was a perfect Deed, and therefore capable of being confirmed; though to enable the King to take, there wanted Inrolment, which might be at any Time after; the ſame Law, if the Biſhop had made a Leaſe for Years to the King, Confirmation of the Leaſe before Inrolment would be good. Co. Lit. 301. a. Rol. Abr. 478. Palm. 466. Latch 240. *Dimmock's* Caſe.

So if the Patron and Ordinary had by Deed given Licence to the Parſon to grant a Rent-charge out of the Glebe, and the Parſon had granted it accordingly, this was good, and ſhould bind the Succeſſor, though this was not a Confirmation ſubſequent, but a Licence precedent. Co. Lit. 300. b. Rol. Abr. 480. 7 H. 4. 15. Bro. *Nov. Caſes* 201.

So if a Biſhop makes a Leaſe for Years at this Day, which needs Confirmation, and the Leaſe is made on the ſecond of *May*, and confirmed on the firſt of *May*, this is a good Leaſe, by *Catlin* and *Southcot*; but *Wray* objected, that a Leaſe cannot be confirmed before it be made; to which they replied, that the Aſſent before was a good Confirmation of the Leaſe made after. Owen 33.

So where a Biſhop made a Leaſe the ſecond of *May*, which was confirmed the third of *May* and ſealed the fourth of *May*, this was held a good Confirmation.

So where the Deed of Confirmation bore Date before the Deed confirmed, but by Agreement the Deed confirmed was firſt delivered, the Confirmation was held good; for a Confirmation is but a mere Aſſent by Deed to the Grant, and therefore may be either before or after the Grant or Leaſe itſelf, or at the Time of the Leaſe or Grant; as if a Parſon makes a Leaſe, with the Aſſent of the Patron and Ordinary, this is a good Confirmation; and ſo where the Dean and Chapter are to confirm likewiſe, if their reſpective Seals are affixed. 1 H. 6. 8. Rol. Abr. 480. Dyer 106.

And yet it hath been holden on the contrary, that if a Confirmation be made and delivered before the Grant or Leaſe to be confirmed, that this is not a good Confirmation; and though, after the Grant or Leaſe, the Deed of Confirmation be delivered again, yet that will not make it good, for that it was a Deed by the firſt Delivery; and the ſecond Delivery will not make it good as an Aſſent, becauſe the Aſſent ought to be by Deed, and the firſt Delivery was void; but that Confirmation may be made before the Grant or Leaſe be confirmed; the other Caſes are expreſs, and the Reaſon of the Thing ſeems likewiſe to make for it; for the Confirmation being nothing but an Aſſent or Agreement that the Biſhop or Parſon may make ſuch Leaſe, *&c.* when this Aſſent appears under Seal, and a Leaſe, *&c.* made purſuant to it, there can be no Reaſon to impeach the Leaſe after, which has all the Sanction that the Law Rol. Abr. 480. 8 H. 6. 6. *Page 389

requires

requires, *viz.* the Concurrence and Aſſent of the Perſons appointed by Law to that Purpoſe, and before or after are only Circumſtances of Time, which ſeem not material when the Aſſent, which is the Subſtance, ſufficiently appears.

Moor 66. pl. 180. Therefore if a Biſhop makes a Leaſe for twenty-one Years according to the Statutes, and after makes a concurrent Leaſe for Years of the ſame Land to another, and after, before any Confirmation of the ſecond Leaſe, the Biſhop makes another concurrent Leaſe to a third Perſon, which is immediately confirmed, and after the ſecond Leaſe is confirmed alſo; in this Caſe the ſecond Leaſe ſhall be good and effectual by the Confirmation, although the laſt Leaſe was confirmed before it, becauſe the Confirmation adds nothing to it, nor conveys any Intereſt, but only makes it more perdurable and effectual.

5 Co. 15. *Newcomen's* Caſe. Cro.Eliz.18. *Higgins* ver. *Grant.* Cro.Car.38. Cro. Jac. 53. And upon this Reaſon it hath been adjudged, that Leaſes made before 13 *Eliz. cap.* 10. for more Years than are allowed thereby, being confirmed after the ſaid Statute, are good, and ſhall bind the Succeſſor; for the Confirmation is only an Aſſent, and when it is made relates to the making of the Leaſe, which being before the Statute, remains at Common Law, and by conſequence binds the Succeſſor; alſo ſuch Confirmations being only to perfect Leaſes made before that Statute, are not within the Intent thereof.

Cro. Eliz. 430. Moor, pl. 636. Sir *Edward Denny* and *Eakinſtal.* So where an Archdeacon, Impropriator of a Parſonage, 12 *Eliz.* let Part of his Glebe for fifty Years, and the Biſhop, Patron of the Archdeaconry, and the Dean and Chapter, 15 *Eliz.* confirmed that Leaſe, and then the Archdeacon died; and it was held, 1. That the Statute 1 *Eliz. cap.* 19. extended only to the immediate Poſſeſſions of the Biſhoprick, and here the Land let was not any Part of the Poſſeſſions of the Biſhoprick, but of the Archdeaconry, and the Confirmation, though it is neceſſary, yet at moſt it amounts only to an Aſſent, and the Intereſt paſſes from the Archdeacon and not from the Biſhop; but if the Biſhop had been diſſeiſed of any of the Poſſeſſions of the Biſhoprick, and after had confirmed the Land to the Diſſeiſor, this would not bind his Succeſſors, becauſe here the Confirmation paſſed an Intereſt, and without ſuch Confirmation the Biſhop himſelf might have entered and reſtored the Poſſeſſion, and no Act of his ſingly can bind his Succeſſor. 2. It was adjudged that this Confirmation, though after 13 *Eliz. cap.* 10. ſhould bind the Archdeacon's Succeſſor, becauſe the Leaſe to which it relates was made before the Statute, and that Statute reſtrains only from Alienating, not from Confirming.

Co.Lit. 301. 21 H. 7. 1. Degg 118. 4 Leon. 78. In which laſt Book the contrary is held by *Clench.* But if a Biſhop, Parſon, or any other ſole Eccleſiaſtical Corporation, makes a Leaſe for Years, which needs Confirmation, this Confirmation ought to be made in the Life and during the Incumbency of the Leſſor, for after his Death, Reſignation, Deprivation, or other Amotion, the Leaſe is become void for want of Confirmation; and then Confirmation made after cannot revive it, though it be made in the Vacation before any Succeſſor comes in.

5 Co. 15. Cro.Car.38. But if a Parſon makes a Leaſe for Years, which is not confirmed by the Biſhop or Patron then in being, but by the ſucceeding Biſhop and ſucceeding Patron, this is a good Leaſe, and ſhall bind the Succeſſor, becauſe the Leaſe was abſolutely good againſt the Parſon himſelf who made it, and the Confirmation was only neceſſary to make it binding on the Succeſſor; and in this Caſe, the Leaſe being duly confirmed during *Page 390* * the Incumbency, had all the Sanction the Law requires; for there is no prefixt Time for the Confirmation of ſuch Leaſes, ſo it be made during the Life and Incumbency of the Leſſor.

5. How

5. How far a Regard is to be had to the true Naming of the Corporation or Perſons who do confirm.

Herein we ſhall only obſerve, that Corporations Aggregate, as Dean and Chapter, Mayor and Commonalty, Warden and Fellows, *&c.* may make or confirm Leaſes, without expreſſing either the Chriſtian or Surname of the Dean, Mayor, Warden, *&c.* becauſe in their Politick Capacity, as a Corporation Aggregate, they continue always the ſame and are ſaid never to die; but in Leaſes or Confirmations by a Biſhop, Dean, Mayor, *&c.* or other ſole Corporation, both their Chriſtian and Surname, or at leaſt their Chriſtian Name, ought to be expreſſed, becauſe they are ſubject to Death and Succeſſion, *&c.* and therefore muſt be particularly named to ſhew whoſe Leaſe, *&c.* it was; and ſo ſome hold too in the firſt Caſe.

Bro. Tit. *Leaſes* 45. Dyer 83, 86, 106. 11 Co. 21. Hob. 32. Leon. 307. But for this *vide* Head of *Corporations*.

(H) Of void or voidable Leaſes by Eccleſiaſtical Perſons: And herein,

1. Againſt whom Leaſes not purſuant to the Statutes, or otherwiſe defective, are void or only voidable.

HERE it is to be obſerved, that if a Biſhop grants the next Avoidance of a Church, which is not warranted by 1 *Eliz. cap.* 19. becauſe it is a Thing which lies merely in Grant, out of which no Rent can be reſerved; or makes a Leaſe of the Advowſon of a Church, or grants an Annuity out of the Poſſeſſions of his Biſhoprick, or makes a Leaſe of Tithes for three Lives, or a Leaſe of any other of his Poſſeſſions, not purſuant to all or any of the eight Rules before-mentioned; yet in none of theſe Caſes is ſuch Leaſe or Grant void or voidable by the Biſhop himſelf who made it, but remains good againſt him during ſuch Time as he continues Biſhop; but as to the Succeſſors of the Biſhop, ſuch Leaſes or Grants are void or voidable, as the Caſe happens to be, as will appear hereafter; and the Reaſon ſuch Leaſes or Grants are good againſt the Biſhop himſelf, who made them, is becauſe they were ſo at the Common Law, and the Statutes were made only for the Benefit of the Succeſſors, that they ſhould not be bound by the Acts of their Predeceſſors, which might turn to their Prejudice and Diſadvantage; but not to give the Biſhop himſelf Power to avoid or derogate from his own Acts, which would be againſt all Rules both of Law and Equity, and therefore was not within the Meaning of the ſaid Statutes; for then he would be impowered by Act of Parliament to do wrong to other Perſons, which it cannot be preſumed the Parliament intended to allow.

Cro. Eliz. 440. And. 241. Sav. 119. 3 Co. 59. Cro Jac. 173. 2 Brownl. 164. Cro. Eliz. 207, 690. Hard. 326. Co. Lit 45. a. 10 Co. 59. b. 2 Leon. 138. Leon. 308. Rol. Rep. 169. Keb. 182. 11 Co. 73. a.

So where a Biſhop, by Deed inrolled, gave Lands to the Queen, without the Conſent of the Dean and Chapter, yet it was held that this was good againſt the Biſhop himſelf who made ſuch Gift.

Rol. Rep. 151.

* So for the Reaſons before-mentioned, though the 13 *Eliz. cap.* 10. ſays that all Leaſes, Gifts, Grants, *&c.* made by any Perſons or Corporations therein mentioned, contrary to the Tenor of that Act, ſhall be utterly void and of none Effect to all Intents, Conſtructions and Purpoſes; yet it hath been adjudged, that a Leaſe made by a Dean and Chapter againſt the ſaid Statute ſhall not be avoided, nor any Covenants therein contained, during

* Page 391

Brownl. 21. Moor 875. 2 Brownl. 134, 158. 3 Co. 60. Leon. 308. Co. Lit. 45. a.

during the Life and Continuance of the Dean that made the Leaſe; ſo that if they have made a Leaſe for Years of any of their Poſſeſſions, and before the Expiration thereof make a concurrent Leaſe alſo for the ſame Lands, and then make a third Leaſe for Lives, with expreſs Covenant, that the Grantee for Lives ſhall enjoy the Land againſt the ſecond or concurrent Leaſe, and Grantee for Lives being in Poſſeſſion is evicted, and brings Covenant againſt the Dean and Chapter; in this Caſe, though the Leaſe for Lives be void by the 13 *Eliz. cap.* 10. yet it was agreed by the Juſtices, that becauſe the Dean who made the Leaſe for three Lives was living, and continued Dean at the Time of the Eviction, that the Leaſe was not void, and by conſequence an Action was well maintainable againſt the Dean for Breach of the Covenant therein contained.

11 Co. 67, 78. b. Rol. Rep. 171. So where a Maſter and Fellows of a College, by Deed inrolled, made a Leaſe for Years, not warranted by that Statute, and afterwards ſuffered a Fine, and five Years to paſs without Claim; though this was void againſt the ſucceeding Maſter, yet by Conſtruction the Leaſe and Fine were held good againſt the College, (though it be a Corporation aggregate that never dies,) during the Life of the Maſter, who was Party to the Leaſe, and made no Claim, becauſe he was the Head and principal Part of the Corporation.

Hetley 24. Co. Lit. 45. a. Comp. Incumb. 380. So if a Dean, Archdeacon, Prebend, Parſon, or other ſole Corporation, make Leaſes of their ſole Poſſeſſions, not warranted by the ſaid Statutes, yet they ſhall bind themſelves during their whole Time, becauſe the Statutes were made to provide chiefly for the Benefit of the Succeſſors, and not to relieve the Parties themſelves againſt their own Acts or Grants; though it is held by *Popham*, that if a Parſon made a Leaſe without reſerving any Rent, that this ſhould not bind even himſelf; but *Quære.*

Mod. 204. 2 Mod. 56. Hard. 326. Leon. 308. 3 Co. 60. Co. Lit. 45. a. 325. b. 341. But where there is a Chapter that hath no Dean, as the Chapter of the Collegiate Church of *Southwell*, there Grants or Leaſes made by them contrary to 13 *Eliz. cap.* 10. are void *ab initio* againſt themſelves; and ſo of Leaſes or Grants by any other Corporation Aggregate, who have no Head or principal Perſon; for they muſt be either void *ab initio*, or good for ever, becauſe they continue always the ſame, and one has no Superiority or Power more than another; but in caſe of a Dean and Chapter, Maſter and Fellows, *&c.* though they are a Corporation Aggregate, and never die, yet Leaſes or Grants made by them, contrary to the ſaid Statutes, ſhall bind during the Time of the Dean, Maſter, *&c.* who was Party thereto, becauſe ſuch Dean, Maſter, *&c.* who are the Head of the Corporation, are ſubject to Death and Succeſſion, as other ſole Corporations, and therefore ſhall have no Aid from this Statute to avoid their own Leaſes; but only their Succeſſors, for whoſe Benefit the Statute was made, together with the Chapter, ſhall have Power to avoid ſuch Leaſes, *&c.* but if the Dean and Chapter, Maſter and Fellows, *&c.* were all equally ſeiſed, and the Dean and Maſter ſolely ſhould make a Leaſe, though it were in all Reſpects warranted by the Statutes, yet this Leaſe ſeems void *ab initio* at Common Law, becauſe the Dean, Maſter, *&c.* had no ſole Seiſin whereof to make any Leaſe at all; but the Chapter in the one Caſe, and Fellows in the other, having an equal Eſtate and Intereſt, ought to have joined in ſuch Leaſe or Grant, and for want of their joining, ſuch Leaſe or Grant ſeems void at Common Law, as it would be for a Miſnomer, *&c.* and then the Leſſee cannot hold it againſt the Dean and Chapter, if they ſeek to avoid it.

*Page 392 Dyer 239. * As Leaſes and Grants, not warranted by the Statutes, are not void againſt the Leſſors and Grantors themſelves, ſo neither are Leaſes or Grants made without due Confirmation, where Confirmation is neceſſary, but only by the Grantor's Death or Amotion.

If

If a Biſhop makes a defective or voidable Leaſe or Grant, not only the Succeſſor, but alſo the King, when the Temporalties come into his Hands, may take advantage thereof, by avoiding them during the Vacancy of the Biſhoprick, in Privity and Right of the Biſhop; but yet this ſhall not ſo abſolutely avoid the Leaſe, but that the ſucceeding Biſhop may make the ſame either good or void, at his Election, as to himſelf; and this either expreſly, as by actual Agreement to the Leaſe or Grant of his Predeceſſor; or implicitly, as by Acceptance of Rent incurred after the Death of his Predeceſſor; or doing any other Acts, which amount to an Agreement in Law; and therefore this differs from the Caſes before put, where Avoidance of a Leaſe by a Parſon ſhall avoid it, not only for his own Time, but alſo againſt all his Succeſſors; ſo that they can never after ſet it up again, or affirm it by any Act of theirs whatſoever; for the Parſon hath the whole Fee-ſimple in him as much as any of his Succeſſors can ever have; and therefore when he once avoids the Leaſe, as to the whole Fee-ſimple which he hath, he avoids it for ever, ſo that it can never after revive; but the King hath not the Fee-ſimple in the Temporalties, but only the Cuſtody or Guardianſhip of them during the Vacation of the Biſhoprick, which is but a temporary and qualified Intereſt; and therefore what he does ſhall not be binding on the Succeſſor; but if the Succeſſor himſelf avoids ſuch Leaſe or Grant, then it is the ſame with the other Caſe, and no ſucceeding Biſhop after can revive or ſet it up again, becauſe it was avoided by one who had the whole Fee-ſimple and Eſtate in him. 7 Co. 7. The Earl of *Bedford*'s Caſe.

But here a Difference is to be obſerved betwixt ſuch Leaſes as are actually void by the Death, *&c.* of the Leſſor, and ſuch as are only voidable; and here again we muſt diſtinguiſh, 1. Between the Perſon leaſing. 2. Between the Things leaſed, and the Leaſes themſelves; and becauſe the Common Law, with reſpect to the three Diſtinctions, holds good ſtill, where the ſeveral Statutes before mentioned are not purſued, we ſhall conſider how the Common Law ſtood in theſe Particulars, which, together with the Reaſons thereof, will ſhew how the Law is at this Day upon the ſaid Statutes.

The firſt Diſtinction to be obſerved is between the Perſons leaſing, that is, between ſuch ſole Corporations as had the whole Fee-ſimple abſolutely in them, as Biſhops, Abbots, *&c.* and ſuch ſole Corporations as were looked upon only to have a qualified Fee-ſimple, as Parſons, Vicars, Prebends, Provoſts in Cathedral Churches, and others who were Preſentative or Collative, and not Elective.

As to Leaſes by Parſons, Vicars, *&c.* if by the Common Law any of theſe had made a Leaſe for Years of any of the Poſſeſſions of their Church, without Confirmation of Patron and Ordinary, *&c.* ſuch Leaſes by their Death, or other Avoidance, had become abſolutely void without Entry or other Ceremony, ſo as no Acceptance of the Rent, or other Act done by the Succeſſor, could affirm or make them good or binding over againſt themſelves; but Leaſes for Years by Biſhops, Abbots, *&c.* though without Confirmation of the Dean and Chapter, or Aſſent of the Convent, were not abſolutely determined by their Death, *&c.* but continued good till ſome Act done by the Succeſſor to avoid them; for they have, and always were allowed to have, the whole Fee-ſimple and Inheritance of their Poſſeſſions in themſelves; and therefore before the third Council of *Nice*, *Anno* 710, might by their ſole Alienation, without the Confirmation of the Dean and Chapter, have bound their Succeſſor for ever; and though by that Council ſuch Alienations are reſtrained, as hurtful and injurious to the Church, and the Confirmation of the Dean and Chapter made neceſſary; yet this is only *quoad* Binding the Suc- Bro. Tit. *Acceptance* 9, 10, 20, 26, Tit. *Confirmation* 21, Tit. *Dean* 20, Tit. *Leaſes* 18, 19, 32, 33, 52. F. N. B. 50. Plow. 264. Cro. Eliz. 18. Poph. 121. Dyer 46, 239. Co. Lit. 45. b. 102, 341. 6 Co. 8. a. *Page 393 Hetl. 88. Roll. Abr. 481. Kol. Rep. 361. Bridgm. 94. 3 Co. 65. Raym. 166. 2 Keb. 325.

Succeſſor; for the Fee-ſimple continues ſtill in them, and therefore Leaſes for Years made by them ſubſiſt after their Death or Removal, as they would do if they had been made by a Tenant in Fee of any Lay Poſſeſſions, till the Succeſſor comes to avoid them by aid of the Canons made at that Council, which have received a Sanction from our Law.

Vide the Authorities *ſupra.* So it was in Caſe of Abbots, Priors or Deans, *&c.* where they were ſole ſeiſed, if they had made a Leaſe for Years of any of their Poſſeſſions, this had not abſolutely determined by their Death, *&c.* becauſe they had the whole Fee-ſimple in them; and therefore ſuch Leaſes continued good till the Succeſſor came to avoid them, for want of Confirmation of the Perſons ſubſtituted by Law for that Purpoſe.

Hard. 156. Sir *John Thorough-good* and Sir *Henry Herbert.* Therefore where a Prebend made a concurrent Leaſe for Years of Tithes, rendering the antient Rent, without Confirmation of the Dean and Chapter, yet it ſeems to be allowed, that this was not abſolutely void by his Death, *&c.* but only voidable; and then Acceptance of the Rent by the Succeſſor will make it good during his Time; for Leaſes not warranted by thoſe Statutes remain at Common Law, which makes them only voidable, not actually void upon the Death, *&c.* of the Perſon who makes them.

The ſecond Diſtinction to be obſerved is, between the Things leaſed and the Leaſes themſelves.

Vide the Books *ſupra.* It had been before obſerved, that Leaſes for Years by Parſons and Vicars determine abſolutely by their Death, without Entry, or other Ceremony; but if they make a Leaſe for Life or Lives, and die, or are removed, yet the Leaſe continues good till ſome Act done by the Succeſſor to avoid them; the Reaſon is, becauſe ſuch Leaſe for Life or Lives being an Eſtate of Freehold, could not paſs without the Solemnity of Livery and Seiſin; and therefore to defeat that, there muſt be an Act of equal Notoriety, *viz.* the Entry of the Succeſſor; and by conſequence, if the Succeſſor before ſuch Entry accepts the Rent, or does any other Act ſignifying his Conſent to ſuch Leaſe, this affirms the ſame during his Time, ſo as he can never after avoid it, becauſe it was only voidable, not actually void by the Leſſor's Death, *&c.* and conſequently capable of an Affirmance; and the Law is the ſame at this Day, as to Things which lie in Livery.

Cro. Jac. 173. Comp. Incumb. 380-1. Palm. 175. Degg. 134, 318. Bro. Tit. *Leaſe* 41. But as to Things which lie in Grant or Prender, there ſeems a Diverſity between the Common Law and the Law as it ſtands at this Day upon the before-mentioned Statutes; for if a Biſhop makes a Leaſe for Lives of a Portion of Tithes, or other Things not manurable, reſerving the antient Rent, and dies, *&c.* and his Succeſſor accepts the Rent, yet this Acceptance ſhall not bind him, becauſe the Leaſe was abſolutely void by the Biſhop's Death, *&c.* who made it without Entry, or other Ceremony; and the Reaſon of its being ſo abſolutely void is, becauſe the Things leaſed lying only in Grant or Prender, no Rent could be thereout reſerved, recoverable by the Succeſſor; for diſtrain he could not, becauſe there was nothing wherein a Diſtreſs might be taken; and an Action of Debt would not lie, becauſe the Leaſe being for Lives, no Action of Debt was maintainable till after the Lives ended; and therefore ſince his Acceptance of the Rent due at one Day will not enable him to ſue for it, if afterwards denied, he ſhall not be bound by ſuch Acceptance; but if the Tithes, or other Things lying in Grant, had been let for Years, there the Succeſſor's Acceptance of the Rent would have bound him during his Time, becauſe then he might have an Action of Debt for any Arrears that ſhould incur after; and this Conſtruction ſeems to ariſe wholly from the Statutes before-mentioned, which, as appears before, were made wholly to provide for the Succeſſor, that he might not be impoveriſhed

Page 394 * or prejudiced by the Acts of his Predeceſſor; for at Common Law all Leaſes for Lives or Years, as well of Things which lay in Grant as of Things which lay in Livery, were only voidable after the Biſhop's Death, *&c.* not actually void: and herein the Law at this Day, as to Biſhops, appears

pears to be the Reverſe of the Common Law as to Parſons, Vicars, &c. for as their Leaſes for Years were abſolutely void by their Death, &c. but their Leaſes for Life or Lives only voidable; ſo here the Biſhops Leaſes for Lives are abſolutely void by their Death, &c. whereas their Leaſes for Years are only voidable by their Succeſſor: But *Quære* whether the Common Law made any ſuch Diſtinction as to Things in Livery and Things in Grant, either in caſe of Biſhops, or Parſons, Vicars, &c. for the only Diſtinction taken notice of in the Books is, between Biſhops, &c. who had the whole Fee abſolutely in them, and Parſons, Vicars, &c. who had only a qualified Fee, and between Leaſes for Years by Parſons, Vicars, &c. and Leaſes for Life or Lives made by them; but it ſeems clear, that if the Law be ſo at this Day as to Biſhops, when they make Leaſes of Things in Grant, ſo it is as to all other Eccleſiaſtical Perſons, (except Parſons, Vicars, &c.) within the Statutes before-mentioned, that Leaſes for Lives of Things in Grant determine abſolutely by their Death, for the Reaſons before given; but Leaſes for Years of ſuch Things in Grant are only voidable by the Succeſſor, not abſolutely void; but as to Parſons, Vicars, &c. Leaſes for Years made by them, whether of Things in Livery or Things in Grant, determine abſolutely by their Death, if not duly confirmed, or the Statutes not purſued, becauſe then they remain at Common Law, where their Death or other Amotion was an abſolute Determination of all Leaſes for Years in general made by them, and conſequently of Leaſes for Years of Things in Grant, as well as others; and this Diſtinction in the principal Caſe between Leaſes for Lives of Things in Grant, and Leaſes for Years thereof, by Biſhops and other Eccleſiaſtical Perſons within the ſaid Statutes (except Parſons, Vicars, &c.) that the one are abſolutely void by the Death, &c. of the Leſſor, and the other only voidable, ſeems to be a reaſonable Diſtinction, and to reconcile all the Books, which make it a great Queſtion, if Leaſes in general by Biſhops, &c. not purſuant to the ſaid Statutes, are abſolutely void by the Death, &c. of the Leſſor, or only voidable; for if Leaſes for Years by them of Things which lie in Grant are only voidable, and not actually void, becauſe the Succeſſor is not without ſome Remedy for the Rent, and therefore may adhere to that, if he pleaſes, and affirm the Leaſe for his Time; much leſs are Leaſes for Years or Lives of Things which lie in Livery, (though the Statutes are not purſued) abſolutely void by the Death, &c. of the Leſſor, ſince in ſuch Caſes the Succeſſor has as full and ample Remedy for the Rent by Diſtreſs or otherwiſe, as he would have had if all the Circumſtances required by the Statutes had been purſued; and then *quilibet poteſt renunciare Juri pro ſe introducto*; and if the Succeſſor thinks fit to wave the Defect of ſuch Circumſtances, and abide by the Leaſe, it would be unreaſonable, and againſt the Intent of the Statutes, to put it out of his Power ſo to do, by making the Leaſe actually void, ſo as no Acceptance of the Rent, or other Act done by him, could affirm it; but where his Acceptance of the Rent at one Day will not help him to any Remedy for it the next, there it would be unreaſonable that ſuch an unwary Act ſhould ſtrip him of the Benefit intended for him by the ſaid Statutes, and where he had no Remedy for the Rent, ſhould have none for the Land neither, which would totally fruſtrate the Deſign and Intent of the Act, and tend to the Impoveriſhment of moſt Succeſſors to Eccleſiaſtical Perſons.

2 Rol. Rep. 161. *Ed. Coke's* Caſe. Jon. 406. Cro. Car 95. 5 Co. 2. 10 Co. 60, 61. Cro. Jac. 173.

But this Acceptance of Rent, which ſhall affirm a voidable Leaſe muſt be by him who is perfect Succeſſor; therefore where the Succeſſor of a Biſhop, before he had a Reſtitution of the Temporalties out of the King, *accepted the Rent reſerved by his Predeceſſor upon a voidable Leaſe, yet it was held, that notwithſtanding this Acceptance, he might well enter and avoid the Leaſe; becauſe before ſuch Reſtitution he was not perfect Succeſſor;

Palm. 517. Biſhop of *Oxford's* Caſe. *Page 395

ceſſor; and then ſuch Acceptance of the Rent ſhall not bind him, any more than if he had been a perfect Stranger.

11 Co. 79. a. Rol. Rep. 172. *Magdalen College's* Caſe. So where a Maſter of a College, or Head of any Corporation Aggregate, accepts Rent upon a voidable Leaſe made by his Predeceſſor, and the reſt of the Corporation, without Authority in Writing from the Corporation to accept the ſame, this Acceptance ſhall not affirm the Leaſe during the Life or Continuance of ſuch Maſter or Head who ſo accepted it; for the Right being as much in the Fellows, or other Members of the College, as in the Maſter, *&c.* himſelf, he cannot by any Act of his own conclude or bind them from their Entry upon any voidable Leaſe; alſo he himſelf, in their Right, may enter to avoid ſuch Leaſe, notwithſtanding his own Acceptance of the Rent.

Rol. Abr. 474. Hetley 24. Cro. Car. 95. *Wheeler* ver. *Danby.* If a Biſhop's Bailiff, of his own Head, and without any Order from the Biſhop, receives Rent upon a voidable Leaſe made by the Predeceſſor of the Biſhop, this ſhall not bind the Biſhop; but where a Biſhop made a Leaſe for Lives of certain Lands, Parcel of the Manor of *A.* reſerving Rent, but not in all Things purſuant to the Statutes, and by conſequence voidable by the Succeſſor, and then the Biſhop dies, and another is made, and the Bailiff of the Manor came to him, and ſhewed him in general, that there were certain Rents in Arrear of the ſaid Manor, and thereupon the Biſhop commanded him to receive the ſaid Rents, which he did accordingly, and, amongſt the reſt, the Rent upon the ſaid voidable Leaſe, and after paid all the ſaid Rents to the Biſhop, without giving him Notice particularly of that Rent; yet this Acceptance ſhall bind the Biſhop, becauſe he ought to take notice what Leaſes are made by his Predeceſſor, and what Rent he himſelf received, for, if he had no Title, he ought not to have received the Rent at all; if he had, he muſt be ſuppoſed to know it, and then his Acceptance of the Rent ſhews his Aſſent to the Leaſe upon which it was reſerved.

Poph. 121. Leon. 309. Alſo it is to be obſerved, that ſo far as the Leſſor is bound by any void or voidable Leaſes, ſo far alſo the Leſſee, his Executors or Aſſigns, which ſoever of them have the Intereſt, are bound thereby, and no further; therefore when the Leaſe is not void without Entry, if Rent be in Arrear after the Death of the Predeceſſor, the Succeſſor hath Remedy to recover ſuch Arrears, if he chuſes to affirm the Leaſe; but if the Leaſe be abſolutely void, the Succeſſor hath no Remedy at Law for any Rent incurred after the Death of his Predeceſſor.

Leon. 309. So the Leſſee of a voidable Leaſe, after the Death of the Leſſor, may maintain an Action of Treſpaſs againſt any Stranger, who ſhall enter or do any other Act of Treſpaſs upon the Land before the Leaſe be actually avoided †.

† Becauſe his Poſſeſſion intitles him to the Action of Treſpaſs, it being a poſſeſſory Action.

2. By what Means and in what Caſes ſuch voidable Leaſes may be made good.

Dyer 239. Fitz. Tit. *Abbot* 9. Bro. Tit. *Acceptance* 15. This in a great meaſure has been explained under the foregoing Diviſion; it remains only to ſhew, that, beſides Acceptance of the Rent, there are other Ways by which ſuch voidable Leaſes may be affirmed, as by diſtraining for Rent due at the Death of the Predeceſſor, or by bringing an Action of Waſte againſt the Leſſee; or, in caſe the Leaſe be for Life or Lives, by bringing an Aſſiſe for the Rent due after the Death of the Predeceſſor, or Acceptance of Fealty from the Leſſee; all theſe amount to an Affirmance of ſuch voidable Leaſes, and make them good againſt the

Perſon

* Perſon who ſo affirms them, for his own Time, becauſe theſe Acts ſhew a ſufficient Intent in the Succeſſor to continue and acquieſce in the Leaſes made by his Predeceſſor. *Page 396

3. The Manner of avoiding ſuch Leaſes as are only voidable.

This may be done either by Entry, where the Leaſe is of Things corporeal and manurable, or by Claim where the Leaſe is of Things incorporeal; as where a Leaſe for Years is made, rendering Rent, upon Condition to be void for Non-payment, this Leaſe ſhall not be void without a Demand made of the Rent; for if it were otherwiſe, it would be in the Power of the Leſſee to make the Leaſe void at any Rent Day he thought fit, and ſo to add the Wrong of making the Leaſe void to that of Non-payment of the Rent. Dyer 222. *Ayer* and *Ome.* Sid. 7. *Young* and *Wright.* Dyer 28. a. in Margin.

And where an Entry is to be made, this may be done either by the Bailiff of the Party that would enter, or by other Perſons deputed for that Purpoſe; but a Bailiff, merely in virtue of his Office, cannot make an Entry for his Maſter without ſpecial Warrant, becauſe his Office is to manage his Maſter's Lands, and to take the Profits thereof to his Maſter's Uſe; but to gain new Lands, which the Maſter had not before, does not belong to his Office as Bailiff; beſides, an Entry being a Thing which the Maſter may or may not make, his Bailiff ſhall not determine his Election therein. Moor 52. Dyer 222.

Where a Corporation Aggregate have Title of Entry to avoid a Leaſe, they cannot command their Bailiff to enter, unleſs it be by Deed; for their Parol Command in ſuch Caſe is void, and the Entry thereupon tortious, becauſe as a Body Politick they are inviſible, and incapable of Acts as Natural Perſons are: But yet, *per Curiam*, if one diſtrains as Bailiff to a Corporation, though in Truth he he not Bailiff, yet he may make Conuzance as ſuch, and if the Corporation agree thereto, it is good without Deed, becauſe the Command he had in ſuch Caſe is not traverſable. Rol. Abr. 514. b. *Dumper* ver. *Syms.* Bro. Tit. *Corporation* 9. 6 Co. 38. 4 Co. 119.

But a Biſhop may by Parol command his Servant to demand a Rent or make an Entry, and this is good, becauſe as a Sole Corporation he is capable of the ſame Acts as all Natural Perſons are. 4 Leon. 181. *Wood* verſus *Chiver.*

A Dean and Chapter made a Leaſe for Years, rendering Rent, and for Default of Payment the Leaſe to be void; the Rent was in Arrear, and not paid; then they made a new Leaſe to another Perſon, and affixed their Seal to it in the Chapter-Houſe, before any Entry made upon the firſt Leſſee, and at the ſame Time made a Letter of Attorney to one to enter and make Delivery of this Leaſe upon the Land, who accordingly did it. And it was objected, that this ſecond Leaſe was void, becauſe the Deed being perfected as the Deed of the Corporation, by their affixing their Seal to it, the Delivery after by the Attorney was void, it being perfect before; and the firſt Perfection of it as a Deed could not make it a good Leaſe for Years, becauſe the firſt Leſſee was in Poſſeſſion, and they made no Entry to avoid it; but yet *per Curiam* it was held to be a good Leaſe, and that there was no other Means for a Corporation to make a Leaſe but this; and *Gawdy* ſaid, it was not the Deed or Leaſe of the Corporation till Delivery, as of another Perſon; and therefore where it is ſaid in *Davis* 44. to be agreed, that if a Dean and Chapter put their Chapter Seal to a Deed, this is a perfect Deed thereby, without any Delivery; this muſt be underſtood when the Dean and Chapter are in Poſſeſſion, not when they are out of Poſſeſſion, or have only a Right; and ſo the Diverſity appears to be taken upon the Books; for otherwiſe * the Leaſe muſt be inevitably void in ſuch Caſe; for till it be ſealed, the Attorney cannot deliver it as the Deed of the Corporation; and if the Cro. Eliz. 167. 2 Leon. 97. *Willis* verſus *Jermin.* Dav. 44. 2 Rol. Abr. 23. *Flud* and *Gregory.* Vent. 257. 3 Keb. 307. *Good* verſus *Aſh.* *Page 397

Sealing perfects it presently as their Deed, so that it cannot be delivered after, then it is void for want of an Entry, and so all Ways the Lease would be void; which would be a very unreasonable Construction, when it may be so easily avoided; and in the latter Books it is said, that though the Putting of the Seal of a Corporation Aggregate to a Deed carries with it a Delivery, yet the Letter of Attorney to deliver it upon the Land suspends the Operation of it as an Escrow till Entry, &c. but yet the Corporation, if they think fit, may after the Indenture of Lease ingrossed make a Letter of Attorney to another, to seal and deliver it as their Deed or Lease to the Lessee upon the Land, without first affixing their Seal to it; and so it was done in the Case of the Wardens and Fellows of *All Souls College* in *Oxford*; but then, as it seems, the Attorney must affix the Corporation Seal to it, and not any other Seal; but yet in one Book it is held *per Curiam*, that a Corporation Aggregate, as there the President, Fellows and Scholars of *St. John's College* in *Oxford*, making a Lease, are to subscribe and seal it, and then deliver it by their Attorney, having a Letter of Attorney for it, and that they could not deliver it in any other Manner; but whether the Attorney might also affix their Seal or not, is not mentioned in the Case.

Leon. 306. *Carter* versus *Claypool*. Bulst. 119. *President, &c. of St. John's College* versus Lord *Norris*.

(I) Of Leases made by those who have but a particular Estate or Interest in the Lands leased: And herein,

1. Of Leases made by Tenant in Dower or Curtesy.

AS to which it will be sufficient to observe, that if Tenant in Dower or by the Curtesy make a Lease for Years, reserving Rent, and die, this Lease is absolutely determined, so that no Acceptance of the Rent by the Heir or those in Reversion can make it good; though their Estate is *quodam modo* a Continuance of the Estate of their Husband or Wife, yet it is a Continuance of it only for Life, and they have no Power to contract for, or intermeddle with the Inheritance, and consequently their Leases or Charges fall off with the Estate whereout they were derived, and the Lessee is become Tenant by Sufferance by his Continuance of Possession after.

Bro. Tit. *Acceptance* 14, 19. Tit. *Leases* 17, 19. Plow. 30, 272. Cro. Car. 398, 399. Jon. 354. Vaugh. 80-1.

2. Of Leases made by Tenant for Life.

Tenant for Life can make no Leases to continue longer than his own Life; but if Tenant for Life makes a Lease for twenty Years generally, and after he in the Reversion confirms that Lease, and then the Tenant for Life dies, though this at first would have determined by the Death of the Lessor, yet the Confirmation hath made it good and unavoidable for the whole Term; but if the Lease had been for twenty Years, if the Lessor Tenant for Life should so long live, there if the Reversioner had confirmed this Lease, yet it would not prevent its Voidance upon the Death of the Tenant for Life. The Diversity between which Cases is this, That in the first Case the Lease being made generally for twenty Years, nothing appears to the contrary but that it was a good Lease for that
*Page 398 * Time absolutely; for the Death of the Lessor, which would determine it sooner, does not appear in the Lease itself; then when the Reversioner, who alone

Poph. 105. Co. 147. *Anne Mayhew*'s Case.

alone could take advantage of that implied Limitation, thinks fit to wave it, and confirms the Leaſe, as it was made at firſt, for twenty Years abſolutely, this makes it *his own Leaſe* for ſo much of the Time as would have fallen into his Reverſion by the Death of the Tenant for Life, before the Twenty Years run out; but in the other Caſe, the Death of the Tenant for Life being made the expreſs Limitation and Circumſcription of the twenty Years in the Leaſe itſelf, no Confirmation of that Leaſe, as ſo limited can enlarge it to extend beyond the Life of the Leſſor, that being the expreſs Determination affixed to it.

And yet we find one Caſe where it is held, that if a Man makes a Leaſe for twenty-one Years, if the Leſſee ſo long live, and after the Leſſor and Leſſee join in a Grant by Deed of the Term to another, and after the firſt Leſſee dies within the Twenty-one Years, that yet the Grantee ſhall enjoy it during the Reſidue of the Term abſolutely. But to reconcile this Caſe with the other, it muſt be intended, that in the Aſſignment no Notice is taken of the expreſs Limitation affixed to the Leaſe, but that they joined in an Aſſignment of the Leaſe for the Reſidue of the Twenty-one Years, and then it may well be conſtrued to amount to a *Confirmation by the Leſſor* for that Time, as the Leſſor may confirm the Land to the Leſſee for any longer Time, and thereby enlarge his Eſtate or Intereſt. 10 Co. 49. a.

If *A.* Leſſee for the Life of *B.* makes a Leaſe for Years by Indenture, and after purchaſe the Reverſion, and then *B.* dies, *A.* ſhall avoid his own Leaſe, notwithſtanding he hath now an Eſtate capable of ſupporting the Leaſe for the whole Term, for he may confeſs the Leaſe for Years as it was, and avoid it by ſhewing his own Eſtate in the Lands at the Time of that Leaſe made, and is not eſtopped to do this, becauſe an Intereſt paſſed from him, he well may confeſs and avoid. Co. Lit. 47. b. 6 Co. 15. a. R. l. Abr. 878.

B. Tenant for Life of *C.* and he in the Remainder or Reverſion in Fee join in a Leaſe for Years by Indenture, this during the Life of *C.* is the Leaſe of *B.* who then only had the preſent Intereſt in the Lands, and the Confirmation of him in the Remainder or Reverſion; but after the Death of *C.* then this becomes the Leaſe of him in the Reverſion or Remainder, and the Confirmation of *B.* for the Leſſors having ſeveral Eſtates in them in ſeveral Degrees, the Leaſe ſhall be conſtrued to move out of each one's reſpective Eſtate or Intereſt as they become capable of ſupporting thereof, which is the moſt natural and uſeful Conſtruction of the Leaſe, eſpecially as there can be no Eſtoppel in this Caſe, by reaſon of the ſeveral Intereſts which paſſed from each; and therefore during the Life of Tenant for Life, if the Leſſee, being evicted, ſhould declare of a Leaſe by both, this would be againſt him, as was adjudged, becauſe for that Time it was only the Leaſe of the Tenant for Life, Co. Lit. 45. a. Dyer 234. b. Moor, pl. 196. pl. 939. Poph. 57. 6 Co. 14.

3. Of Derivative Leaſes, or by one who is but a Leſſee for Years himſelf.

As a Leſſee for Years may aſſign or grant over his whole Intereſt; ſo he may grant it for any fewer or leſſer Number of Years than he himſelf holds it; and ſuch Derivative Leſſee is compellable to pay Rent, perform Covenants, &c. according to the Terms agreed in ſuch Grant or Aſſignment; alſo it is ſaid in (*a*) *Broke*, that a Termor ſo aſſigning may diſtrain for the Rent, without any Power reſerved for that Purpoſe, though a Perſon who aſſigns his whole Intereſt cannot, becauſe he has no Reverſion. *Vide* Tit. *Aſſignment and Covenant.* (*a*) Bro. Tit. *Diſtreſs* 7.

* But ſuch Derivative Leſſee is not liable to the Rent reſerved on the original Leaſe, otherwiſe than as his Cattle may be liable to a Diſtreſs for Rent- *Page 399

2 Vern. 276, 374. & vide Cro. Eliz. 159. Leon. 179.

Rent-arrear to the original Leſſor, as any Stranger's Levant and Couchant may be; for there is no Privity between him and the Original Leſſor, as there is between a Leſſor and Aſſignee; and therefore ſuch a one, though he take the whole Term, except one Day, ſhall not be liable to any of the Covenants in the original Leaſe.

Preced. Chan. 124. *Colcheſter* ver. *Arnot.* 2 Vern. 383. S. C.

Leſſee of a Prebend makes an Under-Leaſe, and the Leaſe being pretty far ſpent, he requeſted the Tenant to ſurrender, to enable him to renew, and offered to give any Security to grant him a new Leaſe for ſo many Years as he had to come in his old one; but the Tenant was obſtinate and would not, unleſs his Landlord complied with ſome Demands of his; upon which he brought his Bill in Equity to inforce him to a Compliance; but my Lord *Keeper* ſaid, though it were a Benefit to the Plaintiff, and no Prejudice to the Defendant, yet there being no Agreement in the Deed for that Purpoſe, he could do nothing in it.

But now by the 4 *Geo.* 2. *cap.* 28. *ſect.* 6. it is enacted in the Words following, *viz.* "Whereas many Perſons hold conſiderable Eſtates by "Leaſes for Lives or Years, and leaſe out the ſame in Parcels to ſeveral "Under-Tenants, and whereas many of thoſe Leaſes cannot by Law "be renewed without a Surrender of all the Under-Leaſes derived out of "the ſame, ſo that it is in the Power of any ſuch Under-Tenants to "prevent or delay the Renewing of the principal Leaſe, by refuſing to "ſurrender their Under-Leaſes, notwithſtanding they have covenanted ſo "to do, to the great Prejudice of their immediate Landlords, the firſt "Leſſees; for preventing ſuch Inconveniencies, and for making the "Renewal of Leaſes more eaſy for the future, be it enacted by the "Authority aforeſaid, that in caſe any Leaſe ſhall be duly ſurrendered "in order to be renewed, and a new Leaſe made and executed by the "chief Landlord or Landlords, the ſame new Leaſe ſhall, without a "Surrender of all or any the Under-Leaſes, be as good and valid to all "Intents and Purpoſes, as if all the Under-Leaſes derived thereout had "been likewiſe ſurrendered at or before the Taking of ſuch new Leaſe; "and all and every Perſon and Perſons, in whom any Eſtate for Life or "Lives, or for Years, ſhall from Time to Time be veſted by virtue of "ſuch new Leaſe, and his, her, and their Executors and Adminiſtrators, "ſhall be intitled to the Rents, Covenants and Duties, and have like "Remedy for Recovery thereof; and the Under-Leſſees ſhall hold and "enjoy the Under-Meſſuages, Lands and Tenements, in the reſpective "Under-Leaſes compriſed, as if the original Leaſes, out of which the "reſpective Under-Leaſes are derived, had been ſtill kept on Foot and "continued; and the chief Landlord and Landlords ſhall have and be "intitled to ſuch and the ſame Remedy, by Diſtreſs or Entry in and "upon the Meſſuages, Lands, Tenements and Hereditaments comprized "in any ſuch Under-Leaſe, for the Rents and Duties reſerved by ſuch "new Leaſe, ſo far as the ſame exceed not the Rents and Duties re-"ſerved in the Leaſe, out of which ſuch Under-Leaſe was derived, as "they would have had in caſe ſuch former Leaſe had been ſtill continued, "or as they would have had in caſe the reſpective Under-Leaſes had "been renewed under ſuch new principal Leaſe; any Law, *&c.*

4. Of Leaſes made by a Diſſeiſor or Diſſeiſee.

Co. Lit. 300. Poph. 50.

If a Diſſeiſor makes a Leaſe for Years, or grants a Rent-Charge, and the Diſſeiſee confirms it, and after re-enters, yet he ſhall not avoid the Leaſe or Rent, becauſe by his Confirmation of them he hath departed with ſo much of his antient Right, which incorporates and mixes with the Leaſe or Grant, ſo that he can never after avoid them.

If

*If one be diſſeiſed of Lands, and whilſt he is out of Poſſeſſion intends to make a Leaſe for Years, the Way is to prepare a Deed of Leaſe, and after he hath ſigned and ſealed it, before any actual Delivery thereof, as his Deed, to deliver it as an Eſcrow to a third Perſon, to be delivered as his Deed after Entry and actual Poſſeſſion taken in his Name, or after Signing and Sealing before actual Delivery, he may make a Letter of Attorney to a third Perſon, to enter upon the Land in his Name and after ſuch Entry to deliver it upon the Land, or elſewhere, as his Deed, to the Leſſee, and though ſuch Letter of Attorney be affixed to the Deed, and to make it an effectual Letter of Attorney, that muſt be ſealed and delivered, yet the Sealing and Delivery of that by the Leſſor, though affixed to the Deed of Leaſe, will not be conſtrued a Delivery of the Leaſe itſelf, becauſe no ſuch Intent appears, but the contrary; and therefore the Delivery of the Letter of Attorney ſhall have no more Influence upon the Deed of Leaſe, than if it had not been affixed thereto; or ſuch Diſſeiſee may prepare a Deed of Leaſe, and at the ſame Time execute a Letter of Attorney to a third Perſon, to enter upon the Land, and after ſuch Entry to ſign, ſeal and deliver the Leaſe as his Act and Deed to the Leſſee: And all theſe Ways are good, becauſe the Delivery is the eſſential and finiſhing Part of a Deed; and if the Poſſeſſion and Seiſin be reduced before that comes, the Delivery after is as effectual as if the whole Deed had been prepared and executed after; becauſe till the Delivery, the Deed took no Effect, and when the Delivery was, he was in actual Poſſeſſion, and conſequently might make ſuch Leaſe; but if ſuch Diſſeiſee, being out of Poſſeſſion, had ſealed and delivered the Deed of Leaſe as his Deed, though he had after actually entered upon the Land, and then delivered the Leaſe again as his Deed, yet no Intereſt would paſs to the Leſſee by either of theſe Deliveries; for, as his Deed, it took abſolute Effect by the firſt Delivery, and then the ſecond Delivery, to make it his Deed, was void and to no Purpoſe; for a Deed cannot have two Deliveries; and the firſt Delivery, to make it a Leaſe, was void, becauſe he was then out of Poſſeſſion, and had only a Right of Entry, which he could not transfer to a Stranger; and therefore the Leaſe is abſolutely void to carry any Intereſt to the Leſſee; and ſo it would be, if after ſuch Delivery of it as his Deed, he had made a Letter of Attorney to enter and deliver it as his Deed upon the Land, for the firſt Delivery made it his Deed effectually; but that could paſs no Intereſt, becauſe he was then out of Poſſeſſion, and the ſecond Delivery to make it a Deed, was void, becauſe it was his Deed by the firſt Delivery, and therefore cannot be delivered again; and *Quære*, in the Caſe above-mentioned, if the Letter of Attorney were at the Concluſion of the Deed of Leaſe, in the very ſame Parchment or Paper whether the Diſſeiſee could diſtinguiſh his Sealing and Delivery of that as a Letter of Attorney, ſo that it ſhould not amount to a Sealing and Delivery of the Deed itſelf, and thereby make void any after Delivery, when the Poſſeſſion and Seiſin were reduced.

*Page 460
Co. Lit. 48. b.
Cro. Eliz. 483. *Stephens* ver. *Elliot.*
3 Co. 55.
Cro. Eliz. 446. *Jennings* ver. *Bragg.*
2 Bendl. 81.
2 Rol. Abr. 25. *Davies* ver. *Bridges.*

The Heir after the Death of his Anceſtor, before any actual Entry, may make a Leaſe for Years, becauſe the Poſſeſſion in Law was caſt upon him immediately by the Death of his Anceſtor, and none had Poſſeſſion in Fact; but if a Stranger had firſt entered by Abatement, then ſuch Leaſe made by him after would be void, becauſe by the Entry the Stranger gained Poſſeſſion in Fact, which deveſted the Poſſeſſion in Law of the Heir, and ſo he had neither Poſſeſſion in Fact nor Law, whereof to make a Leaſe, and conſequently the Leaſe muſt be void.

Plow. 137.

If the Heir of the King's Tenant *in Capite*, or in Socage, before Livery, or after Office found, makes a Leaſe for Years, this ſeems to be good,

Bro. Tit. *Leaſes* 57. Sav. 55.

good, for such Lease being only a Contract between the Lessor and Lessee, may be made before any actual Entry, by reason of the Pos-
*Page 401 *session and Seisin in Law, which were cast on him by the Death of his Ancestor; but if he had made a Feoffment in Fee, or a Lease for Life before Livery sued, these could not be made without actual Entry into the Land to make Livery of Seisin, and such Entry would be an Intrusion upon the King's Possession, and amounts to a Forfeiture, by attempting to take a Freehold out of the King.

5. Of Leases made by Joint-tenants or Tenants in Common.

As to Leases by Joint-Tenants and Tenants in common, we shall here, for Method sake, set down some of the most remarkable Cases relating thereto, though these Matters are more fully treated of under their proper Heads ‡.

‡ It is said Tenants in Common cannot make a joint Lease. *Vide* the Case of *Heatherly* v. *Weston* P. 4 Geo. 3. 2 Wilf. 232.

Co. Lit. 163. Bro. Tit. *Grants* 154. Rol. Abr. 848.

1. Then, if two Joint-Tenants are in Fee, and one lets his Moiety to *J. S.* for Years, to begin after his Death, this is good, and shall bind the other, if he survives; because this is a present Disposition, and binds the Land from the Time of the Lease made, so that he cannot after avoid it; but a Devise for Years in such Manner, by one Joint-tenant, would not bind the other surviving, because that is no present Disposition, nor binding upon the Devisor himself, inasmuch as he may revoke or cancel his Will, and so destroy that Devise; and therefore such Devise, not taking effect to any Purpose till his Death, comes too late to prevent the Survivorship, which being the elder Title, shall be preferred, and shut out the Devise; so all Grants or Charges, by one Joint-tenant out of the Land, fall off with his Life, and cannot affect the Survivor, because they being no immediate Disposition of the Land itself, that comes whole and intire to the Survivor under the first Title, and, by consequence, over-reaches all intermediate Charge or Grants thereout by the other Joint-tenant who is dead.

Co. Lit. 186.

But if one Joint-tenant grant *Vesturam* or *Herbagium terræ* for Years, and dies, this shall bind the Survivor; so if two Joint-tenants are of a Water, and one grants a separate Piscary for Years, and dies, this shall bind the Survivor; because in these Cases the Grant of the one Joint-Tenant gives an immediate Interest in the Thing itself whereof they are Joint-tenants.

Moor, pl. 514. Poph. 96. *Harbin* vers. *Barton*. 3 Bulf. 273. Rol. Rep. 401. Dyer 187. Plow. 263. Cro. Jac. 91. 3 Bulf. 131. Co. Lit. 184. b.

If two Joint-tenants for Life are, and one of them makes a Lease for Years of his Moiety, either to begin presently, or after his Death, and dies, this Lease is good and binding against the Survivor; the Reason whereof is, that notwithstanding the Lease for Years, the Joint-tenancy in the Freehold still continues, and in that they have a mutual Interest in each other's Life, so that the Estate in the Whole, or any Part, is not to determine or revert to the Lessor till both are dead; for the Life of the one, as well as of the other, was at first made the Measure of the Estate granted out by the Lessor; and therefore so long as either of them lives, if the Joint-tenancy continues, he is not to come into Possession. Now these Joint-tenants having a reciprocal Interest in each other's Life, when one of them makes a Lease for Years of his Moiety, this does not depend for its Continuance on his Life only, but on his Life and the Life of the other Joint-tenant, whichsoever of them shall live longest, according to the Nature and Continuance of the Estate whereout it was derived; and then, so long as that continues, so long the Lease holds good, and, by consequence, such Lessee shall hold out the surviving Joint-tenant and the Reversioner, till the Estate, whereout his Lease was derived, be fully determined; but if a Rent were reserved on such

ſuch Leaſe, this is determined and gone by the Death of the Leſſor, for the Survivor cannot have it, becauſe he comes in by Title Paramount the * Leaſe and Heirs of the Leſſor have no Title to it, becauſe they have no Reverſion or Intereſt in the Land; but *Quære*, if the Executors or Adminiſtrators cannot maintain an Action of Debt or Covenant, either upon the Covenant in Law, or expreſs Covenant, for Payment of the Money, if there be any. Co. 96. Co. Lit. 185. a. Moor 139. *Page 402

A. and *B.* Joint-tenants for their Lives, *A.* by Indenture leaſes the Moiety which he holds in Jointure with *B.* to *C.* for ſixty Years from the Death of *B.* if he the ſaid *A.* ſhould ſo long live, and demiſes the other Moiety to *C.* for ſixty Years from his own Death, if *B.* ſhall ſo long live; then *A.* dies, and *B.* ſurvives; and it was adjudged, that this Leaſe was void for both Moieties; for by the firſt Words it was a good Leaſe from *A.* of his Part, upon the Contingency of his ſurviving *B.* but that never happened; and as to *B.*'s Part, *A.* had no Power to leaſe or contract for it during the Life of *B.* though he had happened after to ſurvive him, for that it was but a bare Poſſibility, which could not be leaſed or contracted for; and therefore the Leaſe was void in the Whole. Cro. Jac. 91. Moor, pl. 1074. *Witlock* ver. *Horton.*

A. and *B.* Joint-tenants for their Lives, *A.* leaſes his Part for ſixty Years, if he and *B.* ſo long live, then *B.* ſurrenders his Part, and takes back a new Eſtate; then *A.* dies, living *B.* and it was adjudged, that this Leaſe made by *A.* was determined by his Death; for the Joint-tenancy, which would have given them, or their Leſſees, an Intereſt in each other's Life, is by the Surrender of *B.* determined and gone, and then the Leaſe of *A.* ſtood ſingle on his own Life, and conſequently by his Death is determined; ſo it would be, if after ſuch Leaſe for Years by one Joint-tenant, they had made Partition of the Joint-Eſtate, and then the Leſſor had died, his Leaſe would be at an end, becauſe the Joint-tenancy, which ſhould have ſupported it after his Death, is by the Partition defeated and gone. Cro. Jac. 377. Rol. Rep. 309. 3 Bulſ. 130. Rol. Abr. 131. *Daniel* and *Waddington.*

If one Joint-tenant or Tenant in common makes a Leaſe for Years of his Part to his Companion, this is good; for this only gives him a Right of taking the whole Profits, when before he had but a Right to the Moiety thereof; and he may contract with his Companion for that Purpoſe, as well as he may with any Stranger. Co. Lit. 186. a. Cro. Jac. 83. 611. Moor, pl. 194. Rol. Abr. 851.

6. Of Leaſes made by Copyholders.

If a Copyholder takes upon him to make Leaſes, not warranted by the Cuſtom of the Manor, and without the Lord's Licence, this is a Forfeiture of his Copyhold, but no Diſſeiſin to the Lord; and the Leaſe is good againſt every body but the Lord. Moor 184. Salk. 186. pl. 5.

And it ſeems not to be material whether ſuch Leaſe be by Parol or in Writing; but it muſt be a perfect Leaſe, and muſt have a certain Beginning and certain End, for otherwiſe the Leaſe is void, and carries but an Eſtate at Will at moſt; which is no Forfeiture. Moor 292. Heil. 122. Bulſ. 189.

A. Copyholder for Life having got *B.* to be bound with him for 100 *l.* and given him a Counterbond, executes a Deed, whereby reciting the Counter-bond, and the Eſtate *A.* had in the Lands for Life, *A.* covenants, grants and agrees for himſelf, his Executors, Adminiſtrators and Aſſigns, with *B.* that he, his Executors, and Adminiſtrators, ſhould hold and enjoy theſe Lands, from the making of the Deed, for ſeven Years, and ſo from the End of ſeven Years to ſeven Years, for and during the Term of forty-nine Years, if *A.* ſhould ſo long live, and a Covenant, that if the 100 *l.* were * paid, and *B.* indemnified, the Deed to be void; and the Queſtion was, Whether this would amount to a Leaſe for forty-nine Years, if the Copyholder 2 Mod. 79. *Richards* ver. *Selby.* *Page 403

holder ſhould ſo long live; and ſo being in the Caſe of a Copyhold, and no Cuſtom to warrant ſuch Leaſe, be a Forfeiture of the Eſtate? And it was argued to be no Leaſe, becauſe ſuch Conſtruction would be a Wrong to both Parties; to the one, by defeating his Security, and to the other, by a Forfeiture of his Eſtate; which would be unjuſt; when by conſtruing it only to be a Covenant for the whole, each might be ſafe, and their Intention anſwered; and it was ſaid, that the Caſes, wherein ſuch Words have been held to amount to a Leaſe, were all of them in Caſes of Freehold, where no ſuch Miſchief could enſue; but the Court, notwithſtanding, inclined this was a good Leaſe by the Intention of the Parties, and conſequently a Forfeiture; for then the Jury would have found it ſo; but if the Words had been doubtful, and ſuch as would admit of divers Conſtructions, there to prevent a Forfeiture, it ſhould be taken to be only a Covenant, but here the Words are plain and clear; but no Judgment was given.

2 Keb. 267. *Lenthall* verſ. *Thomas.*

A Copyholder, by Articles of Agreement, covenanted and promiſed with another, that he ſhould hold at *Halves* for a Year, *according to the Cuſtom of the Manor*, at ſuch a Rent, and ſo from Year to Year for five Years; this was adjudged no Forfeiture, for the Prejudice that would enſue on ſuch Conſtruction to the Copyholder; alſo the Leaſe being worded *ſecundum Conſuetudinem Manerii* is tied up to the Cuſtom of the Manor; ſo that if there be no Cuſtom to warrant this Manner of Leaſing, the Leaſe itſelf falls to the Ground; alſo there was further in the Leaſe a Covenant, that if the Leſſor put out the Leſſee, he ſhould be allowed ſo much Rent by Way of Retainer; ſo that the Leſſee was at Uncertainty whether he ſhould enjoy it during the whole Term; for this gave the Leſſor Liberty to put him out, making the Allowance agreed upon, and ſtipulated between them; and beſides, it was doubted if the Words *covenant and promiſe that he ſhould enjoy* for ſuch a Time, would amount to a Leaſe, or were not rather relative to enjoying after a Leaſe made; for the Word *covenant* is none of thoſe reckoned up to make a Leaſe; and in the Caſes where it hath been ſo held, it was joined with the Word *agreavit*, which imports a mutual Conſent or Agreement of both Parties; and here, though there be the Word *agreed* or *Agreement*, yet it is only in the Style of the Articles; alſo here the Covenant is quietly to enjoy, which *a fortiori* does not make a Leaſe, but regards only the Manner of enjoying it after a Leaſe made, and being only to hold at Halves, it can be no Leaſe: This is the Manner of reporting this Caſe, which ariſes ſo by Jumps and Steps, and is ſo incoherently put, that it is hard to conclude any Thing from it relative to the Matter before us; beſides that the Giſt of the Caſe ſeems to turn upon the Words *holding at Halves*; for they are to govern and explain the Words *covenant and promiſe*, which of themſelves may be applied to ten thouſand other Things, and have no Meaning at all, till the ſubſequent Words explain what it is he covenants and promiſes; and the Words *holding at Halves* are of ſo ambiguous and doubtful a Signification, that according to the Rule taken in the foregoing Caſe, they might well leave Room for the Court to make ſuch a Conſtruction as ſhould prevent a Forfeiture; and in one Caſe it is expreſly held, that *expoſing to Half* is no Leaſe, but only a Liberty to plough and ſow, but paſſes no Intereſt, nor can the Leſſee have Treſpaſs for breaking the Soil; but in the ſame Book it is ſaid, that if he had expoſed it to Halves for two or three *Crops*, this had been a Leaſe.

Cro. Eliz. 143. *Hare* verſ. *Cicely.*

Latch 199. Godb. 364. Jon. 157. Noy 92. in all the S. C. between *Aſhfield* and *Aſhfield.*

An Infant Copyholder, without Licence of the Lord, made a Leaſe for Years by Parol, rendering Rent, and at full Age was admitted, and accepted the Rent, and then ouſted the Leſſee; and in this Caſe, though it was agreed, that a Leaſe for Years, rendering Rent, by an Infant, of Freehold Lands, was only voidable; yet it was urged, that in caſe of a Copyhold it would be otherwiſe; becauſe the Leaſe not being warranted by the Cuſtom, would

*would be a Diſſeiſin to the Lord, and conſequently a Forfeiture of his Copyhold, which being a great Miſchief to the Infant, the Court ought rather to help him, by adjudging ſuch Leaſe to be abſolutely void; but, notwithſtanding this, it was adjudged, that the Leaſe was a good Leaſe till avoided, and that a Leaſe for Years by a Copyholder without Licence is not a Diſſeiſin; and admitting it ſhould be a Forfeiture in this Caſe, yet if the Lord enters for it, the Infant may re-enter upon him, and ſo is no Miſchief; and therefore he, having accepted the Rent at full Age, hath made it good and unavoidable; and *Jones* ſays, that it was held to be no Forfeiture as to the Lord, but that admitting it were, yet it was a good Leaſe as to all Strangers; and that for this Reaſon principally it was adjudged ſuch Acceptance had made it good. *Page 404

A Copyholder for Life made a Leaſe for a Year by Indenture, dated ſuch a Day, and the ſame Day, by another Indenture, makes a ſecond Leaſe to the ſame Party for a Year, to commence ſuch a Day, being two Days after the firſt Leaſe ſhould expire; and by another Indenture dated the ſame Day and Year, makes a third Leaſe of the ſame Lands to the ſame Party, to commence ſuch a Day, being two Days after the ſecond Leaſe would expire; and ſo betwixt each Leaſe two Days betwixt the Beginning of the new Leaſe and the End of the former; and if this was a Forfeiture of his Eſtate, becauſe the Cuſtom of the Manor warranted a Leaſe but for a Year only, was the Queſtion. And it was agreed, that whether the Cuſtom of the Manor, or the general Cuſtom of the Realm, allows a Copyholder to make a Leaſe for a Year, this ought to be a Leaſe in Poſſeſſion, and he cannot, after ſuch Leaſe made, make another in Reverſion; and theſe three Leaſes being made all at one Time, ſhall be intended one intire Contract, and ſo a Leaſe for three Years, which is more than the Cuſtom warrants, and conſequently a Forfeiture; and the Intervention of two Days between each Leaſe was but a Fraud and Covin to defeat the Lord of his Forfeiture which ſhall not avail; and therefore it was adjudged againſt the Copyholder, that he had forfeited his Eſtate. Cro. Car. 233. Jon. 249. Rol. Abr. 508. *Mathews* verſ. *Wheſton.*

So where a Copyholder, who by the Cuſtom of the Manor could make a Leaſe for one Year only, made a Leaſe for a Year excepting the laſt Day of the Year, & *ſic de Anno in Annum*, excepting the laſt Day of every Year, during his own Life; this was adjudged, by all the Court, clearly to be a Forfeiture, and the Exception of a Day at the End of every Year to be only a Shift to evade the Cuſtom; which it cannot do; for it is a Leaſe certain for two Years at leaſt, excepting two Days, which in effect, is a Leaſe for more than one Year; and if he might by ſuch Exception of a Day or two, at the End of two Years, get out of the Reach of a Forfeiture, he might then make a Leaſe for twenty Years, or what other Time he thought fit, which the Law will not permit; and in *Bulſ.* this Manner of Leaſing, appears expreſly to have been by Articles, by way of Covenant, that he ſhould have the Land in that Manner, not by Words of immediate Leaſing, which make this a direct Authority, that a Covenant that he ſhall have or enjoy ſuch Lands, amounts to an immediate Leaſe, and not a Covenant barely; and though it were in caſe of a Copyhold, yet it would not ſave the Forfeiture. Cro. Jac. 308. Bulſ. 215. Rol. Abr. 507. *Lutterell* and *Weſton.*

So if a Copyholder makes a Leaſe for a Year, & *ſic de Anno in Annum* during ten Years, this is clearly a good Leaſe for ten Years, and if not warranted by the Cuſtom, will be a Forfeiture of his Eſtate. Rol. Abr. 508. Bulſ. 190. Cro. Jac. 301. 2 Mod. 81.

Theſe Caſes being ſo adjudged, and that a Copyholder cannot, either by way of Covenant, or of executory and renewable Leaſes annually, prevent the Forfeiture of his Eſtate, if he exceeds the Number of Years warranted by the Cuſtom, and has no Licence from his Lord for that Purpoſe; let us ſee if there be any Way yet found out to avoid this Miſchief, and yet make over to the Leſſee ſome Certainty that he ſhall enjoy the Lands after the Term warranted by the Cuſtom is expired, without which

which few will care to take Leaſes for ſo ſhort a Term as the Cuſtoms of
*Page 405 * moſt Manors generally allow; and we find one Caſe where an Attempt of
Cro. Jac. 301. Bulſ. 190. Lady *Mountague*'s Caſe. this kind was made, and it ſeems to have ſucceeded accordingly: the Caſe was this: A Copyholder made a Leaſe for a Year only of his Copyhold Land, according to the Cuſtom, and covenanted that after the End of this Year the Leſſee ſhould have or enjoy the ſame Lands for another Year, and ſo *de Anno in Annum* for ten Years; this was held by *Yelverton* Juſtice to be no ſuch Leaſe as would make a Forfeiture, becauſe he had a lawful Eſtate but for one Year only; and the Court agreed with him herein; and this ſeems to be a very reaſonable Conſtruction; for when he had in expreſs Terms leaſed it but for one Year only, and after in the Deed covenanted for the Leſſee's having or enjoying it for a longer Term, this Variation in the Manner of Expreſſion muſt vary the Senſe of it likewiſe; for now it appears that he intended by the Covenant ſomething different from the Leaſe itſelf, otherwiſe he would not have departed from that Form of Expreſſion, which was the moſt proper and natural whereby to ſignify his Intention of Leaſing; and then it would be unjuſt and unnatural to ſtrain the Covenant, which has a Meaning proper and peculiar to itſelf, to ſignify the ſame with the firſt Part of the Deed, which varies not only in Form, but was alſo intended to quite another Purpoſe.

Rol. Abr. 848. 3 Bulſ. 252. 2 Mod. 81. And perhaps in ſuch Covenant it may be ſtill better if it were worded *to permit and ſuffer* the Leſſee to have, hold, and enjoy the Lands in ſuch Manner; for a Covenant in that Form, even of Freehold Lands will not amount to an immediate Leaſe, becauſe the Words *permit and ſuffer* prove that the Eſtate is ſtill to continue in him from whom the Permiſſion is to come; for if any Eſtate thereby paſſed to the Covenantee, he might hold and enjoy it without any Permiſſion from the Covenantor; and therefore in ſuch Caſe the Covenantee hath only the bare Covenant for his Security of Enjoyment, without any actual Eſtate made over to him.

7. Of Leaſes made by Executors or Adminiſtrators.

Vide Tit. *Executors and Adminiſtrators.* Executors and Adminiſtrators, as they may diſpoſe abſolutely of Terms for Years veſted in them in Right of their Teſtators or Inteſtates; ſo may they leaſe the ſame for any fewer Number of Years, and the Rent reſerved on ſuch Leaſes ſhall be Aſſets in their Hands, and go in a Courſe of Adminiſtration.

6 Co. 63. 67. b. Sir *Moyle Finch*'s Caſe. *Vide* 5 Co. 29. *Prince*'s Caſe. So where Leſſee for fifty Years of a Reverſion expectant upon a Leaſe for Life makes his Will in Writing, and thereof appoints one *B.* his Son, an Infant of three Years of Age, Executor, and dies; Adminiſtration is granted to *C. durante Minori Ætate* of *B.* generally, then *C.* makes a Leaſe for ten Years, without reſerving any Rent, for aught appears; and yet this Leaſe was held good, becauſe, by the Eccleſiaſtical Law, *Minor* 17 *Annis non admittitur fore Executor*; and therefore Adminiſtration being granted generally during his Minority, the whole Term and Power of diſpoſing thereof, for that Time, veſts as abſolutely in the Adminiſtrator as it would have done in the Executor himſelf, if he had been of an Age capable of acting therein; becauſe for that Time the Teſtator died *Quaſi Inteſtatus*, and the Adminiſtrator for that Time hath the ſame Power as if he had actually died Inteſtate; and therefore ſuch Leaſe is good, at leaſt till the Executor attains his Age of ſeventeen Years, when ſuch Adminiſtration ceaſes; and ſome held that ſuch Leaſe would hold good after, till the Executor avoided it by actual Entry, by reaſon of the general Power which ſuch Adminiſtrator had in the mean Time; and therefore ſuch continuing Acts are not *ipſo facto* determined by the ceaſing of the Adminiſtration, but are only voidable in the ſame Manner as other Leaſes would be, *viz.*

by

by an Entry of the Executor, * when he comes to take upon him that Office; but if the Adminiſtration had been ſpecial, *ad Opus, Commodum & Ultilitatem* of the Executor during his Minority, & *non aliter, nec alio modo*, as it was in *Prince*'s Caſe, then none could make Title by virtue of ſuch a Leaſe made by ſuch ſpecial Adminiſtrator, even during the Minority of the Executor, becauſe the Nature and Manner of the Adminiſtrator's Power appearing in the very Title which the Leſſee muſt make to ſuch Leaſe, this Leaſe would appear not to be purſuant thereto, becauſe it could not be of Neceſſity, nor for the Uſe or Advantage of the Infant, ſince it could not take effect during the Life of the Tenant for Life; and therefore ſuch Leaſe would be condemned as void preſently. *Page 406

8. Of Leaſes made by a Bailiff of a Manor.

A Bailiff of a Manor cannot, by virtue of his Office, make Leaſes for Years; for his Buſineſs is only to collect Rents, gather the Fines, look after the Forfeitures, and ſuch like; but he hath no Eſtate or Intereſt in the Manor itſelf, and therefore cannot contract for any certain Intereſt thereout; but the Lord of the Manor may give him a ſpecial Power to make Leaſes for Years, as he may do to any Stranger; and then ſuch Leaſes, if they are purſuant to the Power, and made in the Name of his Lord, will be good as Leaſes by the Lord himſelf: For the Bailiff, though he hath ſuch Power, cannot make them in his own Name; but a general Bailiff of a Manor may make Leaſes *at Will*, without any ſpecial Authority, becauſe being to collect and anſwer the Rents of the Manor to his Lord, if he could not let Leaſes at Will, the Lord might ſuſtain great Prejudice by Abſence, Sickneſs, or other Incapacity to make Leaſes, when any of the former Leaſes were expired; and ſuch Leaſes at Will are for the Benefit of the Lord, and can be no ways prejudicial to him, becauſe he may determine his Will, when he thinks fit. Bro. Tit. *Baily* 40, 41. Tit. *Leaſes* 37. Cro. Jac. 99. Rol. Abr. 339.

But if a Bailiff of a Manor hath a ſpecial Power to make Leaſes for Years, as he ought to make them in the Name of his Maſter, ſo they ought to be made in Writing, that the Authority may appear to be purſued: Therefore where a Bailiff conſtituted by Writing to receive Rents, manage and let the Lands, made a Parol Leaſe for eleven Years, and the Leſſee, being turned out at Law upon an Ejectment, brought a Bill for Relief in Chancery, yet it was diſmiſſed, becauſe he had only a Parol Leaſe, which the Bailiff had no Power to make. 2 Chan. Ca. 202. *Rothwell* verſus Sir *Charles Huſſey*.

9. Of Leaſes made by a Guardian.

A Guardian in Socage may make Leaſes for Years in his own Name, and the Leſſee may maintain Ejectment thereupon; for this Guardian is a Perſon appointed, not by any ſpecial Deſignation of the Party, but by the Wiſdom of the Law, in reſpect of the Lands deſcended to the Infant; ſo that where no Lands deſcend there can be no ſuch Guardian; and his Office originally was to inſtruct the Ward in the Arts of Tillage and Huſbandry, that when he came of Age he might be the better able to perform thoſe Services to his Lord, whereby he held his own Land; and though the Office now be in ſome meaſure changed, as the Nature of the Tenure itſelf is, ſince the Time that the Socage Tenants bought off their Perſonal Labours and Services with an annual Rent to the Lord, yet it is ſtill called Socage Tenure, and the Guardian in Socage is ſtill only where Lands of that kind (as moſt of the Lands in *Eagland* now are) deſcend to the Heir within Age; and though the Heir after fourteen may chuſe his own Guardian Lit. ſ. 123, 124. Co. Lit. 88, 89. Vaugh. 18.

dian, who ſhall continue till he is twenty-one, yet as well the Guardian
*Page 407 * before fourteen, as he whom the Infant ſhall think fit to chuſe after four-
teen, are both of the ſame Nature, and have the ſame Office and Employ-
ment aſſigned to them by the Law, without any Intervention or Direction
of the Infant himſelf; for they were therefore appointed, becauſe the In-
fant, in regard of his Minority, was ſuppoſed incapable of managing him-
ſelf and his Eſtate, and conſequently derive their Authority, not from the
Infant, but from the Law; and that is the Reaſon they tranſact all Affairs
in their own Name, and not in the Name of the Infant, as they would be
obliged to do, if their Authority were derived from him; and if their Au-
thority were derived from him, it would by no Means anſwer the Intention
of the Law in appointing them; for then all Acts done by virtue of ſuch
derivative Authority could be of no more Force than if done by the Perſon
himſelf who gave that Authority, ſince none can communicate more Power
to another than he has himſelf; and that would invalidate all their Con-
tracts, and make them favour of the ſame Imbecillity as if made by the
Infant himſelf; therefore to enable them to take effectual Care of the In-
fant, and his Affairs, the Law has inveſted them, not with a *bare Autho-
rity* only, but alſo with *an Intereſt*, till the Guardianſhip ceaſes; and to
prevent their Abuſe of this Authority and Intereſt, the Law has made
them accountable to the Infant, either when he comes to the Age of four-
teen Years, or at any Time after, as he thinks fit; and therefore their
Authority and Intereſt extends only to ſuch Things as may be for the Be-
nefit and Advantage of the Infant, and whereof they may give an Account;
which is the Reaſon they cannot preſent to any Benefice in Right of the
Vide Tit. *Guardian.* Heir, becauſe they can make no Advantage thereof, (for that would be
Simony) and conſequently have nothing therein whereof they can give an
Account; and therefore the Infant himſelf ſhall preſent thereto.

Bro. Tit. *Garden* 19, 70. Cro. Jac. 55. 98. *Shopland* ver. *Ridler.* 2 Rol. Abr. 41. *Briſden* ver. *Huſſey.*

From what has been ſaid it appears, that a Guardian in Socage hath not
only *a bare Authority*, but *an Intereſt* in the Lands deſcended, and there-
fore, during that Time, may make Leaſes for Years in his own Name, as
any other who hath an Intereſt in Lands may do; for he is *quaſi Dominus
pro Tempore*; and therefore if he makes Leaſes for Years to continue be-
yond the Time of his Guardianſhip, ſuch Leaſes ſeem not to be abſolutely
void by the Infant's coming of Age, but only voidable by him, if he thinks
fit: for they were not derived barely out of the Intereſt of the Guardian,
or to be meaſured thereby, but take effect alſo by virtue of his Authority,
which, for the Time, was general and abſolute; and therefore all lawful
Acts done during the Continuance of that Authority are good, and may
ſubſiſt after the Authority itſelf, by which they were done, is determined;
and conſequently the Infant, when he comes of Age, may by Acceptance
of Rent or other Act, if he thinks fit, make ſuch Leaſes good and unavoid-
(a) But *note* A Teſtamentary Guardian, or one appointed purſuant to the Statute 12 Car. cap. 24. is the ſame in Office and Intereſt with a Guardian in Socage. Vaugh. 179.
able; but a Guardian by (a) Nurture cannot make any Leaſes for Years,
either in his own Name, or in the Name of the Infant, for he hath only
the Care of the Perſon and Education of the Infant, and hath nothing to
do with the Lands merely in virtue of his Office; for ſuch Guardian
may be, though the Infant hath no Lands at all, which a Guardian
in Socage cannot.

Leon. 158, 322. 4 Leon. 7. Owen 45, 56. *Willis* and *Whitewood.*

A. lets Lands to *B.* for four Years, and the Lands being holden in
Socage, and the Heir under fourteen, the Guardian in Socage by an
Indenture, before the firſt Leaſe was expired, lets the ſame Lands in his
own Name to *B.* for eight Years; and if by this Acceptance of a new
Leaſe from the Guardian in Socage the firſt Leaſe was ſurrendered, was
the Queſtion; and it is ſaid to be holden by the Court, that it was ſur-
rendered, or if it could not be properly called a Surrender, for want of a
Reverſion

* Reverſion in the Guardian in Socage, yet they held, that at leaſt the firſt Leaſe was thereby determined by Admittance of the Leſſor's Power to make ſuch preſent Leaſe, which, if the firſt ſhould ſtand in the way, he could not do; and a Guardian in Socage hath Power to make Leaſes for Years; and though this Caſe is cited in (a) *Hutton* to be no Surrender, yet it was in a Caſe, where the Queſtion was of a Surrender ſtrictly and properly ſo called; and therefore though it were not to be cited for an Authority of a Surrender properly ſo called, yet it might amount to a Determination of the firſt Leaſe, which in the principal Caſe, all the Court agreed in that it did; but they held, it would be otherwiſe in caſe of ſuch Leaſe made by a Guardian *per Nurture*, for he can only make Leaſes at Will; and therefore ſuch ſecond Leaſe at Will muſt be abſolutely void, when the Leſſee was in Poſſeſſion already by virtue of a Leaſe for Years. *Page 408 (a) *Hutton*, 105.

If a Woman, who is Guardian in Socage to her Son, marries again, and the Huſband and ſhe join in a Leaſe of the Infant's Lands, this Leaſe, upon the Death of the Huſband, becomes void; for the Intereſt which ſhe had in the Lands was in Right of the Infant, and therefore ſhall not bind her, as thoſe Acts ſhall in which ſhe joins with her Huſband in parting with her own Poſſeſſions. Plow 293. *Oſborne's* Caſe.

10. Of Leaſes made purſuant to Authority.

If one hath Power, by virtue of a Letter of Attorney, to make Leaſes for Years generally by Indenture, the Attorney ought to make them in the Name and Stile of his Maſter, and not in his own Name; for the Letter of Attorney gives him no Intereſt or Eſtate in the Lands, but only an Authority to ſupply the Abſence of his Maſter by ſtanding in his Stead, which he can no otherwiſe perform than by uſing his Name, and making them juſt in the ſame Manner and Stile as his Maſter would do if he were preſent; for if he ſhould make them in his own Name, though he added alſo, by virtue of the Letter of Attorney to him made for that Purpoſe; yet ſuch Leaſes ſeem to be void, becauſe the Indenture being made in his Name, muſt paſs the Intereſt and Leaſe from him, or it can paſs it from no Body; for it cannot paſs it from the Maſter immediately, becauſe he is no Party; and it cannot paſs it from the Attorney at all, becauſe he has nothing in the Lands; and then his adding by *Virtue of the Letter of Attorney*, will not help it, becauſe that Letter of Attorney made over no Eſtate or Intereſt in the Land to him, and conſequently he cannot, by virtue thereof, convey over any to another; neither can ſuch Intereſt paſs from the Maſter immediately, or through the Attorney, for then the ſame Indenture muſt have this ſtrange Effect at one and the ſame Inſtant, firſt to draw out the Intereſt from the Maſter to the Attorney, and from the Attorney to the Leſſee, which certainly it cannot do; and therefore all ſuch Leaſes made in that Manner ſeem to be abſolutely void, and not good, even by Eſtoppel, againſt the Attorney, becauſe they pretend to be made not in their own Name abſolutely, but in the Name of another, by virtue of an Authority which is not purſued; and therefore this Caſe of making Leaſes by a Letter of Attorney, ſeems to differ from that of a Surrender of a Copyhold, or of Livery of Seiſin of a Freehold, by Letter of Attorney; for in thoſe Caſes when they ſay, *We* A. *and* B. *as Attornies of* C. *or by virtue of a Letter of Attorney from* C. *of ſuch a Date*, &c. *do ſurrender*, &c. *or deliver to you Seiſin of ſuch Lands*; theſe are good in this Manner, becauſe they are only miniſterial Ceremonies or tranſitory Acts *in Pais*, the one to be done by holding of the Court Rod, and the other by delivering of a Turf or Twig; and when they do them as Attornies, or by virtue Rol. Abr. 330. 9 Co. 76. b. 77. Cro. Eliz. 115. Moor, pl. 1106. 9 Co. 76, 77. *Combe's* Caſe.

Page 409 virtue of a Letter of Attorney from their Maſter, the Law pronounces thereupon as if they were actually done by the Maſter himſelf, and carries the Poſſeſſion accordingly; but in a Leaſe for Years it is quite otherwiſe, for the Indenture, or Deed alone, convey the Intereſt, and are the very Eſſence of the Leaſe, both as to the paſſing it out of the Leſſor at firſt, and its Subſiſtence in the Leſſee afterwards; for the very Indenture, or Deed itſelf, is the Conveyance, without any ſubſequent Conſtruction or Operation of Law thereupon; and therefore it muſt be made in the Name and Stile of him who has ſuch Intereſt to convey, and not in the Name of the Attorney, who has nothing therein; but in the Concluſion of ſuch Leaſe it is proper to ſay, *In Witneſs whereof* A. B. *of ſuch a Place*, &c. *in purſuance of a Letter of Attorney hereunto annexed, bearing Date ſuch a Day*; or if the Letter of Attorney be general, and concerns more Lands than thoſe compriſed in the preſent Leaſe, then to ſay, *In purſuance of a Letter of Attorney, bearing Date ſuch a Day*, &c. *a true Copy whereof is hereunto annexed, hath put the Hand and Seal of the Maſter*, and ſo to write the Maſter's Name and deliver it as the Act and Deed of the Maſter; in which laſt Ceremony of delivering it in the Name of the Maſter by ſuch Attorney, this exactly agrees with the Ceremony of ſurrendering by the Rod, or making of Livery, by a Turf or Twig, by the Attorney, in the Name or as Attorney of his Maſter; which proves that there is a great Diverſity between uſing the Name of the Attorney in the making of Leaſes, and uſing his Name in making a Surrender of Copyhold, or Livery of Seiſin of a Freehold Eſtate.

Moor, pl. 191. Dyer 132.

The King, by Letters Patent, gave Authority to his Surveyer to make Leaſes of ſuch Lands, reſerving the antient Rent, and the Surveyor makes Leaſes by Indenture between the King *ex una parte*, and *J. S. ex altera parte*, and the Indenture *Teſtatur quod Dominus Rex dimiſit*, &c. and the Concluſion was, *in cujus rei teſtimonium* the Surveyor *Sigillum ſuum appoſuit*; and the Court held theſe Leaſes to be void, becauſe not purſuant to his Authority; for a Bailiff cannot make Leaſes in his own Name, though it be but *de anno in annum*, and of Lands uſually let, but he ought to make them in the Name of his Maſter; ſo here the Surveyor ought not to have put his own Seal to the Leaſe, but the Seal of the King, for without the King's Seal it cannot be his Leaſe; and the Manner of Pleading ſuch Leaſe proves this, for the Words are; *Quod Dominus Rex per A. B. Sigillum ſuum appoſuit*; and a great Caſe was cited, where ſuch Leaſe by a Bailiff, in his own Name, was held to be void.

Cro. Eliz. 678, 734. *Piggot* ver. *Garniſh.*

In Ejectment the Caſe was, that one *A.* deviſed Lands to *B.* his Son in Tail, with divers Remainders over, and makes one *C.* Overſeer of his Will, and willed that he ſhould have the Education of his Son till he came to the Age of Twenty-one, and to receive, ſet and let for the ſaid *B.* the ſaid Lands ſo given him, and therefore to account to the ſaid *B.* being allowed his Charges, &c. *C.* makes a Leaſe for ſeven Years in his own Name, with Reſervation of Rent to himſelf; and this Leaſe by Computation, was to continue Half a Year after *B.*'s attaining his full Age; and if this Leaſe was good for any Part of the Term, was the Queſtion; *C.* being dead, and *B.* not yet of Age; and it was argued to be good for the whole Term, or at leaſt during the Minority of the Son, and only void for ſo much as exceeded the full Age of the Son, and that *C.* had an Intereſt in the Land, and not a bare Authority only; for then all Leaſes muſt have been made in the Name of the Infant, and ſo he might avoid them whenever he thought fit, which the Teſtator never intended to impower him to do. But *Popham*, *Clench*, and *Fenner* held that, as this Deviſe is, *C. was but a Guardian for Nurture*, and could not make Leaſes at his own Will and Pleaſure, for then he might make them for one Hundred Years; but here he can only make Leaſes at Will, for there is no other Time certain appointed, and he is but in the Nature

* Nature of a Bailiff, and accountable; and therefore it was adjudged that the Leaſe was void; from which Caſe it appears, that if the Authority had been ſufficient to enable him to have made Leaſes for Years, ſuch Leaſes made by him during the Continuance of that Authority would not have determined therewith, but ſhould have ſubſiſted during the whole Term of which they were made; and the Infant in ſuch Caſe could not, when he came of Age, have avoided them, as he may Leaſes made by his Guardian in Socage, if he thinks fit, becauſe the Leſſee would have been in by the Will and Deviſe, not by the Guardian *per Nurture*, admitting the Authority or Deviſe had been ſufficient for that Purpoſe, which in none of the following Caſes of Deviſes it ſeems to be. *Page 410

One deviſes Land to his Son when he comes to the Age of twenty-four Years, and in the mean Time that his Executor ſhall have the Overſight and Dealing of all his Lands and Goods; this gives the Executor no Intereſt to make a Leaſe certain for Years, but only an Authority to overſee and order the Land in Right of the Son, and for his Uſe and Benefit, as wanting Diſcretion to manage it himſelf; but the whole Eſtate remains in the mean Time in the Son by Deſcent, and the Executor can only make Leaſes at Will; for there is no expreſs Deviſe to him of the Lands till the Son comes to twenty-four, nor any expreſs Authority to make Leaſes for Years in the mean Time; and the Heir ſhall not be diſinherited, though but for a Time, without a manifeſt Intent in the Will to that Purpoſe; and where in that Caſe, the Son died before he came to twenty-four Years of Age, it was held, that whether the Deviſe gave the Executor an Intereſt or an Authority only, yet it determined by the Death of the Son, whenever that happened; for it was only affixed to his Care of the Son, and conſequently determined by his Death, and was never intended to exclude the next Heir till the Son ſhould or might have attained his Age of twenty four Years; and then the Executor having Power to make Leaſes at Will only, the next Heir may, whenever he thinks fit, determine them by Entry, or otherwiſe. Moor 774. Yelv. 73. *Carpenter* and *Collins*. Dyer 26. b.

But if the Words of the Will had been that the Executor ſhould have the Land, or the Profits of the Land, to his own Uſe, without Account, till the Son ſhould come to twenty-four, provided, or to the Intent that he ſhould bring up and educate his Child or Children; this would not only amount to a Truſt and Confidence in the Executor, but would alſo fix ſuch an Intereſt in him for anſwering the Purpoſes of the Will, as would go to his Executors, though he ſhould die before the Son attained the Age of twenty-four Years; and the Education of the Child, or Children, is no ſuch Matter of Privity or Confidence, but that another may do it as well; and conſequently in this Caſe, ſuch Executor may make Leaſes for Years, till the Son ſhould or might attain to the Age of twenty-four Years; and this would not determine, though the Son ſhould die before that Age, till by Computation of Time he might have attained that Age, if he had lived. Cro. Eliz. 190. *Parker* and *Plummer*. Cro. Eliz. 252. *Smith* ver. *Havens*. Hob. 285. *Balder* ver. *Blackburn*. Dyer 210. pl. 24.

One deviſed Lands to his Wife *de Anno in Annum*, till his Son ſhould come to the Age of twenty-one Years; this was by all the Juſtices held ſuch an Intereſt only as would determine by the Death of the Son, though before twenty-one; for the Intent was only that his Wife ſhould have the Lands during the Minority of the Son, by reaſon of his ſuppoſed Incapacity to manage them during that Time, which Reaſon is at an End by his Death; and this the rather appears to be his Intent by the Words *de Anno in Annum*, which are executory and applicable to each ſingle Year, and ſhew his Caution, not to give it to his Wife for any determinate Number of Years, leſt his Son ſhould die in the mean Time, whoſe Death, or Attainment of twenty-one Years, he intended ſhould be the Determination of the Wife's Intereſt; but by *Dyer* it would have Moor, pl. 143. 3 Co. 19, 20. *Boraſton*'s Caſe. Chan. Ca. 114. 2 Chan Rep. 136.

been otherwiſe, if the Words had been, *till the Son ſhould or might come* *Page 411 * *to that Age*; and therefore this Caſe differs from *Boraſton*'s Caſe, and the other Caſes, which were adjudged, upon a ſpecial Reaſon, that for Payment of Debts, or for the Support and Proviſion of the Deviſee or Executrix, or for Maintenance of his Children generally, where he had ſeveral; there in ſuch Caſes, though the Son to whom it was deviſed at ſuch an Age ſhould die before that Age, yet the Executrix, or Deviſee, ſhould have ſuch an Intereſt veſted in them for thoſe Purpoſes, as ſhould not determine till the Son ſhould or might have attained that Age, if he had lived; and conſequently ſuch Executrix, or Deviſee, may make Leaſes for Years, which ſhall continue as long as their own Intereſt therein.

11. Of Leaſes made purſuant to Powers in private Conveyances and Settlements.

Vide ante the Caſe of *Orby* and Lord *Mohun*, Letter (E) *p.* 361. and Note, that theſe Powers are in a great meaſure conformable to the ſeveral Qualifications required under that Head.

As in the Settlements of Eſtates in Families, it is uſual to limit but Eſtates for Life to the preſent Takers, to prevent their Power of Alienation and Defeating their Iſſue of the Proviſion intended them by ſuch Settlements; and yet it is neceſſary the Land comprized in ſuch Settlements ſhould be continued in the Occupation and Manurance of Tenants and Farmers, who, being ſkilled in the Arts of Huſbandry, know beſt how to improve and manage them to Advantage; and therefore, to encourage the Induſtry of ſuch Farmers, it is become cuſtomary to impower the Tenants for Life to grant Leaſes for a certain Time, which otherwiſe they could not do, having themſelves but an uncertain Intereſt determinable on their Deaths; it will therefore be neceſſary to conſider theſe Kind of Leaſes, and how far their Purſuing or Deviating from the ſeveral Powers whereon they are founded will invalidate them, and how far not; as alſo upon what Sort of Settlements ſuch Powers may be reſerved, and what not.

Vaugh. 28 to 35. 2 Jon. 27 to 37. *Baruck Tuſtian Triſtram* ver. Viſcounteſs *Baltinglaſs.*

Tenant for Life, upon a Settlement made 12 *Jac.* 1. had Power to make Leaſes of all or any of the Lands which at any Time heretofore have been uſually demiſed or letten in Poſſeſſion for three Lives, or any Number of Years determinable on three Lives, or for Twenty-one Years, or under, reſerving the Rent thereupon now yielded or paid, or more, ſo long as the Leſſees, their Executors and Aſſigns, duly pay the Rents, and perform the Conditions, according to the true Meaning of their Indentures of Leaſe. The Tenant for Life makes a Leaſe of ſeveral Parts of thoſe Lands, for Years determinable on three Lives, ſo long as the Leſſees, their Executors and Aſſigns, duly pay the Rents, *&c.* (*verbatim* as in the Power) reſerving the ſame Rents which were reſerved 12 *Jac.* 1. when the Settlement was made, and ſpecifying particularly what thoſe Rents were; and other Lands, called *Loſield*, which were found not to have been in Leaſe ſince 12 *Eliz.* (when they were let for Twenty-one Years at 100*l. per Ann.* Rent) he now leaſes thoſe Lands for Twenty-one Years, rendering 100*l. per Ann.* Rent, and with the ſame Clauſe as in the other, *viz.* ſo long as the Leſſees, their Executors and Aſſigns, duly pay, *&c.* the Rents due at *Mich'.* for the Lands in the firſt Leaſe were found to be in Arrear, but paid in a Month after; and the Rent upon the Leaſe of *Loſield* was duly tendered, but not received; and before the next Rent-Day the Defendant, as Heir at Law in Remainder, entered, upon whom the Leſſees re-entered to maintain their Leaſes, *&c.* and 1. It was agreed, that the Limitation in the ſeveral Leaſes, ſo long as the Leſſees, their Executors and Aſſigns, duly pay, *&c.* was well warranted by the Power being *in Terminis* the ſame with the Power, and therefore was good. 2. That by Non-payment of the Rent at the Days,

Days, the Leaſes were determined, ſo that no Acceptance after could * ſave or ſet them up again. 3. It ſeemed to be agreed that the firſt Leaſe was good, becauſe expreſly found, that the Rents reſerved were the ſame as were reſerved 12 *Jac.* 1. and that neceſſarily implies that thoſe Lands were then in Leaſe, and being antient Lands, they ſhall be preſumed to have been uſually demiſed; and the rather, becauſe no Doubt was made of this at the Trial. But 4. It was adjudged that the Leaſe of *Loſield* was not warranted by the Power; 1. Becauſe the Qualifications annexed to the Power of Leaſing ſhew, that Land not ſo qualified was not to be leaſed; now the Land to be leaſed by virtue of this Power, was ſuch as had been actually let, which muſt be twice at leaſt; but *Loſield* appears to have been let but once; therefore not within the Power; alſo *uſually* may ſignify the common Continuance of Land in Leaſe; as Land leaſed for 500 Years long ſince, is Land uſually demiſed, though it were demiſed but once; but then the Words, *at any Time*, ſhew that it muſt be of Lands which had been uſually at all Times let, which *Loſield* was not, being out of Leaſe for above twenty Years before the Settlement; but chiefly and laſtly this Leaſe was adjudged void, becauſe the Power was to make Leaſes, reſerving the Rent thereupon now yielded or paid, *viz.* at the Time of the Settlement; and this Land not having been leaſed for twenty Years before, could be under no Reſervation of Rent at that Time, and by conſequence the Rent thereupon then reſerved (which was none) could not be reſerved upon any After-Leaſe to be made; and the Words (*or more*) will not hold, becauſe they are Words of Relation, and muſt refer to ſome Rent before, which here was none at all; and becauſe *more* or *leſs* are Words of Compariſon, and Comparatives neceſſarily ſuppoſe a Poſitive; but nothing, or no Rent is a mere Privative; and yet the Objection againſt this Conſtruction ſeems conſiderable; for it was ſaid, that the Words (*at any Time heretofore uſually demiſed*) imply that ſome Lands were not then in Leaſe; therefore the Clauſe of reſerving the Rents, which were then yielded and paid, muſt extend only to the Rent of ſuch Lands as were then in Leaſe, and not for the others, which were not then in Leaſe; yet ſince he had a Power of leaſing them, if they had been at any Time theretofore uſually demiſed, he might leaſe them, reſerving what Rent he pleaſed; and ſo is one. (*a*) Book expreſs in Point as to the Reſervation; but the Difference between that Caſe and this is, that there the Power was to let all or any the Lands generally, without any Reſtraint; whereas this is reſtrained to Lands *uſually* letten, which, as appears afore, this of *Loſield* was not, having been let but once; and therefore the very Power of leaſing fails as to that; otherwiſe the Reſervation of a Rent, though none was reſerved before, ſeems no great Objection againſt the Leaſe; *Ideo Quære.*

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2 Jon. 31.

(*a*) 2 Rol. Abr. 262. *Cumberford's* Caſe.

A Settlement was made to the Uſe of *A.* for Life with Remainders over, provided that the Tenant for Life may make Leaſes of the Premiſſes, or any Part thereof, ſo as upon every Leaſe there be reſerved 5*s.* an Acre for every Acre of the Land or Premiſſes ſo demiſed; the Tenant for Life leaſes a Rectory, (which was not included within the Settlement, and conſiſted only of Tithes, without any Glebe,) reſerving Rent, or without any Rent at all reſerved; and if this were a good Leaſe within this Power was the Queſtion. It was argued not, becauſe Conſtruction is to be made upon the whole Clauſe, and the latter Words, which appoint the Reſervation of 5*s.* Rent for every Acre of Land, ſhall reſtrain the general Import of the Word *Premiſſes* to Land only, which can only conſiſt of Acres; otherwiſe it may as well be ſaid, where a Power is to make Leaſes, ſo as the antient Rent be reſerved, that you may, by virtue of this Power, leaſe Lands which were never before demiſed, and that the Words *antient Rent* ſhall only be applied to

Vent. 294. 2 Lev. 150. 3 Keb. 544, 547. *Walker* and *Wakeman.*

the Lands which had been antiently or uſually demiſed. But it was anſwered and reſolved by the Court, that this Leaſe was within the
*Page 413 * Power, and ſo would a Leaſe of Land, not uſually demiſed, in the Caſe before put; for the Power being general and affirmative at firſt to make Leaſes of all or any Part, the Reſtraint which comes after under the *ſo as*, &c. ſhall be extended no farther than the very Words themſelves import, that is, in the one Caſe to ſo much an Acre for that which conſiſts of Acres, and to the antient Rent for that which was antiently or uſually demiſed in the other; and this Reſolution was founded chiefly on *Cumberford's*
2 Rol. Abr. 262. Caſe, where the Power was to make Leaſes of all or any Part, ſo as ſuch Rent, or more, were reſerved upon every Leaſe which was reſerved within the Space of two Years before; and a Leaſe was made of Part of theſe Lands which had not been demiſed within two Years before; and it was reſolved to be a good Leaſe, and that he might reſerve any Rent he pleaſed, becauſe the Power was general to leaſe all; and therefore the reſtrictive Clauſe ſhould be applied only to ſuch Lands as had been demiſed within two Years before: But *Hale*, in the principal Caſe, ſaid, if it had been
‡ *Ante* fo. 411. *res integra*, he might perhaps be of another Opinion. *Note* alſo, this Caſe ſeems againſt the Caſe of *Vaugh.* 35, before ‡.

2 Rol. Abr. 262. If Land hath been leaſed, by virtue of a Contract, from Year to Year for three Years, this cannot be ſaid to be uſually letten, becauſe this is but one Leaſe, though renewable every Year.

Co. 134. a. 139. Poph. 81. 8 Co. 71. a. And. 273. *Harcourt* ver. *Poole*. 2 Rol. Abr. 261. 2 Jon. 35. If a Feoffment in Fee be made to the Uſe of *A.* for Life, Remainder to *B.* in Tail, with Power for *A.* to make Leaſes reſerving, or ſo that he reſerve the accuſtomable Rent, payable to all thoſe who ſhall have the Reverſion or Remainder; if *A.* makes Leaſes accordingly, theſe Leaſes derive their Eſſence out of the Feoffment, and after they are made do, in point of Time, precede all the other Eſtate limited by that Feoffment; ſo that the Rent thereupon reſerved, ſhall go with the Reverſion or Remainders thereby limited, as a Rent properly ſo called, and not as a Sum in groſs; and therefore thoſe in Reverſion or Remainder may diſtrain, or have an Action of Debt for Recovery of it, as if they were ſeiſed in Fee, and had made ſuch Leaſe; and where one *(a)* Book calls it a Sum in groſs, this is
(a) Co. 139. (b) In 2 Jon. 35. for which is cited And. 273. 2 Rol. Abr. 261. denied to be Law in *(b)* another, and ſeveral Books cited to prove it a Rent; but in (c) *Poph.* it is ſaid to have been a Doubt, in the Lord *Dyer's* Time, if ſuch Leaſes ſhould be good, unleſs there was a Clauſe, that the Feoffees, and their Heirs, ſhould ſtand ſeiſed to the Uſe of ſuch Leſſees; for which Reaſon it may not perhaps ſtill be amiſs to inſert ſuch a
(c) Poph. 81. Clauſe, though ſuch Leaſes have ever ſince been held to be good without ſuch Clauſe; for ſince the ſame Deed that limits the Eſtates to *A.* and *B.* gives *A.* Power to make Leaſes for ſuch a determinate Time, theſe Leaſes cannot be derived out of the Intereſt of *A.* for that being but for his own Life, is not commenſurate to ſuch Leaſes, which at all Events are to laſt for ſuch a Time; and if ſuch Leaſes were to determine upon *A.'s* Death, the Power would be nugatory and idle, becauſe without it he might have made ſuch Leaſes; but the Power being to make Leaſes which ſhall endure longer than the Life of *A.* theſe Leaſes, when they are made, muſt be derived out of the ſame Root as the Eſtate of *A.* himſelf is, that is, out of the Eſtate of the Feoffees, who for that Purpoſe have a Kind of *Scintilla Juris* left in them to ſerve ſuch future Leaſes when they are made, and by conſequence muſt be ſeiſed to the Uſe of ſuch Leſſees, and then the Statute of 27 *H.* 8. *cap.* 10. preſently carries the Poſſeſſion accordingly, and the Power, being coeval with the other Eſtates, may well ſubject them to the Execution thereof, ſince he who is Maſter of his own Eſtate, may diſpoſe of it upon what Terms he thinks fit.

Poph. 81. But theſe Leaſes can only be made by virtue of ſuch Powers upon Eſtates executed by Tranſmutation of Poſſeſſion; therefore if one bargains

gains and ſells Lands to another by Indenture enrolled for the Life of the Bargainee, with Power for the Bargainee to make Leaſes for three Lives, or twenty-one Years; yet this is of no Effect to give him any ſuch Power, for here is no Tranſmutation of the Poſſeſſion at Law, but only a Uſe raiſed by virtue of the Conſideration, to which the Statute immediately carries a Poſſeſſion, according to that Uſe; but for the Reſidue of the Eſtate, it continues wholly in the Bargainor, as it was before; and then the Perſons who are to be the Leſſees being unknown, no Conſideration can ariſe from them to the Bargainor, and by conſequence no other Uſe can then be drawn out of him; and if the Uſe does not ariſe at the Time of the Bargain and Sale, it can never ariſe after; becauſe when the Deed is once perfected, its Operation, as to creating any new or further Intereſt, is then at an End, and conſequently no Leaſes can be made upon ſuch a Conveyance, for want of a Conſideration to raiſe a Uſe to the Leſſees. *Page 414

So if one covenants to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to his Wife for Life, with divers Remainders over, with a Power for the Covenantor, for divers good Cauſes and Conſiderations, to make Leaſes for Lives or Years, *&c.* this Power is perfectly void, ſo that he cannot by virtue thereof make Leaſes, even to his Sons or Daughters, or any other of his Blood, much leſs to Strangers; becauſe ſuch general Conſideration can raiſe no Uſe at all, and no Averment of a particular Conſideration can help it, becauſe his Intent appears to be general, with regard to the Perſons to take ſuch Leaſes, as to the Conſideration whereon they are to be made; for his Intent then was not to demiſe to one Perſon more than to another; and ſince ſuch Leaſes are to ariſe and take their Effect out of the Eſtate of the Covenantor, there muſt be a Conſideration to raiſe a Uſe for that Purpoſe at the Time of the Covenant made; which in this Caſe there cannot be, *when neither the Perſons nor the Conſideration are known*; and if there be no Conſideration to raiſe ſuch Uſe at the Time of the Covenant perfected, it can never ariſe after, becauſe the further Operation of the Deed then ceaſes; but upon a *Feoffment Fine* or *Recovery*, where the Eſtate is *executed*, and a Change of the Poſſeſſion made preſently, there no Conſideration is requiſite to raiſe any of the Uſes; and then, by virtue of the Power which is created at the ſame Time with the Conveyance itſelf, the Leaſe may be made at any Time after. Co. 176. Moor 144, 145. 2 Rol. Abr. 260. Cro. Jac. 180. 3 Keb. 809. Raym. 247. *Baynes* ver. *Belſon.*

And yet where one covenanted to ſtand ſeiſed to the Uſe of himſelf for Life, Remainder to his eldeſt Son, with Power for himſelf to leaſe a ſmall Part for forty Years, which he accordingly afterwards did, for a Proviſion for a younger Child; and though at Law this was not good, yet the Lord Chancellor *Egerton*, upon a Bill in Chancery, decreed, there ſhould be Relief, becauſe the Son claimed by the ſame Conveyance by which the Power was limited, and the Conveyance was intended to have been by Livery, but that the Father was adviſed ſuch Covenant to ſtand ſeiſed would do as well; alſo the Law in *Mildmay*'s Caſe was not then adjudged; ſo that neither the Party nor his Counſel did then know but that ſuch Power was warranted by Law. Chan. Ca. 101, 263-4. *Prince* and *Green* verſus *Chandler*. 40 Eliz. 3 Chan. Ca. 91.

A Huſband ſeiſed of Lands in Right of his Wife, he and his Wife levy a Fine to the Uſe of themſelves for their Lives, and after to the Uſe of the Heirs of the Wife; Proviſo, that it ſhall and may be lawful to and for the ſaid Huſband and Wife, at any Time during their Lives, to make Leaſes for twenty-one Years, or three Lives; and the Wife being covert, made a Leaſe for twenty-one; and it was adjudged a good Leaſe againſt the Huſband, though made when ſhe was a Feme Covert, and although it was made by her alone, by reaſon of the Proviſo: This is the Caſe *verbatim*, as it is put in the Book: But ſurely the Reporter muſt be miſtaken: for, as it is put, there appears no Power for the Wife ſolely to make Leaſes, but only in conjunction with her Huſband; therefore the Power muſt be intended for the Wife ſolely, or for the Huſband and Wife, *or either of them*; Godb. 327. pl. 419.

them; and then, no doubt, ſuch Leaſe by the Wife alone will bind the Huſband, becauſe it takes its Eſſence *out of the Fine*, to which both were Parties, and conſenting.

*Page 415 8 Co. 69, 70. 2 Rol. Abr. 260. *Whitlock*'s Caſe. 3 Mod. 268-9. *Lutwich* ver. *Pigott*. Ld. Raym. 268. 2 Ld. Raym. 908, 1198. Vern. 85, 407. 2 Vern. 69, 80, 164, 376. 379, 528, 531, 535, 542, 661, 665. Prec. Chan. 256, 293, 452, 474. Gilb. Eq. Rep. 1, 137, 160, 166. Fitzgib. 156, 214, 216. Comyns 37. pl. 25, 494. pl. 212. Ld. Raym. 267. Caſ. Temp. Talb. 72, 93. Will. Rep. 149. pl. 41. 245, 604, 741, 777. pl. 225. 2 Will. Rep. 415, 489.

* *A.* ſeiſed of a Reverſion in Fee expectant upon an Eſtate for Life to *B.* covenants to levy a Fine, *&c.* to the Uſe of himſelf for Life, Remainder to the Uſe of himſelf in Tail, *&c.* with Power to *A.* to make any Leaſe or Leaſes in Poſſeſſion or Reverſion of all or any the Premiſes, provided that ſuch Leaſe or Leaſes, *non excedat ſuper numerum trium Vitarum ad Majus*, or twenty-one Years, and ſo as the accuſtomable Rent be reſerved, payable during ſuch Leaſe or Leaſes; a Fine is levied accordingly; then *A.* makes a Leaſe to *C.* for ninety-nine Years, if two Lives ſhould ſo long live, to begin after the Death of *B.* rendering 14 *l. per Annum* (the antient Rent) to him, his Heirs and Aſſigns, and to ſuch Perſon and Perſons to whom the Inheritance ſhall after his Death appertain; and if this was a good Leaſe, purſuant to his Power, was the Queſtion; and adjudged that it was, becauſe the firſt Part of the Power was to make Leaſes abſolutely and indefinitely, in Poſſeſſion or Reverſion, and the Reſtraint which came after was only that they ſhould not exceed three Lives, or twenty-one Years, which this Leaſe here does not; for though it is for ninety-nine Years, yet it is determinable on two Lives, which is leſs; alſo the Power being to make Leaſes as well in Reverſion as in Poſſeſſion, and for Lives, as well as Years, could not have been executed; as to making Leaſes for Lives, in any other Manner; for they could not be made for Lives in Reverſion, as they may for Years determinable on Lives; and a Leaſe in ſuch Manner was moſt conſonant to the Nature of his Eſtate, which was but a Reverſion after the Eſtate for Life to *B.* But the Court agreed, that if one hath Power generally to make Leaſes for three Lives, he cannot make a Leaſe for ninety-nine Years, if three Lives ſo long live; for this is not purſuant to his Power, which was only to make Leaſes for three Lives; and there being no other Liberty given in the Power, he cannot vary from it, becauſe ſuch Powers being to charge the Inheritance of a third Perſon, are to be taken ſtrictly. 2. It was adjudged, (*a*) that the Reſervation was good, becauſe ſuch Leaſe, after it is made, comes in by virtue of the Power above all the Limitations, and takes its Eſſence, not out of the Eſtate for Life, but out of the Eſtate of the Conuzees before all the other Eſtates, and then they coming in after, in the Nature of Reverſioners, the Reſervation to them is good.

pl. 156, 506. pl. 163. (623.) 8 Mod. 249, 381. 9 Mod. 11. 12 Mod. 147, 149, 151. Stra. 596. Eq. Caſ. Abr. 348. pl. 19. 2 Eq. Caſ. Abr. 87. pl. 9. 660. pl. 8, 673. pl. 9. Comyns 312. pl. 262. Max. in Eq. laſt Caſe. 9 Mod. 12. 10 Mod. 463. 2 Stra. 962. 2 Barnard. *K. B.* 341. 2 Stra. 992. (*a*) Mod. 108. See Gilb. Eq. Rep. 16. 9 Mod. 178. 10 Mod. 103, 181, 196, 210, 214. 12 Mod. 32. Prec. Chan. 435. Eq. Caſ. Abr. 256. Will. Rep. 91, 104. pl. 24, 509, 520, 536. pl. 156. 3 Will. Rep. 171, 230, 235. 2 Lev. 27. Poph. 196. 2 Mod. pl. 12. Lucas, 463. Stra. 596.

3 Keb. 746. It was ſaid by the Judges, in 3 *Keb.* that the Conſtruction in *Whitlock*'s Caſe, that a Perſon, having Power to make Leaſes for three Lives, could not make a Leaſe for ninety-nine Years, determinable on three Lives, was too nice, and expreſſy contrary to the Intent of the Parties.

Mich. 8 Geo. 2. *Rattle* ver. *Popham* in *B. R.* 2 Stra. 992. Yet in a late Caſe, where *A.* made a Settlement, and limited the Eſtate to himſelf for Life, Remainder to his Son *B.* for Life, with ſeveral Remainders over, with a Power to *B.* when he came into Poſſeſſion, *to aſſign or limit the ſame to any Woman* that he ſhould marry, or *for the Uſe or in Truſt for her*, in lieu of her Jointure; *B.* on his Intermarriage, by Deed reciting his Power, demiſed the Eſtate to Truſtees for ninety-nine Years, in Truſt for her, if ſhe ſhould ſo long live; and though it was agreed, that this was no greater Eſtate than by the Power he was enabled to make, being to determine on her Death, and that an Eſtate for Years was, in the Eye of the Law, of ſhorter Duration than an Eſtate for Life; yet it was reſolved,

reſolved, that the Power being poſitive, and ſpecifying what Eſtate was to be limited, ought to be conſtrued and purſued ſtrictly, being to ariſe out of the Eſtate of a third Perſon; and they agreed the Rule laid down in (a) *Whitlock*'s Caſe, that all poſitive particular Powers muſt, in all material Circumſtances, be poſitively and particularly purſued. (a) 8 Co. 70. Ley 74. Co. 45. S. Rule laid down.

One had Power in effect to make Leaſes for the Lives of *A. B.* and *C.* and he makes a Leaſe to them for their three Lives, and the Life of the * longer Liver of them; and this was held to be ſufficient within the Power, becauſe for three Lives generally, and for three Lives and the longer Liver of them, is all one, ſince without ſuch Words it would have gone to the Survivor. 3 Keb. 44. *Allſop* verſus *Pine*. * Page 416

Tenant in Fee makes a Leaſe for Life, and after levies a Fine to the Uſe of *J. S.* for fifteen Years, Remainder to the Uſe of himſelf for Life, with Power for himſelf to make Leaſes for twenty-one Years, or three Lives in Poſſeſſion; and the Queſtion was, if by virtue of this Power he might make Leaſes during the Continuance of the Term for fifteen Years, or not till after that was ended: and *per Curiam* clearly, he may make Leaſes preſently in Poſſeſſion; for the Power iſſues out of the whole Eſtate, and by virtue thereof he may make Leaſes in Poſſeſſion preſently, and need not ſtay till the Term ended, or that the Lands came into Poſſeſſion; alſo the Termor ſhall have the Rent reſerved thereon; and they agreed, that, as this Power was, he could not make Leaſes in Reverſion, but the Term of fifteen Years was immediately ſubject to the Power and when that is executed it will charge the Poſſeſſion. 2 Bulſ. 216. Cro Jac. 347. Rol. Rep. 12. 2 Rol. Abr. 260. *Fox* ver. *Prickwood*.

Tenant for Life, with Power to make Leaſes for twenty-one Years, rendering the antient Rent, makes a Leaſe for twenty-one Years, to begin ſuch a Day after; this is not purſuant to the Power, and conſequently void, becauſe *pro tempore* it is a future Leaſe, which this Power does not warrant, but it ought to be made in Poſſeſſion; for if he might make them in Reverſion or *in futuro*, though but a Month after, he may as well make them to begin twenty Years after, or after his Death, and ſo defeat the Intent of the Power, which being to charge the Eſtates of third Perſons, is to be taken ſtrictly. Palm. 468. Cro. Eliz. 5. 6 Co. 33. Leon. 35. 3 Leon. 130. 4 Leon. 64. Moor 199. Poph. 9. Yelv. 222. Cro Jac. 318. 2 Rol. Abr. 261.

But where a Huſband, ſeiſed of Lands in Right of his Wife, made a Leaſe for twenty-one Years purſuant to 32 *H.* 8. *cap.* 28. and after by a private Act of Parliament it was enacted, that the Huſband ſhould have thoſe Lands for his Life, Remainder to his Wife for Life, and that all Leaſes and Grants thereof made or to be made by the Huſband for three Lives, or twenty-one Years, reſerving the antient Rent, ſhould be good; and the Huſband after made a Leaſe of theſe Lands, to begin after the Expiration of the firſt Leaſe, and it was held good; for the Lands being in Leaſe at the Time of the making of the Act, the Intent of the Act ſeems to warrant ſuch Leaſe in Reverſion, and the rather, becauſe there was no Reſtraint from making Leaſes in Reverſion, as there is in 32 *H.* 8. *cap.* 28. which ſeems implicitly to give a Power of leaſing them in Reverſion; but they agreed, that if the Lands had not been in Leaſe at the Time of making the Act, or if a Leaſe had been made in Poſſeſſion purſuant to the Act, the Huſband could not in either of theſe Caſes have made a Leaſe in Reverſion, or to begin at a future Time; becauſe then the Power might well be executed by making Leaſes in Poſſeſſion, which here, having but a Reverſion himſelf, he could not; alſo they held, that a Commiſſion from the Queen to make Leaſes for twenty-one Years, to ſave her the Trouble of making them, would not warrant Leaſes in Reverſion. Raym. 247. Dyer 357. Leon. 36. 3 Leon. 71. 4 Leon. 66. 2 Rol. Abr. 261.

One poſſeſſed of a Manor for ninety-nine Years, by his Will deviſes it to *A.* his Wife for her Life, with Power to let, ſet, or make Eſtates out of it, and that in as ample Manner as I myſelf might, if I were living; and 2 Rol. Abr. 261. *Hele* verſus *Green* adjudged on a ſpecial Verdict.

and after the Death of *A.* he deviſes it to *B.* his Daughter, and the Heirs of her Body begotten, and dies, and *A.* being his Executrix, conſents to the Deviſe, and after makes a Leaſe of Part of the ſaid Manor to *C.* for ninety-nine Years, if three Lives ſo long live, and dies; this was adjudged a good Leaſe againſt *B.* the Daughter; though it was objected, that ſhe had Power to diſpoſe of it only during her own Life, becauſe otherwiſe ſhe might defeat the Remainder limited to the Daughter. But the Court held, that the Diſpoſition made by her ſhould continue after her *Page 417 * Death, otherwiſe the Power would be merely idle, ſince without it ſhe might have diſpoſed of it during her own Life.

Lev. 167. Sid. 260. Raym. 132. Keb. 778, 910. *Opey ver. Thomaſius*; & *vide* Chan. Ca. 17.

One ſeiſed of Lands in Fee makes a Leaſe for ninety-nine Years, if three Lives ſhould ſo long live, and after ſettles the Reverſion on himſelf in Tail, with Power to make Leaſes for one, two, or three Lives, or for twenty-one Years in Poſſeſſion, and after he makes a Leaſe for twenty-one Years, to begin after the Expiration of the firſt Leaſe; and if this was purſuant to his Power, was the Queſtion. And the Court agreed, that where Tenant in Poſſeſſion makes a Settlement with Power to make Leaſes generally, there he can only make Leaſes in Poſſeſſion; but where he that makes the Settlement had only a Reverſion at the Time, there he may make Leaſes out of that Reverſion; for that agrees with the Intention of the Parties, which is to be the Guide in the Conſtruction of all ſuch Powers; but here the Power being expreſly to make Leaſes in Poſſeſſion, this Leaſe, which was of the Reverſion only, is not within the Power, as the Court ſeemed to agree; though it was urged, that a Leaſe *in præſenti* of the Reverſion was conſonant to the Intent of the Parties, and ſuch a Leaſe in Poſſeſſion as the Nature of his Eſtate would admit of; *ideo Quære:* And *note*, The Caſe of *Slocomb* and *Hawkins*, as it is reported in *Cro. Jac.* ſeems to impeach the Diverſity agreed on by the Court; for there it is put, that Tenant in Fee of a Manor, which was then in Leaſe for Years, levies a Fine thereof to the Uſe of himſelf for Life, Remainder to his eldeſt Son in Tail, with Power for the Tenant for Life to make Leaſes at any Time for twenty one Years; and before the firſt Leaſe expired the Tenant for Life made a Leaſe for twenty-one Years, to begin after the Determination of the firſt Leaſe, and died; and though the Settlement itſelf was of a Reverſion, and the Power general, yet this Leaſe in Reverſion was adjudged void; for that, as the Court ſaid, it ought to have been a Leaſe in Poſſeſſion; but *Yelverton*, who reports the ſame Caſe, mentions it as a Settlement of Lands in Poſſeſſion, and that the Tenant for Life made a Leaſe for twenty-one Years, and after, before the Expiration thereof, made another Leaſe for twenty-one Years, to begin after the Expiration of the firſt Leaſe; and this ſecond Leaſe was adjudged clearly void, and contrary to the Meaning of the Power.

Cro. Jac. 318. *Slocomb.* ver. *Hawkins.* Yelv. 222. S. C.

Leon. 147-8. *Read* and *Naſh.*

Deviſee for Life, with Power to make Leaſes for twenty-one Years, whereupon the old accuſtomed yearly Rent ſhall be reſerved, makes a Leaſe for twenty-one Years, under the old Rent, *&c.* and a Year before the Expiration of that Leaſe he makes a Leaſe to another for twenty-one Years, *to begin preſently*; this Leaſe ſeems to be good within his Power as a concurrent Leaſe, becauſe it is no Charge upon the Reverſion, nor is there any more than twenty-one Years *in toto* againſt the Reverſioner; but this Power would not warrant the making of Leaſes in Reverſion; for then he might charge the Inheritance *ad Infinitum.*

9 Co. 76. 2. Rol. Abr. 330.

Tenant for Life, with Power to make Leaſes for three Lives, or twenty-one Years, cannot make ſuch Leaſes by Letter of Attorney, by virtue of his Power; becauſe ſuch Leaſes not being derived out of the Intereſt of the Tenant for Life, but by an Authority derived from the Tenant in Fee, and to charge the Eſtate of third Perſons, the Truſt for that Purpoſe is perſonal, and cannot be delegated to another.

A. makes

A. makes a Leaſe to *B.* for Life, and after levies a Fine to the Uſe of *C.* for Life, Remainder to himſelf in Fee, with a Proviſo or Power to make Leaſes for twenty-one Years, or three Lives, and that the Conuzees ſhould ſtand ſeiſed to ſuch Uſes, afterwards *A.* covenants to ſtand ſeiſed to the Uſe of *D.* in Tail, with divers Remainders over, and after grants the Reverſion aforeſaid to *E.* for Life, who diſtrains *B.* and avows, and Judgment was given againſt the Avowant; becauſe by the Covenant to ſtand ſeiſed, *&c. A.* had deſtroyed his Power of making Leaſes, and by * conſequence the Grant to *E.* not being derived thereout, could not affect any of the proceding Eſtates. Noy 66. *Cook* verſus *Bromehill.* *Page 418

One hath Power to make a Leaſe for ten Years, and he makes a Leaſe for twenty Years; yet in Equity this is good for ten Years, and ſo has been ſettled ſeveral Times. Chan. Ca. *Pawcy* and *Bowen.*

One having Power to make Leaſes for twenty-one Years in Poſſeſſion, made a Leaſe to *A.* for twenty-one Years in Truſt for the Payment of Debts; but the Leaſe was made to commence from a Time to come, and ſo not purſuant to the Power; yet, being made for the Payment of Debts, was ſupported in Equity. Chan. Ca. 10. *Pollard* ver. *Greenvill.*

If one makes a Feoffment in Fee to the Uſe of himſelf for Life, with Power to demiſe, leaſe, grant, or deviſe the Lands for three Lives, or twenty-one Years, yet this gives him no other Power in effect than to limit the Uſe of the Land for three Lives, or twenty-one Years; for all Leaſes to be made by him by virtue of ſuch Power take their Eſſence out of the original Feoffment; therefore if he makes a Leaſe for three Lives, and makes Livery of the Land, this is a Forfeiture of his own Eſtate for Life; becauſe he himſelf being only Tenant for Life, cannot out of that Eſtate make ſuch Leaſes; and when he takes upon him to make Livery of the Land, he takes upon him to make the Leaſe as Owner of an Eſtate ſufficient for that purpoſe, which he is not; and to make ſuch Leaſes no Livery is requiſite, becauſe they taking effect out of the firſt Feoffment, the Livery made upon that is ſufficient to ſupply all the future Limitations to be made in purſuance thereof; but if he purſues the Words of the Power, and ſays only, *I demiſe or leaſe ſuch Lands to you for three Lives*, this is ſufficient, and will be taken in Execution of the Power a good Leaſe for three Lives. So if he only ſays, *I limit the Uſe to you for three Lives*, &c. this likewiſe is ſufficient, becauſe this in effect is the Subſtance of his Power, and the Statute preſently carries the Poſſeſſion after ſuch Uſe. So if one hath Power only to limit new Uſes, and he gives or deviſes, *&c.* the Land itſelf, this is alſo good, and enures to a Limitation of the Uſe; becauſe the Uſe is but an Equity to have the Land itſelf, and when he gives, demiſes, or deviſes the Land itſelf, he alſo gives all his Uſe and Equity therein, and then the Statute executes the Poſſeſſion accordingly. Moor 514, 611, 645. 2 Lev. 149. Vent. 291. 3 Keb. 512. accord, that it is the beſt Way to make no Livery; but *Hale* thought it no Forfeiture, becauſe by the ſealing of the Deed the Leaſe takes effect and then the Livery comes too late.

It was found by a ſpecial Verdict, that *A.* being ſeiſed of the Manor of *M.* did, on his Son's Marriage, ſettle the ſame to the Uſe of himſelf for Life, and after to the Uſe of his Wife for Life, then to the Son in Tail, with the following Proviſo or Power; *viz. That it ſhould be lawful for the ſaid* A. *during his Life, and for his Wife, after his Death, during her Life by Deed indented to make Leaſes, either in Poſſeſſion for the Term of one, two, or three Lives, or for the Term of thirty-one Years, or for any other Term or Terms, Number or Numbers of Years, determinable upon one, two, or three Lives, or in Reverſion for one or two Lives, or for thirty Years, or for any other Term or Number of Years, determinable upon one or two Lives; ſo as ſuch Demiſe be not made of any the antient Demeſne Lands, Parcel of the ſaid Manor, or of any other Lands which for the Space of ſeven Years have been uſed as Demeſne Lands, and ſo as the antient Rent be reſerved*; afterwards *A.* by Deed makes an abſolute Leaſe for thirty Carth. 427-8. 2 Salk. 537. pl. 1. 5 Mod. 244, 378. L. Raym. 267. Comyns 37. pl. 25. *Winter* ver. *Loveday.*

thirty Years of Copyhold Lands, Parcel of the ſaid Manor, which were in the Tenure of *J. S.* for the Term of two Lives, to commence after the two Lives then in Being. And in this Caſe it was held by *Holt* Chief Juſtice, *Turton* and *Eyre* Juſtices, *contra Rokeſby*, 1. That a Leaſe of Copyhold Lands was not warranted by the Power, being within the Exception of Antient Demeſne Lands, all Copyhold Lands being Antient Demeſne, it being an inſeparable Quality of every Copyhold, that it was Time out of Mind Parcel of the Manor. 2. It was held by the ſaid Juſtices, againſt *Rokeſby*, that a Leaſe for thirty Years abſolute in Reverſion after
Page 419 two Lives, might be made by *A.* or his Wife of any Lands which were in their Power of Leaſing; and herein *Holt* held, that a Leaſe to commence at any Day to come, is properly a Leaſe in Reverſion; but in this Caſe it ſignifies *a Leaſe to commence after ſome Intereſt in Being at that very Time when the Leaſe in Reverſion was made*; that this Power to leaſe for Life in Reverſion muſt be taken to be a Leaſe of the Reverſion itſelf, and not a concurrent Leaſe, and that it cannot be otherwiſe, becauſe a Freehold cannot commence *in futuro*; and where there is a Power given to make Leaſes in Poſſeſſion and Reverſion, in ſuch Caſe if a Leaſe is made in Poſſeſſion, and afterwards ſome Life drops, he cannot make a new Leaſe in Reverſion of the ſame Lands, becauſe his Power is executed by making the firſt Leaſe; that where a Qualification is annexed to a Power of Leaſing, which, if obſerved, goes in Deſtruction of the Power, the Law will diſpenſe with ſuch Qualification; as where there is a Power to make a Leaſe of a Manor, or of any Part thereof, ſo as the antient Rent is reſerved, yet he may by this Power make a Leaſe of the Services, Parcel of the Manor, upon which no Rent can be reſerved; otherwiſe the expreſs Power would be defeated.

Abr. Eq. *Gooding* ver. *Gooding.* A Man made a voluntary Settlement on his Son for Life, and after to his firſt and other Sons in Tail, with Power to the Son to make a Leaſe in Poſſeſſion for ninety-nine Years, determinable on three Lives, and alſo to make Leaſes for ſixty Years, to commence after his Death, if he had Iſſue Male, to continue ſo long as he had Iſſue Male; the Son makes a Leaſe to his Father in Truſt for one of his younger Children, but the Leaſe was not purſuant to the Power; yet it was decreed good, and taken to be a Leaſe made by the Father after a voluntary Settlement.

(K) By what Form of Words Leaſes may be made.

HERE it may be laid down for a Rule, that whatever Words are ſufficient to explain the Intent of the Parties, that the one ſhall deveſt himſelf of the Poſſeſſion, and the other come into it for ſuch a determinate Time, whether they run in the Form of a Licence, Covenant, or Agreement, are of themſelves ſufficient, and will in Conſtruction of Law amount to a Leaſe for Years as effectually as if the moſt proper and pertinent Words had been made uſe of for that Purpoſe; and on the contrary, if the moſt proper and authentic Form of Words whereby to deſcribe and paſs a preſent Leaſe for Years, are made uſe of, yet if upon the whole Deed there appears no ſuch Intent, but that they are only preparatory and relative to a future Leaſe to be made, the Law will rather do violence to the Words, than break through the Intent of the Parties; for a Leaſe for Years being no other than a Contract for the Poſſeſſion and Profits of the Lands on the one Side, and a Recompence of Rent or other Income on the other, if the Words made uſe of are ſufficient to

prove

prove ſuch a Contract, in what Form ſoever they are introduced, or however variouſly applicable, the Law calls in the Intent of the Parties, and models and governs the Words accordingly.

My Lord *Coke* tells us, that the Words *demiſe*, *grant*, *betake*, and *to Farm-let*, and whatever other Words amount to a Grant, may ſerve for a Leaſe for Years. Co Lit. 45 b. 2 Mod. 250.

So, he ſays, *dedi* is a ſufficient Word to make a Leaſe for Years. Co. Lit. 301. b.

*But there are ſeveral other Words which are equally ſufficient to make a Leaſe for Years; therefore in caſe of the King, if he makes a Leaſe for Years, under the Exchequer Seal, in theſe Words; *Sciatis quod nos commiſimus Cuſtodiam* of ſuch Land to ſuch a one, this a good Leaſe, and the Leſſee may plead it as a Demiſe or Leaſe of the Land itſelf; for this ſufficiently ſhews the Intent of the King to part with the Poſſeſſion of the Land for the Time, and therefore amounts to an effectual Leaſe; and this being the Uſage in the Exchequer, all other Courts are bound to take notice thereof. *Page 420 Bro. Tit. *Leaſes* 71. 4 Inſt. 111, 112. Co. Lit. 45. b. 2 Co. 17. a.

So if one only licence another to enjoy ſuch a Houſe or Land till ſuch a Time, this amounts to a preſent and certain Leaſe or Intereſt for that Time, and may be pleaded as ſuch, though it may be alſo pleaded as a Licence; and if it be pleaded as a Leaſe for Years and traverſed, the Leſſee may give the Licence in Evidence to prove it. 5 H. 7. 1. Leon. 129. 3 Bulſ. 252. Sid. 428. Mou. 14. See 11 Mod. 42. pl. 1.

12 Mod. 1, 610. 2 Keb. 561. 2 Lev. 194. 3 Keb. 761. Hard. 366.

So if *A.* by Articles covenants with *B.* that he ſhall have or enjoy ſuch Land for ſuch a Time, this is a good and effectual preſent Leaſe, becauſe here are ſufficient Words to prove a Contract, that the one ſhall relinquiſh the Poſſeſſion, and the other come into it; but if the Covenant had been with *B.* that *C.* a third Perſon, ſhould have or enjoy ſuch Lands of *A.* for ſuch a Time, or that the Executors of *B.* ſhould have or enjoy it for that Time, this would be no Leaſe to *C.* or the Executors of *B.* but only a bare Covenant with *B.* for when theſe Words have their natural and binding Force as a Covenant with *B.* they cannot at the ſame Time have a different Conſtruction, and amount to a Leaſe to *C.* or the Executors of *B.* who are Strangers to the Contract and no Parties to the Deed, nor the Executors of *B.* yet *in eſſe*; neither can theſe Words amount to a Leaſe to *B.* becauſe the Intent is manifeſt that he himſelf is to have nothing in the Land, but is only a Truſtee of the Covenant for *C.* or his Executors; alſo if theſe Words ſhould amount to a Leaſe to *C.* or the Executors of *B.* when they came *in eſſe*, this would take off from their Operation as a Covenant with *B.* for the ſame Words cannot at the ſame Time have two different Conſtructions and Operations; and it cannot be ſaid they are a Covenant with *B.* by the firſt Words, and a Leaſe to *C.* or the Executors of *B.* by the laſt Words; for that *C.* or the Executors of *B.* ſhall enjoy the Land, is the very Explanation of the Covenant with *B.* and gives Life and Force to it, and without that he covenants with *B.* for nothing; for till theſe Words are added, the Covenant with *B.* is but a dead Letter, and has no Meaning or Senſe in it. Leon. 136, 303. Cro. Eliz. 1. 173. Owen 97. Rol. Abr. 847. 3 Bulſ. 252. Fitz. Tit. *Aſſize*, pl. 412.

So where one by Articles covenants, grants and agrees with *J. S.* that he ſhall have ſuch Lands, or have, hold and enjoy ſuch Lands for ſo many Years, theſe are Words ſufficient to ſhew a preſent Contract for the Leſſee's enjoying of theſe Lands, and therefore amount to a preſent Leaſe of them as effectually as if there had been the Words *dimiſit*, *locavit*, or ſuch like; and though there were in the ſame Articles a Covenant to make a good and perfect Leaſe, as Counſel ſhould adviſe, yet that would Bro. Tit. *Leaſes* 20, 30, 60. Noy 14. Cro. Jac. 42, 659. Palm. 201. Leon. 118, 119. 3 Bulſ. 252. Cro. Car.

207. Jon. 231. Hob. 35. Moor 861. 2 Brownl. 23. Rol. Rep. 397. 3 Bulſ. 204. Rol. Abr. 847. Yelv. 85. Brownl. 136. Cro. Eliz. 223. Bro. Tit. *Leaſes* 21. only *cent.* per *Fineux*.

would not prevent or deſtroy the Operation of the firſt Words as a preſent Leaſe; ſuch Covenant only being *in majorem cautelam*, that the Leſſee might require further Aſſurance by Fine, or the like, if he found it neceſſary; and the Difference is, where ſuch Articles, by way of Covenant, are made by him who is Owner of the Lands; and where they are made by a Stranger, or one who has then nothing in the Lands; in the firſt Caſe they amount to a preſent and abſolute Leaſe, but not in the other, becauſe a Man cannot be ſuppoſed to leaſe what he has not; or if it might be ſo ſuppoſed, yet when it appears in the very Articles *Page 421 * that he has nothing in the Lands, his Covenant then can have no other Conſtruction, but that he will procure the Owner of the Lands to permit the Covenantee to hold and enjoy thoſe Lands; which is the proper and natural Interpretation of the Words of the Covenant, when he himſelf has nothing whereof to make a Leaſe.

Cro. Eliz. 233. Leon. 104. *Truſtee* and *Tenant.* 2 Keb. 268.

A Controverſy was between two Perſons touching a Leaſe for Years, which of them had Title to it, and they ſubmitted to the Award of *J. S.* who awarded that one of them ſhould have the Land; this was held to be a good Gift of the Intereſt of the Land, that is, an Award, that the whole Leaſe, or Intereſt in the Land for the Term then to come, belonged to one, excluſive of the other; but if the Award had been, that the one ſhould permit the other to enjoy the Term, this, it is ſaid, would not have given him the Intereſt in the Land, nor would amount to a Leaſe; that is, as I ſuppoſe, becauſe the Permiſſion being to come from the other Party, the Intereſt muſt be ſuppoſed to be and continue in him; and it could not amount to a Leaſe, or an Award of a Leaſe; not to a Leaſe, either from the Arbitrator or the other; not from the Arbitrator, becauſe he had nothing in the Land, and was only to award what the other ſhould do; not to a Leaſe from the other, becauſe it was only the Act and Award of the Arbitrator; neither could it amount to an Award of a Leaſe from the other, becauſe it was only that he ſhould permit the other to enjoy the Term, which he might do without making a Leaſe; and the Words being ſpoken by the Arbitrator, who was a third Perſon, cannot have the ſame Operation, as if they had been ſpoken by one who had Intereſt in the Lands to another, but muſt be taken according to the literal Senſe and Meaning thereof.

Cro. Eliz. 486. Moor, pl. 638. Rol. Abr. 847. 2 Rol. Abr. 449. Palm. 201.

Articles indented in Writing were made between *A.* and *B.* in this Manner: *Imprimis*, it is covenanted and agreed between the Parties, that *A.* doth let ſuch Lands for and during five Years, to begin at *Mich'* next following, under 10*l.* a Year Rent; or provided that the Leſſee ſhall pay 10*l.* at *Mich'* and *Lady-day*, by even Portions, during the Term; alſo the ſaid Parties do covenant, that a Leaſe ſhall be made and ſealed, according to the Effect of theſe Articles, before the Feaſt of *All-Saints* next enſuing; yet this was held to amount to an immediate Leaſe, by reaſon of the firſt Words in the preſent Tenſe, and that the laſt Words were only for making ſuch a Leaſe in Writing for further Aſſurance; and the rather here, becauſe the Leaſe to be ſealed was to be made after the Beginning of the Term.

2 Bendl. 7. Moor, pl. 31. Cro. Eliz. 33, 306.

One ſaid to another, you ſhall have a Leaſe of my Lands in *D.* for twenty-one Years, paying therefore 10*l. per Ann.* make a Leaſe in Writing, and I will ſeal it; this was agreed by all the Juſtices to be a good Parol Leaſe for twenty-one Years, though no Writing was made of it, (being before the Statute of Frauds) for the Intent of the Parties was ſufficiently expreſſed, and the making of it in Writing was but for further Aſſurance, and left to the Leſſee, if he thought it neceſſary.

2 Bendl.

One made his Will in this Manner: I have made a Leaſe to *J. S.* for Term of twenty-one Years, paying but 20*s.* Rent; this was held a good Leaſe or Deviſe by the Will for twenty-one Years, and that the Word *have* ſhould be taken in the preſent Tenſe, as *dedi* is in a Deed of Feoffment, to comply with the Intent of the Teſtator.

But

But now, on the contrary, if the moſt proper Form of Words of leaſing are made uſe of, yet if, upon the whole Deed, there appears no ſuch Intent, but that it is only preparatory and relative to a future Leaſe to be made, the Law will rather do Violence to the Words, than break through the Intent of the Parties, by conſtruing a preſent Leaſe, when the Intent was manifeſtly otherwiſe. Where Words of Covenant, &c. will not, in the Caſe of Copyholds, amount to a Leaſe ſo as to work a Forfeiture, *vide ſupra*. Under Leaſes made by Copyholders.

* Therefore where Articles were drawn between *A.* and *B.* in this Manner: Articles agreed upon, &c. *Imprimis*, *A.* doth demiſe ſuch a Cloſe to *B.* to have it for forty Years, and a Rent reſerved, with Clauſe of Diſtreſs, &c. In witneſs whereof, &c. and afterwards there was written in the ſame Paper a Memorandum, that theſe Articles are to be ordered by Counſel of both Parties, according to the due Form of Law; and becauſe the Intent of both Parties appeared by that Memorandum, and by a Leaſe actually drawn by Counſel, but never ſealed, (upon ſome Diſagreement between the Parties (it was ruled by the Court, upon Evidence in Ejectment, that theſe Articles were not a ſufficient Leaſe, and the Jury found accordingly; and yet here was the Form and Words of a preſent and immediate Demiſe or Leaſe ‡. *Page 422 Noy 128. *Sturgeon* verſ. *Painter*.

‡ *Sed. qu.* If not ſufficient to intitle the Tenant, on performing the Conditions, to hold the Land, againſt the Landlord, for the Term? and, if he ought to recover in Ejectment, unleſs, for Condition broken?

So where Articles of Agreement are drawn between *A.* and *B.* in this Manner: Firſt, the ſaid *A.* is *contented* to demiſe ſuch Lands, &c. to the ſaid *B.* from *Mich'* next for ſix Years; and after theſe Words, the Rent reſerved is 100*l. per Ann.* a Re-entry for Non-payment of the Rent, a Covenant for Reparations, and a Covenant to do ſuch other Thing; and theſe Articles are ſealed and delivered by the Parties; yet they do not amount to a Leaſe, but are only preparatory Covenants or Inſtructions towards a Leaſe, and never were intended to have the Force or Effect of a Leaſe themſelves; beſides that, the Word *contented* imports only an Approbation of ſomething to be done after; this Caſe is cited in (*a*) *Cro. Jac.* in this Manner: That if one covenants and grants with another that he ſhall *have and hold* ſuch Lands for ten Years, that this is a good and abſolute Leaſe for that Time; but if he covenants and grants that he ſhall *enjoy* thoſe Lands for ten Years, this is no Leaſe, becauſe it ſounds only in Covenant; *Quære* of the Difference between *holding* and *enjoying*, for there ſeems none; therefore the Caſe muſt be miſtaken. Rol. Abr. 848. *Pleazance* and *Higham*. 2 Mod. 81. See Will. Rep. 16, 71, 330, 781. 3 Will. Rep. 9. Gilb. Eq. Rep. 108, 166. Stra. 447. (*a*) Cro. Jac. 172.

One made a Leaſe for Life, & *proviſum eſt*, that if the Leſſee die within ſixty Years, that then his Executors and Aſſigns ſhould enjoy the Land in his Right for ſo many Years as ſhould be behind of the ſixty Years from the Date of the Leaſe; this was held to be only a Covenant, and no Leaſe, for which there are divers Reaſons aſſigned in the Books; as firſt, becauſe the Words purport an Agreement, and not a Grant, and ſo found only in Covenant, which is a very unintelligible Reaſon. Another Reaſon given is, becauſe if it ſhould be conſtrued a Demiſe, it muſt be void, becauſe there is no Perſon *in eſſe* to take it; for the Executors are not *in rerum natura*, nor Parties to the Deed. Another Reaſon given is, becauſe nothing of the ſaid Term was given to the Leſſee himſelf for Life, as Remainder to him and his Executors for ſixty Years. A fourth and laſt Reaſon is, becauſe there is no Certainty either of the Beginning or Ending thereof, and therefore it cannot be a good Leaſe; but a better Reaſon than any of theſe ſeems to be, that he having in the firſt Part of the Deed made a Leaſe in expreſs and proper Words, muſt be ſuppoſed to mean ſomething leſs in this laſt Part of the Deed, which varies ſo widely in the Form of Expreſſion, and which has a natural and proper Meaning of its own as a Covenant, but cannot Dyer 150. Co. 155. Hob. 35. Moor 480. Rol. Abr. 848. Bendl. pl. 115.

amount

amount or come up to a Leaſe, without Violence and Force done to the Words, as well as the Intent of the Parties and this the rather ſeems probable, becauſe *Moor* holds clearly, that if it had been provided that if the Leſſor die within ſixty Years, that then he demiſed the Land to another (who was alſo a Party to the Deed) for ſo many of the ſixty Years as ſhould be then to come; this would be a good Leaſe, for here he comes into the very ſame Form of Expreſſion made uſe of in the firſt Part of the Deed which was an actual Demiſe, and therefore muſt be ſuppoſed to mean the ſame Thing in the latter Part too, and conſequently ſuch Words would make it an actual Demiſe ‡.

‡ *Qu.* If it is not a general Rule that the firſt Part of a Deed, and the laſt Part of a Will, are to govern the Conſtruction; if the above are not Diſtinctions, without Differences; and if there is not more Subtlety than Wiſdom in the Deciſions, unleſs where a forced Conſtruction is put, to ſave a Forfeiture?

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Cro. Jac. 172. Rol. Abr. 847. 2 Mod. 80.

* *A.* ſeiſed of Lands in Fee by Indenture, covenants with *B.* before *Eaſter* then next, to convey thoſe Lands by Fine, or other Aſſurance to *B.* and his Heirs, to the Uſe of him and his Heirs, with a Proviſo, that if *A.* paid to *B.* 100*l* at the End of thirteen Years, that then he might re-enter, and that then all Aſſurances ſhould be to the Conuzor, and covenanted and granted for him and his Heirs, that *B.* and his Heirs ſhould enjoy thoſe Lands till the End of the ſaid thirteen Years, and for ever after, if the 100*l.* were not paid; and *B.* covenanted to pay annually, during the thirteen Years, two Capons, and that during the thirteen Years he would not commit Waſte; no Aſſurance was made within the Time; and if this, upon the whole Deed, amounted to a Leaſe for thirteen Years, was the Queſtion. And it was adjudged that it was no Leaſe, but only a bare Covenant, and this Judgment affirmed in Error; for the Intent of the Parties was to make Aſſurance of the Inheritance by way of Mortgage, and the Covenant was only that he ſhould enjoy the Lands during the Time of the Mortgage, whether it continued thirteen Years only, or for ever; and if a Fine had been levied, or a Feoffment made, it is plain this Deed had been no Leaſe, but only a Covenant to lead or declare the Uſes of ſuch Fine or Feoffment; and though none was levied or made, yet the Deed ſtill continues of the ſame Nature as it did at firſt, or as if ſuch Fine or Feoffment had been actually executed; and the Covenant on *B*'s Part, that he would do no Waſte, does not expound it otherwiſe, for that was only that he, being a Mortgagee in Fee, ſhould do no Waſte, for which otherwiſe there would be no Remedy.

Cro. Jac. 659. Palm. 201. 2 Rol. Rep. 241. Rol. Abr. 859. *Pauſeley* and *Blackman.*

So where one, by Indenture inrolled, for Money, bargained and ſold Lands to one and his Heirs, provided, that if the Bargainor for five Years paid annually 10*l.* to the Bargainee at the Days limited in the Deed, and at the End of the ſaid five Years ſhall pay 240*l.* then the Bargain and Sale to be void; provided alſo, and it is further covenanted and agreed between the ſaid Parties, that the Bargainee, his Heirs or Aſſigns, ſhall not intermeddle with the actual Poſſeſſion of the Premiſſes, or the Perception of the Rents and Profits, till Default be made in the Payment of the ſaid Sums; this was held to be no Leaſe to the Bargainor for five Years, but only in the Nature of a Leaſe at Will, by reaſon of the Negative Words, that the Bargainee ſhould not intermeddle with the Rents and Profits for that Time, and conſequently ſo long was to leave the Bargainor in Poſſeſſion as he was before.

Co. Ent. 85. a. *Bradſton* ver. *Buck.*

So where *A.* acknowledged a Recognizance to *B.* of 200*l.* and *B.* by Indenture of Defeaſance, did covenant, promiſe and agree with the ſaid *A.* that if *A.* his Heirs or Aſſigns, ſhould, after ſuch a Time, convey ſuch an Advowſon to him and his Heirs; and if the ſaid *B.* his Heirs, Executors, *&c.* ſhall, and may at all Times hereafter, peaceably and quietly have, hold, uſe, occupy, poſſeſs and enjoy the ſaid Advowſon, without the Let, Suit, Trouble, *&c.* of the ſaid *A.* or any other Perſon or Perſons, *&c.* then the Recognizance to be void; and the Queſtion was, if this laſt Clauſe amounted

to a Leaſe of the Advowſon; and the Court was of Opinion that it did not, for the Intent of the Parties was not to make a Leaſe of it, but only a Condition to defeat the Recognizance, and that this laſt Clauſe ſhould have relation to the Eſtate in Fee precedent, being if the ſaid *A.* his Heirs, *&c.* which cannot be intended of a Leaſe; alſo the Clauſe is indefinite, at all Times hereafter, and does not limit any certain Time, for Life or Years, wherein the Advowſon ſhall be peaceably enjoyed, and therefore ſhall be intended during the Eſtate in Fee before mentioned; but no Judgment was then given.

If one makes a Leaſe for Life, and after grants that the Lands or the Reverſion ſhall remain to another for twenty-one Years after the Death of the Tenant for Life, theſe Words are ſufficient to paſs a Reverſionary Intereſt by way of future Leaſe without Attornment, though there is not the * Word *Demiſe*, or any other Word uſual or proper to deſcribe a Leaſe for Years by; but here being Words ſufficient to prove a preſent Contract for the reverſionary Intereſt of theſe Lands, after the Eſtate for Life determined, theſe, in caſe of a Leaſe for Years, which is but a Contract, are in themſelves ſufficient, and adequate to any other Form. Dyer 124. pl. 40. 125. pl. 44. Plowd. 148, 150. *Page 424 Bro. Tit. *Leaſes* 71. Yelv. 85. Brownl. 136.

(L) What Certainty is requiſite to Leaſes for Years as to their Beginning, Continuance, and Ending: And herein,

1. With regard to the Date of the Leaſe.

AS to the Date, that may be conſidered either as it is an impoſſible Date, or an uncertain Date, between which the general Difference taken in the Books, is, that if a Leaſe be made to begin from an impoſſible Date, there the Leaſe ſhall take Effect from the Delivery; becauſe it could not be any Part of the Agreement between the Parties, as from the 30th Day of *February*, or the 32d Day of *April* next; but where the Limitation is uncertain, as a Leaſe in *October*, *Habendum* from the 20th of *November*, without ſaying from *November* next following or preceding, or what other *November*; this Uncertainty vitiates the Leaſe itſelf, becauſe it was Part of the Agreement, that the Leaſe ſhould begin from the 20th Day of ſome *November* or other; but it not appearing to the Court what *November* was intended, they cannot determine it for the Parties, and therefore for ſuch Uncertainty the Leaſe itſelf becomes void. Mod. 180.

So where a Leaſe is made to begin from the Nativity of our Lord God laſt paſt, without ſaying from the Feaſt of the Nativity, this Leaſe ſhall begin preſently; becauſe it could be no Part of the Agreement between the Parties that the Leaſe ſhould begin from the Nativity itſelf, which is paſt ſo many hundred Years ago; and therefore, for this Impoſſibility of Relation, the Leaſe ſhall begin preſently; but if it were to begin from the Nativity of our Lord God generally, or from the Nativity of our Lord God next enſuing, omitting the Word *Feaſt*, *Twiſden* was of Opinion ſuch Leaſe ſhould be void, for the Uncertainty of its Commencement; but *Sid.* in reporting of the Caſe, ſeems to be of a contrary Opinion, and makes a *Quære*, if it ſhall not begin preſently; and, in Truth, this ſeems the moſt reaſonable Opinion, for as to Impoſſibility of Relation, there is the ſame in this as there is in the other; and therefore, by the ſame Reaſon, it ſhall begin preſently †. Sid. 461. Vent. 84. 2 Keb. 656.

† What ſound Reaſon can be aſſigned, why it ſhould not commence from the Chriſtmas, intended by the Parties, it being as clearly evident as the Sun at Noon-day.

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Rol. Abr. 849. *Darcett's* Caſe. 850. *Elme* verſ. *Leaves.*

In Ejectment, if Plaintiff declares on a Leaſe by *J. S.* 20 *Auguſt* for twenty Years *a Feſto Annunciationis beatæ Mariæ Virginis ultimo præterito ante Datum hujus Indenturæ* or *Indenturæ prædictæ*, where no Mention is made of any Date or Indenture before in the Declaration, this Leaſe ſhall be taken to commence from the Feaſt of the Annunciation next before the 20th of *Auguſt* in that Year wherein the Declaration is; becauſe it muſt have been ſo conſtrued if the Words *ante Datum hujus Indenturæ* had been omitted, and the Addition of thoſe Words can be to no Purpoſe, nor of any Uſe, when no Indenture at all is mentioned before, and therefore ſhall be void, or as if they had been totally omitted.

*Page 425 Rol. Abr. 849. Dyer 261. Leon. 199.

* If a Leaſe be made for thirty-one Years, *Anno* 1531, and after, *Anno* 1535, the Leſſor, reciting the ſaid Leaſe, by Indenture makes a new Leaſe in theſe Words, *Noveritis me dictis* 31 *Annis finitis & completis dediſſe & conceſſiſſe omnia Præmiſſa* to *J. S. Habend' & tenend' a Die Confectionis Præſentium* (*Termino prædict' finito*) *uſque ad Finem Termini* 31 *Annorum tunc immediate ſequentium plenarie complendorum*; this Leaſe ſhall begin in Computation from the Expiration of the firſt Leaſe for thirty-one Years, and ſhall continue for thirty-one Years after ſuch Expiration of the firſt Leaſe; for if it ſhould begin from the Day of the making of the Deed, then there would be four Years thereof to come after the Expiration of the firſt Leaſe, which would be plainly againſt the Intent of the Parties; and therefore it ſhall be interpreted that he ſhall have it for thirty-one Years after the Day of the Date, and the Expiration of the firſt Term of thirty-one Years, *viz.* after both.

Godb. 166. Dyer 261. b in Margin.

So where Leſſee for an hundred Years made a Leaſe for forty Years to *B.* if he ſhould ſo long live, and after leaſed the ſame Lands to *C. Habend'* for twenty-one Years from the End of the Term of *B.* to begin and be accounted from the Date of theſe Preſents; and the Queſtion was, if the Leaſe to *C.* ſhould be ſaid to begin preſently, or after the Term of *B.* And the Judges were clear of Opinion, that the Leaſe to *C.* ſhould not be accounted from the Time of the Date, but from the End of the Term of *B.* becauſe by the firſt Words it is a good Leaſe in Reverſion in that Manner, and then it ſhall not be made void by any ſubſequent Words, or, as *Coke* ſaid, the laſt Words ought to be conſtrued to give an Intereſt as a future Intereſt preſently, and the actual Poſſeſſion after the Expiration of the firſt forty Years Term is well granted by the firſt Words.

Leon. 227. pl. 308.

A Man made a Leaſe for Years, to begin at the Feaſt of our *Lady Mary*, for twenty-one Years, without ſhewing in Certainty at which of the Feaſts of our *Lady*, *viz.* the *Annunciation* or the *Purification*; yet *Anderſon* held it a good Leaſe, and that the Leſſee might determine the Certainty of the Beginning of the Leaſe, by his Entry, at which of the Feaſts he thought fit; but *Periam* doubted; and in Truth this Caſe ſeems within the Rule before laid down to be void, for the Uncertainty of the Time of its Commencement ‡.

‡ Certainly a Jury would determine it, according to the common Acceptation of the Term, in the Country where the Leaſe was made.

4 Leon. 144. *Highman* ver. *Cook.*

In Ejectment the Plaintiff declares upon a Leaſe for Years, *Habend'* from the Sealing and Delivery, and declares that the Sealing and Delivery was 1° *Maii*, and the Ejectment was the ſame Day; and it was moved in Arreſt of Judgment, that the Ejectment could not be ſuppoſed the ſame Day, for the Leaſe did not begin till the next Day enſuing the Sealing and Delivery. But the Court diſallowed the Exception; for where the Leaſe is to begin from the Time of the Sealing and Delivery, or generally to hold for twenty-one Years next following, the Ejectment may well be ſuppoſed to be the ſame Day; for the Beginning of the Leaſe

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is preſently upon the Sealing and Delivery; and therefore ſuch a Leaſe ſhall end the ſame Time and Hour.

If an Indenture of Demiſe bears Teſte 4 *May*, 10 *Jac.* and is delivered 5 *May*, 10 *Jac. Habend' a Feſto Annunciationis Beatæ* Mariæ *Virginis tum ult' præterit', pro Termino viginti unius Annorum prox' ſequent' Datum dictæ Indenturæ*; this Leaſe commences in Computation from *Lady-Day* before the Date, and in Intereſt the 5th Day, which is the Day next after the Date; and ſo all the Words of the Indenture ſhall take Effect the 5th Day, being the Day of the Delivery of the Deed, and then the Leaſe will determine on the Feaſt of the *Annunciation* twenty-one Years after; and therefore the Count which was of ſuch a Leaſe, omitting *Datum Indenturæ*, was held to be well enough warranted by this Leaſe found *in hæc Verba*, the Ejectment not being laid till the 5th of *May*. Rol. Abr. 850. Hob. 18. *Moore* verſ. *Huſſey*.

* In Ejectment the Plaintiff declared upon a Leaſe made 14 *Jan.* 30 *Eliz.* from *Chriſtmas* before for three Years, and upon Evidence the Plaintiff ſhewed a Leaſe bearing Date 13th *Jan.* the ſame Year, and proved to have been then executed; and it was moved, for this Variance between the Declaration and the Evidence, that the Jury might be diſcharged; but *Anderſon* Chief Juſtice ſaid, that the Evidence was ſufficient to ſupport the Declaration; for if the Leaſe was ſealed and delivered 13 *Jan.* it was then a Leaſe 14 *Jan. quod cæteri Juſticiarii conceſſerunt.* *Page 426 4 Leon. 14. pl. 52. *Frice* verſus *Feſter*.

If an Indenture of Demiſe bears Teſte 25 *March*, 15 *Car.* and is delivered the Day of the Date, and the *Habend'* is from and after the Day of the Date of theſe Preſents, for and during the Time and Term of ſeven Years from henceforth next and immediately following fully to be compleat and ended, this Leaſe begins in Computation from the Delivery of the Deed, which was the Day of the Date, and in Intereſt the next Day after the Date, and ſo all the Words will have an Operation; for it appears that he was not to have the Poſſeſſion till the next Day after the Date, by the Words *Habend'* from and after the Day of the Date, which excludes the Day of the Date, but that the ſeven Years ſhould commence by Computation from the Delivery, *viz.* from henceforth, which refers to the Limitation of the ſeven Years; and therefore where the Plaintiff declared on this Leaſe by Indenture dated 25th of *March Habend' a Die Datus* for ſeven Years, it was adjudged againſt him, for by Computation it began *a Datu Indenturæ*. Rol. Abr. 850. *Corniſh* ver. *Cawſey*.

If one makes a Leaſe to *A.* for twenty-one Years, and after makes another Leaſe to *B.* for Years, to begin *a Fine & Expiratione prædict' Termini* 21 *Annor' dimiſſor'* to *A.* and then the Leaſe to *A.* is determined, either by an expreſs Surrender, or by an implied Surrender in Law, as by *A.*'s Acceptance of a new Leaſe for Life from the Leſſor, the Leaſe to *B.* ſhall begin preſently; but if the Leaſe to *B.* had been to begin *poſt Finem & Expirationem prædict'* 21 *Annor'*, there the Leaſe to *B.* ſhould not begin upon the Surrender, Forfeiture, or other Determination of the firſt Term to *A.* till the twenty-one Years actually run out by Effluxion of Time; the Reaſon of which Difference is, that in the firſt Caſe the Word *Term* comprehends as well the Eſtate or Intereſt in the Land, as the Time for which it is demiſed; and therefore the ſecond Leaſe being limited to begin *a Fine & Expiratione prædict' Termini* 21 *Annor'*, whenever the Term, which includes alſo the Eſtate and Intereſt, is determined, the Leaſe to *B.* ſhall begin; but in the other Caſe the Leaſe to *B.* is not to begin till after the End and Expiration of the twenty-one Years, which cannot be ended but by Effluxion of Time. Plow. 198. Dyer 177. pl. 35. Co. Lit. 45. b. Co. 154. Rol. Abr. 849. Leon. 106.

The Biſhop of *Bath* and *Wells*, 18 *H.* 8. made a Leaſe in Writing to *A.* and *B.* for ſixty Years; Proviſo, that if the ſaid *A.* and *B.* die within the ſaid Term of ſixty Years, that then, after the Death of the ſaid *A.* and *B.* and of the longer Liver of them, it ſhall be lawful for the ſaid Biſhop, and his Succeſſors, to enter into the ſaid Lands; *A.* dies, the 6 Co. 34. Cro. Jac. 71. Biſhop of *Bath* and *Well*'s Caſe, Dyer 312. pl. 89.

Biſhop dies, and his Succeſſor, 22 *H.* 8. demiſes the ſaid Lands to *C. Habend' cum poſt ſive per Mortem, ſurſum Redditionem, vel forisfact' præd'* B. *vacare contigerit*, for ſixty Years, with Confirmation of the Dean and Chapter, and then *B.* dies within the ſixty Years, and the Grantee of the Biſhop would avoid this Leaſe to *C.* 1. Becauſe being limited to begin upon one of three Accidents, *viz.* Death, Surrender, or Forfeiture, none of which happened, it could not begin at all; for it was not determined by the Death of *A.* and *B.* within the ſixty Years, as all the Court agreed, but continued till the Leſſor, or his Succeſſors entered; for ſo it was expreſly provided by the Leaſe, and that was a mere Condition, and not a Limitation; and then the ſecond Leaſe, as was argued, cannot begin at all, or at leaſt the Time thereof ſhall run on from the Death of *B.* the Survivor; but it was adjudged the ſecond Leaſe was good; for it was only limited *cum per Mortem, ſurſum Redditionem, &c.* the firſt Leaſe
*Page 427 * ſhould determine, but alſo *cum poſt Mortem vacare contigerit*; ſo that this ſecond Leaſe may well begin when the firſt Term by Effluxion of Time is run out *poſt Mortem* of the Parties; and this differs from a Remainder limited to one after the Death of another; there it ought to begin immediately after the Death, without any *Interim*; but here it ſhall not begin till after the firſt Term run out *poſt Mortem*, whenever in ſuch Manner *vacare contigerit*, and is a good Leaſe preſently in Point of Intereſt, to take Effect in Poſſeſſion whenever the firſt Leaſe, by any of theſe Accidents, happens to be at an End, and is a good *Intereſſe Termini* in the mean Time; and this Conſtruction ought to be made, to ſupport the Leaſe, becauſe it ſhall be taken moſt ſtrongly againſt the Leſſor, and for the Benefit of the Leſſee.

Bendl pl. 72. And. 3. Dyer 116. pl. 70. Bro. Tit. *Leaſes* 62. Plow. 148. Rol. Abr. 849. Cro. Car. 309. Jon. 355. *Miller* and *Manwaring*. Co. Lit. 46. b. Lev. 77. Keb. 360. *Baſſet* verſus *Lewis*. 2 Leon. 11. pl. 17. Vaugh. 73. 2 Lev. 242.

If *A.* reciting that *B.* hath a Leaſe for Years of ſuch Lands, demiſes the ſame Lands to *C.* for Years, to begin after the End or Determination of the ſaid Leaſe to *B.* where in Truth *B.* hath not any Leaſe at all of thoſe Lands, the Leaſe to *C.* ſhall begin preſently; for in Judgment of Law, a void Limitation and no Limitation is all one; ſo if he recites a Leaſe which in Conſtruction of Law appears after to be void, or miſrecites a good Leaſe in a Point material, *Habend'* from the End of the ſaid Leaſe, this new Leaſe ſhall begin preſently; though where the firſt Leaſe is good in Law, and only miſrecited in a Point material, the new Leaſe can begin preſently only in Enumeration of Years, not in Intereſt, till the End of the firſt Leaſe; for in theſe Caſes the Commencement of this new Leaſe, being referred to a Thing which is not, cannot be any ways aſcertained or governed thereby, and then it is as if no ſuch Recital had been, which would have left the Leaſe to begin preſently, as the ſtrongeſt Conſtruction againſt the Leſſor, ſince there is nothing now to aſcertain or determine its Beginning at any other Time.

Lev. 234. Sid. 460. Kent. 83. 2 Keb. 322. *Foot* verſus *Berkley*.

So where the Queen-Mother, having the Inheritance of certain Lands ſettled on her for her Jointure, 14 *Car.* 1. reciting, that whereas Queen *Eliz.* 22 *April* in the 42d Year of her Reign, had demiſed thoſe Lands to ſuch a one, *&c.* (whereas the Leaſe intended was in Truth 32 *Eliz.*) the ſaid Queen-Mother did thereby demiſe the ſaid Lands, to begin after the End or Determination of the Eſtate granted to the other *per Literas Patentes prædictas*, for twenty-one Years; and the Queſtion upon this Miſrecital was, when the ſecond Leaſe for twenty-one Years ſhould begin, whether after the Expiration of the firſt Leaſe made 32 *Eliz.* though falſely recited to be made 42 *Eliz.* or whether it ſhould begin preſently; for if ſo, the firſt Leaſe would continue beyond the twenty-one Years limited in the ſecond Leaſe, and ſo the Leſſee have no Manner of Benefit of it; and yet notwithſtanding it was adjudged, that for this Miſrecital the ſecond Leaſe ſhould commence preſently; and ſo the Leſſee was obliged

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to pay a Rent of 60*l. per Annum* for the whole twenty-one Years, though he had nothing in the Lands all that Time; and this Judgment given in *C. B.* was afterwards affirmed upon Error in *B. R.* and in this Caſe the Court agreed, that if the Date of the recited Leaſe only had been miſtaken, and the ſecond Leaſe had been of the Lands, *Habend'* after the Expiration or Determination of the Eſtate or Leaſe of the firſt Leſſee generally, in ſuch Caſe the ſecond Leaſe had been good, and ſhould not have begun before; for then there had been ſufficient Certainty for the Time of its Commencement, and then *Utile per Inutile non vitiatur*; but here being limited to begin after the Determination of the Eſtate granted *per Literas Patentes prædictas*, where there were no ſuch Letters Patent, and ſo the Relation idle and null, the ſecond Leaſe begins preſently, as if no ſuch Recital or Relation had been, and there is no *Utile* at all; for it is tied up to begin after a Leaſe which is not; and the Court denied *Periam*'s Opinion to be Law, that if I let Lands to *B.* to begin after the * Expiration of a Leaſe thereof, which I have made to *J. S.* where in Truth I have made no Leaſe to *J. S.* that the Leaſe to *B.* ſhall never begin; this was denied to be Law, and againſt the Current of all Authorities. Alſo the Court ſaid, the principal Caſe here differs from *Withers* and *Caſſon*'s Caſe, where one made a Leaſe for Years *Habend' a Feſto Purificationis*, and after by Deed, reciting that he had made a Leaſe to commence *a Feſto Annunciationis*, granted the Reverſion to another, and that Grant held good; for in the Grant in the Reverſion the Miſrecital of the particular Eſtate is not material in the Caſe of a common Perſon, ſo long as he hath a Reverſion in him; but here in the principal Caſe one Term is recited to give Certainty to the Commencement of another, and is tied up by ſuch preciſe Words to begin after the Determination of the Leaſe granted by the ſaid recited Letters Patent, that this cannot be referred to a Leaſe that varies in the Date, though agreeing in other Circumſtances, (which yet is not here, for the Certainty of the Term to *B.* is not recited,) and though a Leaſe is good without a Date, yet when a Leaſe is recited to be of ſuch a Date, a Leaſe which bears another Date cannot be ſaid to be ſuch recited Leaſe; ſo that the Leaſe here muſt begin preſently; which, by the way, makes the Grant good, either to paſs the Reverſion with Attornment, or being by Indenture, to take Effect upon the Surrender, Forfeiture, or other Determination of the firſt Term; and ſuch Recital makes no Eſtoppel either againſt the Leſſor or Leſſee, or any claiming under them; or if it ſhould, yet the Jury are not eſtopped to find the Truth; and then the Court ſhall judge accordingly †.

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Hob. 128. *Withers* ver. *Caſſon.*

Vaugh. 82. Vent. 84.

† *Qu.* If the Courts at preſent would make ſuch a Determination, founded on ſuch nice and ſubtle Diſtinctions, when attended with ſuch Conſequences?—Thereby working the *greateſt Injuſtice*, and ſo contrary to the Intent of the Leſſor.

And this Rule, that if the former Leaſe be miſrecited in the Date, *&c.* and a new Leaſe made, to begin after the Expiration of the ſaid recited Leaſe, that ſuch new Leaſe ſhall begin preſently, holds as well in the Leaſe itſelf as where the Jury find an Indenture of Leaſe, whereby it is recited, that the Leſſor made ſuch former Leaſe of ſuch Date, and under ſuch Rent, without finding it ſo in Fact, but only by way of Recital in the Deed, ſuch ſecond Leaſe ſhall in Conſtruction of Law be adjudged to begin preſently, though in the Deed it is limited to begin after the Expiration of the firſt Leaſe ſo recited; becauſe the Jury do not actually find the firſt Leaſe, but only a Recital of it in another Deed, which Recital may be falſe, for ought appears to the Court; and then the ſecond Leaſe ſhall begin preſently, as if no ſuch firſt Leaſe were at all, ſince the not finding it effectually is as if there were none ſuch made.

Vaugh. 73. 80. *Rowe* and *Huntington.* Dyer 93. pl. 28. 4 Co. 74. *Palmer*'s Caſe. Cro. Eliz. 603.

9 Rol. Abr. 815. *Halſwell* and *Aylesworth.* King *Hen.* 8. in the 31ſt Year of his Reign leaſed Lands to one for twenty-one Years, and after granted the Reverſion to a Biſhop, who reciting all the Lands contained in the Letters Patent, and the Land itſelf before leaſed, by Name, and reciting the Letters Patent thus, That whereas *H.* 8. by his Letters Patent, dated 20 *H.* 8. where in Truth they were dated 31 *H.* 8. and alſo miſreciting the Day of the Date, grants all the Lands, Tenements, *&c.* to the firſt Leſſee for a certain Number of Years, *poſt Expirationem hujuſmodi Literarum Patentium*; in this Caſe it ſeems, that the Date being miſtaken, and the Commencement of the new Leaſe referred to the Expiration of the ſaid Letters Patent, when in Truth there were no ſuch Letters Patent as were recited, the ſecond Leaſe ſhall begin preſently, and ſo by Acceptance thereof will amount to a Surrender of the firſt; *aliter* it would have been if the ſecond Leaſe had been limited to begin after the End of the firſt Term generally.

A Leaſe may commence one Day in Point of Computation, and at another Day in Point of Intereſt, and ſuch a Leaſe "*Habendum* from a "Day paſt for 50 Years then next enſuing, the ſaid Term to commence "and begin from and immediately after the Determination of an exiſting "Leaſe of the ſame Premiſſes," ſhall not be eſteemed uncertain in its Commencement. 2 *Bur. Rep.* 1190.

Page 429 2. With regard to other Circumſtances taken notice of in the Deed of Leaſe, whereby to aſcertain the Commencement thereof.

As to other collateral Circumſtances taken notice of in the Deed of Leaſe in order to aſcertain the Commencement thereof, theſe are various, according to the Agreement of the Parties.

2 Leon. 86. Godb. 25. Co. Lit. 45. b. Co. 155. 6 Co. 35. Plow. 6, 373, 524. Rol. Abr. 848. Therefore if one makes a Leaſe for Years to another for ſo many Years as *J. S.* ſhall name, this at the Beginning is uncertain; but when *J. S.* hath named the Years, this aſcertains the Commencement and Continuance of the Leaſe accordingly, and in the mean time, if the Leſſee enters, he ſeems to be Tenant at Will; (but *Quære* if by ſuch Entry before the Commencement of the Leaſe he is not a Diſſeiſor, as other Leſſees are who enter before their Time;) but if the Leaſe had been made for ſo many Years as the Executors of the Leſſor ſhould name, this could not be made good by any Nomination, becauſe to every Leaſe there ought to be a Leſſor and Leſſee; and here the Nomination which aſcertains the Commencement not being appointed till after the Death of the Leſſor, makes the Leaſe defective in one of the main Parts of it, *viz.* a Leſſor, and therefore of Conſequence muſt be void; which is alſo the Reaſon that in the firſt Caſe the Nomination ought to be made in the Life-time of the Leſſor, and not by *J. S.* after his Death, for then it will be void.

Co. Lit. 45. b. Rol. Abr. 848. If a Perſon makes a Leaſe for ſo many Years as he ſhall live, or the Parſon of *D.* makes a Leaſe of his Glebe for ſo many Years as he ſhall be Parſon there, theſe Leaſes are ſaid to be abſolutely void, for the Uncertainty of their Continuance; becauſe none can ſay how long the Leſſor will live, or be Parſon; and then it cannot be a Leaſe for Years, when by no Poſſibility the Number of Years can be aſcertained; but if the Leaſe were for twenty-one Years, or any other certain Number of Years, if the Leſſor ſhould ſo long live, or continue Parſon, or if *J. S.* ſhould ſo long live theſe are good, becauſe the Leaſe at firſt is certain for the determinate Number of twenty-one Years, though the Death of *J. S.* may determine it ſooner; and that is a common and uſual Limitation, and ſeems to have been introduced to obviate the Objection of Uncertainty in the other Manner of Leaſing; but even in that Caſe it ſhould ſeem that the Leſſee will be Tenant at Will, or if Livery were made, will be Tenant during the

the Life or Incumbency of the Leſſor, and ſo have the Freehold in him, though for want of Certainty in the Number of Years, he cannot be ſaid Leſſee for Years †.

†If the Tenant enters, and performs the Condition of his Leaſe, *qu.* if the Leſſor could ever eject him, as ſuch a Leaſe would amount to a Licence to the Tenant, to hold and enjoy the Premiſes?

One made a Leaſe of *Blackacre* to *A.* for ten Years, and of *Whiteacre* to *B.* for twenty Years, and after by Indenture reciting both Leaſes makes a Leaſe to *C.* of *Blackacre* and *Whiteacre* for forty Years, *Habend'* after the End or Determination of the ſaid ſeveral Demiſes made to *A.* and *B.* and then the Leaſe to *A.* of *Blackacre* determines; and if the Leaſe to *C.* therein ſhould begin preſently, or if *C.* muſt wait the Determination of the other Leaſe to *B.* likewiſe before his Leaſe ſhould commence, was the Queſtion; becauſe it was urged, that this Leaſe ſhould begin all at one Time, and not to have ſeveral Commencements. But it was adjudged, that this Leaſe to *C.* in *Blackacre* ſhould begin preſently; for the *Habend'* ſhall be taken *reſpective Reddendo ſingula ſingulis, viz.* that the firſt Leaſe of *Blackacre* to *C.* for forty Years ſhall begin preſently after the Determination of the firſt Leaſe thereof made, and ſo for *Whiteacre*, when the firſt Leaſe thereof determines: becauſe every Deed ſhall be taken ſtrongeſt againſt the Leſſor or Grantor, and moſt beneficially for the Leſſee or Grantee, which in this Caſe without ſuch Conſtruction would be the Reverſe thereof, and *againſt the plain Intent of the Parties, by letting in the Leſſor to the Poſſeſſion and Enjoyment of the Lands compriſed in the firſt Leaſe, till the ſecond Leaſe, which had no Relation thereto, were determined. 5 Co. 7. Moor, pl. 340. Cro. Eliz. 199. 2 Leon. 105. *Page 430

In Ejectment the Plaintiff declared, that *J. S* demiſed to him *per quod'd' Scriptum Obligatorium* ſuch Lands, *Habend' a Die Datus Indenturæ prædict'*; on Not guilty pleaded, it was found and adjudged for the Plaintiff in *Ireland*; and it being aſſigned for Error here, that there was no Time ſpecified when this Leaſe ſhould begin; for it was *Habend' a Die Datus Indenturæ prædict'*, and no Indenture was mentioned before, but only *Scriptum Obligatorium*; yet *per Curiam* it was reſolved, that the Writing ſhould be intended an Indenture, though improperly called *Scriptum Obligatorium*; for every Deed obligeth; or if it ſhould not be intended an Indenture, then it begins preſently, as if it had been from an impoſſible Limitation, as the 40th of *Sept.* or ſuch like. Vent. 137. 2 Keb. 796. *Taylor* verſus *Fitzgerald.*

Copyhold Land was granted to *A. B.* and *C.* for their Lives *ſucceſſivè*, and then the Lord grants and demiſes the ſaid Land to *D.* for forty Years, after the Death, Surrender, Forfeiture, or other Determination of the Eſtate to *A. B.* and *C* then *A.* and *B.* die, *C* marries, and dies; and his Wife holds herſelf in for Life by the Cuſtom, as her Free Bench, and dies; and if the Leaſe for forty Years ſhould commence from the Death of the Huſband or of the Wife, was the Queſtion; for if it ſhould begin from the Death of the Huſband, it would be now ended, and ſo the Ejectment not maintainable; if from the Death of the Wife, there would be yet twenty Years of the Leaſe to come: And the Court agreed, though the Law will not ſupply theſe Words, *which ſhould firſt happen*, ſo that the Leaſe ſhould begin upon the Death, Forfeiture, Surrender, or other Determination, which ſhould firſt happen, yet they thought in this Caſe it ſhould not begin till after the Death of the Wife, for that is the firſt effectual Determination thereof; for it does not determine to any Purpoſe by any of the other Ways, ſince the Wife is in, in continuance of her Huſband's Eſtate, for Life; and it cannot reaſonably be intended that this Leaſe ſhould begin during the Continuance of the precedent Eſtate, which by Poſſibility may continue longer than the forty Years; for the Wife may outlive the forty Years, and then the Leaſe for forty Years from the Death of the Huſband would be void. Lev. 20. *Chantrell* ver. *Randal.* 2 Sid. 165. S C by the Name of *Clerk* verſus *Candle.*

So

Mich. 6 Geo. 2. *in Canc'*, *Iriſh* verſus *Hook.*

So in a late Caſe where *B.* had a Leaſe of twenty-one Years, of Copyhold Lands, to commence after the Determination of the Eſtate which *A.* at that Time had therein, and the Widow of *A.* being intitled to her Free Bench, and happening to outlive her Huſband twenty-one Years, it was held by my Lord Chancellor, that the Eſtate of the Wife was only an Excreſcence of her Huſband's Eſtate, which did not determine till the Wife's Death, at which Time the Leaſe made to *B.* ſhould commence, and continue for twenty-one Years.

3. The Certainty of Leaſes for Years as to their Continuance.

Plow. 271. *Say* verſus *Smith* and *Fuller.*

As to the Certainty of Leaſes for Years, as to their Continuance, this ought to be aſcertained either by the expreſs Limitation of the Parties at the Time of the Leaſe made, or by a Reference to ſome collateral Act, which may with equal Certainty meaſure the Continuance thereof, otherwiſe it will be void.

Plow. 271.

Therefore where a Man made a Leaſe for ten Years, and granted that if the Leſſee, his Heirs or Aſſigns, ſhould pay to the Leſſor, or his Aſſigns, ſuch a Parcel of Tiles at the End of every ten Years then next enſuing, that then he, his Heirs or Aſſigns, ſhould have a perpetual Demiſe of the Pre-

*Page 431 *miſſes from ten Years to ten Years continually following, and out of the Memory of Man; this was held to be a good Leaſe but for ten Years certain, becauſe for all the Years to come it was uncertain, (beſides the Repugnancy and Nonſenſe of the Words *extra Hominum Memoriam*,) for the Payment of the Tiles was to precede all the ten Years that ever ſhould be, and ſo muſt laſt to the End of the World, before any ſecond ten Years, by virtue of the Leaſe, was to begin; and then to be ſure there could be no ten Years at all; and ſo all the other ten Years, being to begin upon an impoſſible Condition precedent, can never take place at all, but are abſolutely void and idle.

Co. Lit. 45. b. 6 Co. 35. Plow. 273. Rol. Abr. 849. 3 Co. 19. Plow. 522.

If *A.* lets Lands to *B.* for ſo many Years as *B.* hath in the Manor of *D.* and *B.* hath then a Term for ten Years in that Manor, this makes *A.*'s Leaſe to him good, and fixes the Meaſure and Continuance thereof, ſo that *B.* ſhall have the Lands demiſed for ten Years: So a Leaſe to one during the Minority of *J. S.* who is then ten Years of Age, is a good Leaſe for eleven Years, if *J. S.* ſo long live; for if he die ſooner, that determines the Leaſe, ſince nothing appears to extend it beyond his Life, and his Minority ceaſes by his Death.

6 Co. 35. b. Plow. 273. Co. Lit. 42. a.

If I have a Rent of 20 *s. per Annum* in Fee iſſuing out of *Blackacre*, payable annually at the Faſt of *Eaſter*, and I grant that Rent to another till he ſhall have received of the ſame Rent 21 *l.* the Grantee ſhall have the Rent for twenty-one Years certain, becauſe the Land is a certain Security for 20 *s. per Annum*, which will take up twenty-one Years certain to anſwer 21 *l.* and therefore ſo long the Grant of the Rent ſhall have Continuance.

6 Co. 35. 3 Leon. 157. Bro. Tit. *Leaſes* 67. Co. Lit. 42. a. 3 Bulſ. 100. Plow. 273.

But if a Man lets Lands of the Value of 20 *s. per Annum* till 21 *l.* be levied of the Iſſues and Profits; this is but a Leaſe at Will without Livery, becauſe it is uncertain whether the Land will be every Year of an equal Value; and though Livery ſhould be made, whereby he will have a Leaſe for Life, or a Freehold Eſtate, yet this will be determinable upon the 21 *l.* levied; for by the original Contract he was to have it no longer than till the Money levied.

6 Co. 35.

If a Woman be *enſient* with a Son, and a Leaſe is made till ſuch Iſſue *in ventre ſa mere* ſhall come to full Age, this is a Leaſe only at Will, and cannot be any Leaſe for Years, becauſe it is uncertain when, or whether ever the Son will be born, and conſequently the Beginning, Continuance and Ending of this Leaſe is uncertain; and therefore it cannot be ſaid any

Leaſe

Leaſe for Years, ſince it is to begin preſently as a Leaſe, and yet nothing appears in the Deed itſelf, nor is there ſuch a Reference to any collateral Circumſtance as may then meaſure the Continuance thereof.

If *A.* ſeiſed of Lands grants to *B.* that when *B.* pays to *A.* 20*s.* that from thenceforth he ſhall have and occupy the Lands for twenty-one Years, and after *B.* pays the 20*s.* this is become a good Leaſe for twenty-one Years from the Time of ſuch Payment made; for though the Commencement of it was contingent and uncertain, and depended upon *B.*'s Election to pay the 20*s.* yet after he had paid them, this takes off all Uncertainty, and fixes the Commencement and Continuance of the Leaſe. Co. Lit. 45. b. 6 Co. 35. a. Rol. Abr. 849.

If one makes a Leaſe to *J. S.* for twenty Years, if the Coverture between *A.* and *B.* ſhall ſo long continue, this is a good Leaſe for that Time *prima facie*, though the Diſſolution of the Coverture may determine it ſooner; and there alſo it ſeems, that a Leaſe to one generally during the Coverture between *A.* and *B.* is a good Leaſe; but this ſurely can be no other than a Leaſe at Will, for the Uncertainty how long the Coverture will continue takes off from any Certainty in the Number of Years that can be affixed to ſuch Leaſe, and conſequently it cannot be eſteemed any Leaſe for Years, more than where it is for ſo many Years as the Leſſor ſhall live, or continue Parſon, *&c.* Plow. 273.

* If one lets Lands for one Hundred Thouſand Days, this by *Bro.* is a good Leaſe for that Time, becauſe the Meaſure and Continuance thereof by Days is as certain as it would be if it were for ſo many Years as comprehend thoſe Days, ſince Days are Part of and go to make up the Years; though it ſhould ſeem that this cannot be properly called a Leaſe for Years, becauſe the Years are only an accidental Circumſtance in the Enumeration of the Days, not any Part of the original Contract between the Parties. *Page 432 14 H. 8. 13. Bro. Tit. *Leaſes* 13.

If a Man makes a Leaſe for Years, without ſaying how many, this ſhall be a good Leaſe for two Years, certain, becauſe for more there is no Certainty, and for leſs there can be no Senſe in the Words. 6 Co. 35-6. Bro. Tit. *Leaſes* 13.

If one makes a Leaſe for ten Years at the Will of the Leſſor, this is a good Leaſe for ten Years certain, and the laſt Words are void for the Repugnancy by *Bro.* but if one lets Lands at Will for a Year, *& ſic de Anno in Annum*, this is a Leaſe only at Will by the firſt Words, and the laſt Words being repugnant ſhall not controul them, or add any more Certainty to its Continuance. Bro. Tit. *Leaſes* 13, 22. 14 H. 8. 13. a.

If a Man leaſes Lands for ſuch a Term as both Parties ſhall pleaſe, this is but a Leaſe at Will, becauſe what that Term will be is utterly uncertain; and the Pleaſure of the Parties ſeems to be limited to attend the Continuance as well as the Commencement and firſt Fixation thereof. 2 Rol. Abr. 851. 6 Co. 35. b.

A Parſon made a Leaſe of his Rectory to one for three Years, and ſo from three Years to three Years, and ſo from three Years to three Years during his Life; or, as it is in *Rolle*, for three Years, and at the End of thoſe three Years for other three Years, *& ſic de tribus annis in tres annos*, during the Life of the Leſſor. The whole Court held it clearly a Leaſe for twelve Years; but by *Dodderidge*, if the Leaſe had been for three Years, and ſo from three Years to three Years, and ſo from the ſaid three Years to three Years; this had been but a Leaſe for nine Years, becauſe the Words *from the ſaid three Years* tie up the Relation retroſpectively to the three Years laſt mentioned, which made in all but ſix Years, and then there are but three Years more added, which make the Whole but nine Years; and for the Words (*during the Life of the Leſſor*) they cannot enlarge it to any further certain Number of three Years, by reaſon of the Uncertainty of the Leſſor's Life, and therefore beyond the twelve Years, or nine Years, it amounts only to a Leaſe at Will, unleſs Livery were made, which muſt neceſſarily paſs a Freehold determinable upon the Leſſor's Death. 5 Bulſ. 158. Rol. Rep. 187. 2 Rol. Abr. 850. Dyer 24.

And

3 Keb. 760. 768. *Ferringham* ver. *Graves.*

And yet in one Book where a Leaſe was made for three Years, and after the End of thoſe three Years for other three Years *& ſic de tribus annis in tres annos*, during the Life of the Leſſor; this was held to be only a Leaſe for nine Years, becauſe the Words *& ſic de tribus annis* ſhall be referred to the three Years laſt mentioned; for otherwiſe theſe Words would exclude the three Years next after the ſix Years, and make the three laſt Years to begin after nine Years and ſo make a Chaſm in the Leaſe, by ſhutting out the three Years next after the ſix Years, ſo as for the three laſt Years it ſhould be only a future Intereſt; which Caſe ſeems to be of a new Stamp, and to thwart the preceding Caſe, as to the Reſolution of its being a Leaſe for twelve Years; and there *Jones* and *Wild* held, that a Leaſe *a tribus annis in tres annos* was but a Leaſe for three Years to commence *in futuro.*

2 Lev. 241. *College of Manchester* ver. *Trafford.*

Error of a Judgment in Ejectment at *Lancaſter*, where the Caſe on a Special Verdict was this: The College in the Time of Queen *Eliz.* reciting a Leaſe made by them 1 *E.* 6. demiſed to one *Trafford* for twenty-one Years rendering 20*l. per Ann.* Rent, *Habendum* from the End of the ſaid Term, made in the Time of *E.* 6. and then follows a Condition of Re-entry for Non-payment of the Rent, and after that a Covenant and Grant, that after the ſaid Twenty-one Years ended he ſhall have the Land for other Twenty-one Years, and ſo from Twenty-one Years to

*Page 433

* Twenty-one Years, till Ninety-nine Years are paſt thence next enſuing ſhall be compleat and ended; and it was found that there was no Leaſe made in the Time of *E.* 6. and that ſince the Date of the Leaſe made in the Time of Queen *Eliz.* more than Ninety-nine Years are paſſed, but from the End of the Term of Twenty-one Years Ninety-nine Years are not yet come; ſo that the Queſtion was only, if the Leſſee ſhall have Ninety-nine Years in all from the Time of the Date of the Leaſe *Tempore Eliz.* or Ninety-nine Years over and above the firſt Twenty-one Years; for it was agreed, that though no Number of Twenty-one Years will center in Ninety-nine, yet the Term ſhall laſt for Ninety-nine Years, which is a certain Term, and the odd Years ſhall be rejected. And it was adjudged at *Lancaſter*, that the Leſſee ſhall have Ninety-nine Years beſides the firſt Twenty-one Years, which ſhall not be accounted Parcel of them, and that by reaſon of the Word *thence*; for if it ſhould be from the making of the Leaſe *Tempore Eliz.* it would be *hence*; but *thence* is a Word which denotes another Time, not the preſent Time, and ſo *thence* muſt refer to the making of the firſt Twenty-one Years, becauſe there is no other Time to which it can refer, there being no Leaſe at all 1 *E* 6. to which it can refer, and ſo the Term is not yet expired; and ſo was the Opinion of the whole Court, and affirmed the Judgment.

Plow. 273. Co. Lit. 45. b. 6 Co. 35. Cro. Jac. 308. Bulſ. 215. Rol. Abr. 851. Lev. 46. 2 Jon. 5. Lutw. 214. Noy 143. Rol. Abr. 850. Bro. Tit. *Leaſes* 49. Plow. 273. 522. 2. 2 Co. 23. 2 Lev. 242.

If a Man makes a Leaſe for a Year, and ſo from Year to Year, *Quamdiu ambabus partibus placuerit*, this is a Leaſe for two Years certain at leaſt; and at moſt, after three Years, this is but an Eſtate at Will; ſo if a Parſon makes a Leaſe for a Year, and ſo from Year to Year as long as he ſhall continue Parſon, or as long as he ſhall live; this is a Leaſe for two Years at leaſt, if he lives and continues Parſon ſo long; and after the two Years, or at moſt after three Years, but an Eſtate at Will for the Uncertainty, unleſs Livery be made.

One made a Leaſe for three Years, and after for three Years, and ſo from three Years to three Years until ten Years be expired; this was reſolved to be a Leaſe but for nine Years; and that the odd Year ſhould be rejected, becauſe that cannot come to fall within any three intire Years according to the Limitation, which in this Caſe are to be taken all together as one Year, or elſe ſo much of the Limitation, as cannot come within that Deſcription, muſt be rejected; and this ſeems to agree with *Brook* and *Plowden*, which in general hold a Limitation in that Manner from Year to Year for forty, fifty, or one Hundred Years

to

to be a good Leaſe for the whole Term, becauſe this is no ſuch Break of an odd Year, at the latter End of the Leaſe, as there is in the other Caſe.

One made a Leaſe *de Anno in Annum, quamdiu ambabus partibus placuerit*; this was agreed by all to be a Leaſe certain for two Years, but there the Leſſee entered and occupied for two Years, and alſo for Part of the third Year, and then died; and for Rent Arrear for Part of the third Year Debt was brought againſt his Executors; and upon *Nihil debet* pleaded, and Verdict for the Plaintiff, it was moved in Arreſt, *&c.* that after the two Years, this being a Leaſe at Will determined by his Death, and then no Action lies for the Rent of the third Year; and of this Opinion was *Popham*; but it was held by *Gawdy* and *Fenner*, that though at firſt this was a Leaſe certain but for two Years, yet when he occupied Part of the third Year, this was then become a Leaſe certain for that Year alſo, ſo that neither of them could avoid it; for otherwiſe, after that the Leſſee hath been at great Charges in Manurance, the Leſſor, by a Determination of his Will, might ſtrip him of all his Profit †. Cro. Eliz. 775. *Agard* ver. *King*. Mod. 3. Vent. 41. See 2 Danv. Abr. 508. pl. 6. 10 Mod. 69, 162. 12 Mod. 7. Ld. Raym. 746. 2 Stra. 776. Sid. 423. 2 Keb. 543. *Geſtwick* ver. *Maſon*. Keilw. 63.

† And here each Party had aſſented to the Continuance of the Leaſe.

A Parol Leaſe was made *de Anno in Annum, quamdiu ambabus partibus placuerit*; it was adjudged that this was but a Leaſe for a Year certain, and that every Year after was a ſpringing Intereſt, ariſing upon the firſt Contract and Parcel of it; ſo that if the Leſſee had occupied eight or ten Years, or more, theſe Years, by Computation from the Time paſt, made an * intire Leaſe for ſo many Years; ſo that if Rent was in Arrear for Part of one of thoſe Years, and Part of another, the Leſſor might diſtrain and avow as for ſo much Rent Arrear upon one intire Leaſe, and need not avow as for ſeveral Rents due upon ſeveral Leaſes, accounting each Year a new Leaſe; and it was alſo adjudged, that after the Commencement of each new Year, this was become an intire Leaſe certain for the Years paſt, and alſo for the Year ſo entered upon; ſo that neither Party could determine their Wills till that Year was run out, according to the Opinion of the two Judges in the laſt Caſe; and this ſeems no way impeached by the Statute of Frauds and Perjuries, which enacts, that no Parol Leaſe for above three Years ſhall be accounted to have any other Force or Effect than of a Leaſe only at Will; for at firſt, this being a Leaſe certain only for one Year, and each accruing Year after being a ſpringing Intereſt for that Year, is not a Leaſe for any three Years to come, though by a Computation backwards, when five or ſix or more Years are paſt, this may be ſaid a Parol Leaſe for ſo many Years, but with this the Statute has nothing to do, but only looks forward to Parol Leaſes for above three Years to come; and this Opinion, in the principal Caſe, ſeems to be confirmed by the like Reſolution of the Court, where the Plaintiff declared, that he retained the Defendant *Anno* 1657, for one Year then next enſuing, and ſo from Year to Year, *Quamdiu ambabus partibus placuerit*; and lays it, that *Anno* 1661, the Defendant withdrew himſelf from his Service for a Month, *per quod, &c.* And the Court held, that though the Retainer at firſt was for a Year certain, yet after every other Year begun, the Retainer held for that Year alſo, and gave Judgment for the Plaintiff. Hill. 7 Ann. in *B. R. Legg* ver. *Hackett*. 2 Salk. 414. pl. 6. S. C. * Page 434 2 Keb. 16.

And yet there are other Caſes in which it ſeems to have been held, that a Leaſe made *de Anno in Annum, quamdiu ambalus partibus placuerit*, is a Leaſe for two Years certain at firſt, and after a Leaſe for every ſeveral Year that the Leſſee holds on; and that if upon ſuch Leaſe three Years Rent be in Arrear, the Declaration muſt be of ſeveral Leaſes ‡ for ſo many 2 Salk. 413.

‡ Where the Demiſe is not by Deed, the Rent may be recovered in an Action on the Caſe, for the *Uſe and Occupation*. St. 11 Geo. 2. c. 19. ſ. 14. —Where it is by Deed, the Plaintiff in his Declaration ſtates his Deed according to the Fact, and then ſhews an Entry by virtue of the Demiſe, and an holding for ſo long a Time, under and by virtue of that Demiſe, and that at ſuch a Time ſo much Rent became and was and ſtill is in Arrear.

many Years as were paſt; and in theſe Caſes it is held, that there muſt be Half a Year's Warning given to ouſt the Leſſee, and that unleſs ſuch Warning be given, it will be Evidence of an Agreement to hold for another Year; from which Caſes it appears that there is yet no uniform unanimous Opinion ſettled as to this Matter.

3 Lev. 359. *Panton* ver. *Iſham.* One let a Stable for a Week for 8*s.* and ſo from Week to Week at 8*s.* a Week, *Quamdiu ambabus partibus placuerit*; this was held, at moſt, but a Leaſe for three Weeks certain, and for the Reſidue at Will; ſo that the Leſſee, at the End of the three Weeks, was not puniſhable for negligent keeping of his Fire, that being only an involuntary Waſte, wherewith Leſſee at Will is not chargeable.

A Leaſe for 7, 14, or 21 Years, as the Leſſor ſhall think proper, (upon which the Leſſee enters and continues in Poſſeſſion;) is undoubtedly a good Leaſe for ſeven Years, whatever may be its Validity as to the other two Terms of 14 and 21 Years. 2 Bur. Rep. 1034.

4. The Certainty of Leaſes for Years as to their Duration and Ending.

As to this, though the preceding Point may ſeem to have taken in all that can come in properly here, ſince the Continuance of Leaſes for Years muſt ſhew their Determination likewiſe; yet there are ſome Caſes remaining which ſeem more proper to be inſerted under this Head.

2 Bendl. 2. pl. 2. 13 Co. 66. 2 Brownl. 292. 5 Co. 9. Cro. Jac. 78. 3 Bulſ. 131. Rol. Rep. 309, 310. 3 Leon. 10. pl. 150. Therefore where a Leaſe was made for forty Years to two Perſons, if they lived ſo long, or to *A.* for forty Years, if he and *B.* ſhould ſo long live, or the Leſſor and Leſſee, or the Leſſor and *J. S.* ſhould ſo long live; in all theſe Caſes the Death of either of them determines the Leaſe, becauſe their Lives are the collateral Meaſure and Limitation of the Continuance of the Term, or rather the Condition whereon the Eſtate depends; and by the Death of one of them, the Condition is as much broken as if both were dead; ſince, with regard to the Condi-
*Page 435 tion, both made but one Perſon; and they cannot now both ſo long live, one being dead already; and the Condition being intire, cannot be ſevered or divided, ſo as when Part of it is broken and gone, the Eſtate ſhould ſtill ſubſiſt and hang upon the other Part thereof; and therefore this differs from a Leaſe to two Perſons for their Lives, for this gives an Eſtate to both for their Lives, and both have an Eſtate of Freehold therein in their own Right, and conſequently this cannot determine by the Death of one of them, for then the other could not be ſaid to have an Eſtate for his Life, as the Leſſor at firſt gave it; but *Rolle* ſeems to think, that where it is to two for forty Years, if they ſo long live, that this does not determine by the Death of one of them, becauſe it is an Intereſt in both, which ſhall ſurvive; but the other Books are againſt it, becauſe their Life is but a collateral Condition and Limitation of the Eſtate, and therefore is broken when one dies.

Vent. 74. *Bailes* ver. *Wenman, & vide* 1 Brownl. 30. Mod. 187. Upon Articles of Intermarriage between *A.* and *B.* it was agreed that the Defendant, Father of *A.* ſhould ſettle the Lands in queſtion upon *C.* for his Life, and after his Death upon *B.* for her Jointure, with a Proviſo, that *C.* ſhould make a Leaſe thereof to the Defendant for Ninety-nine Years, if he, and *D.* his Wife, ſhould ſo long live, which Leaſe was made accordingly; then *D.* dies, and if by her Death the Leaſe was determined, was the Queſtion between the Defendant and the Plaintiff, Leſſee of *C.* And the Court, upon the firſt opening of the Caſe, without Argument, were all of Opinion that it was, and gave Judgment accordingly on the Reaſons of the foregoing Caſe.

Moor, pl. 375. 3 Bulſ. 131, 133. Rol. Rep. 310. One made a Leaſe for forty Years, if *A.* his Wife, or any of their Iſſue, ſhould ſo long live; and it was adjudged that the Leaſe was not determined by the Death of one of them, but ſhould continue till all were dead, by reaſon of the Disjunctive *or*, which goeth to and governs the

the whole Limitation; but if the Words had been, if A. *and his Wife and Iſſue ſhould ſo long live*, there clearly, by the Death of any of them within the forty Years, the Term had been at an end, by reaſon of the Copulative *and*, which conjoins all together, and makes all their Lives jointly the Meaſure of the Eſtate. 2 Brownl. 292. Cro. Eliz. 269. Leon. 74, 244. Co.Lit. 225. a.

A Leaſe was made for Twenty-one Years, if the Leſſee ſo long lived and continued in the Leſſor's Service; the Leſſor dies: *Per Curiam*, the Leaſe is not determined, becauſe it was the Act of God that he could ſerve no longer. Cro. Eliz. 634. Noy 70. *Wrenford* ver. *Gyles*.

A Leaſe is made to two for Years, with a Proviſo, that if the ſaid Leſſee die within the Term, that the Term ſhall ceaſe; they make Partition, or one aliens his Part, and dies, yet the Leſſor cannot enter into his Part, but the Aſſignee or Executors of the Leſſee (if no Aſſignment) ſhall have that Part during the Life of the Survivor, and there ſhall be no Occupancy; and it is not like a Leaſe made to two for Term of their Lives; there if they make Partition, and one dies, his Part ſhall revert to the Leſſor preſently; and if it had been to them for their Lives *& eorum diutius vivent*, yet this would not have prevented the Reverter upon ſuch Partition, *quia expreſſio eorum quæ tacite inſunt nihil operatur*; and the Partition breaks the Joint-tenancy, and defeats the Right of Survivorſhip, and ſo lets in the Reverſion *immediate* to each one's ſingle Part; but in the principal Caſe, the Leaſe at firſt is general and abſolute to both for ſo many Years, which gives them a Joint-tenancy in the Term, and will carry it to the Survivor and his Executors; and then the Proviſo, which comes after, though it ſtraiten it from going to the Executors of the Survivor, yet it does not give it to the Leſſor till both are dead within the Term; and the Partition or Alienation breaks the Joint-tenancy, and prevents the Survivorſhip, and conſequently none but the Alienee, or Executors of the Leſſee, can have that Part during the Life of the other Leſſee. Dyer 67. pl. 18. Co.Lit. 219. 3 Aſſ. pl. 8. 4 Co. 73. 3 Bulſ. 131. Rol. Rep. 310.

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*(M) In what Caſes and to what Reſpects an Entry by the Leſſee is requiſite to the Perfection of his Leaſe.

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AS to this it is to be obſerved, that at Common Law no Leaſe for Years, whether it were with or without any Reſervation of Rent, was looked upon to be compleat till an actual Entry by the Leſſee; for though the Leſſor had done all on his Part to perfect the Contract, ſo that he could not afterwards any way derogate from or avoid it, yet till there was a Tranſmutation of the Poſſeſſion by the actual Entry of the Leſſee, it wanted the chief Mark and Indication of his Conſent thereto, without which it might be unreaſonable to adjudge him in actual Poſſeſſion to all Intents and Purpoſes; ſince it might ſo happen that ſuch Leaſe was made in his Abſence, and when he knew nothing of it, and perhaps might be greater than he would be willing to take; or the Eſtate might be ſo incumbred as to bring a Load upon him rather than any Advantage; for which Reaſons (amongſt others) the Law would not caſt the immediate and actual Poſſeſſion upon him *nolens volens*; and for this Reaſon it was, that till actual Entry he could not maintain an Action of Treſpaſs or Ejectment, becauſe thoſe Actions, complaining of an immediate Violation of the Poſſeſſion, could not be proper for him who had no actual Poſſeſſion; but yet the Leſſor having done all that was Co.Lit. 46. b. 51. b. 270. a. Plow. 142. b. 423. a. 5 Co. 124 b. Cro. Jac. 61. 2 Mod. 249. 2 Vent. 203, 204. See Com. Rep. 119. pl. 84. 10 Mod 533. 11 Mod 181. pl. 7. 196. pl. 12, 210. pl. 1. 12 Mod. 160. 162. 2 Stra. 934. 2 Barnard. *K. B.* 10.

requiſite

requiſite on his Part to deveſt himſelf of the Poſſeſſion, and paſs it over to the Leſſee, had thereby transferred ſuch an Intereſt to the Leſſee, as he might at any Time reduce into Poſſeſſion by an actual Entry, as well after the Death of the Leſſor as before, and ſuch an Intereſt as he might before Entry grant over to another, or if he died before Entry, it would go to his Executors, or to the Survivor and his Executors; if the Grant were made to two jointly, any of which might enter at their Pleaſure, and ſo reduce the Contract into an actual Execution; for it was perfect and compleat on the Leſſor's Part, and the perfecting of it on the Leſſee's Part was intirely in his own Power, and left to his own Diſcretion to uſe when and as he thought fit; and therefore this differed from a Leaſe for Life, or a Feoffment in Fee; for theſe being Eſtates of Freehold muſt neceſſarily be executed by Livery of Seiſin, which carried the immediate and actual Poſſeſſion to the Leſſee or Feoffee, in as much as the Operation of the Livery could not be in Suſpence for the Prejudice that might thereby accrue to Strangers, who, after ſuch ſolemn Tranſmutation of the Poſſeſſion by Livery, could take Notice of no other Tenant of the Freehold, and therefore muſt neceſſarily bring their *Præcipes* againſt them for Recovery of their Rights; which if they might after be defeated and eluded on pretence of any Diſagreement, or that there was no actual Conſent or Agreement thereto, and ſo the actual Poſſeſſion not veſted in them, would be greatly injurious to the Rights of Strangers; beſides that, the Livery can be made to none but the Leſſee or Feoffee himſelf in Perſon, or ſome other Perſon lawfully authorized by Letter of Attorney to receive the ſame; and therefore they can no ways be ſuppoſed ignorant of the Terms upon which they took it, and ſo no ſuch Reaſon for ſuſpending the actual Execution of it; and therefore if a Leaſe were made to *A.* for Life, the Remainder to *B.* for Life, and then *A.* died, a Releaſe to *B.* and his Heirs, before actual Entry, would be good to enlarge his Eſtate, becauſe he had the Freehold in Law in him, immediately upon *A.*'s Death, to anſwer to the *Præcipes* of all Strangers, as fully as he could ever have it by any Entry. But now in the Caſe of a Leaſe for Years it is quite different, as has been ſhewn,

*Page 437 * and therefore till actual Entry, which is an Agreement on his Part, in caſe of ſuch Leaſe for Years, equivalent to the Acceptance of Livery in caſe of the paſſing of a Freehold, the Leſſee for Years hath not the Poſſeſſion, and as he hath not the Poſſeſſion, ſo neither hath the Leſſor a Reverſion to grant either to the ſame Leſſee or a Stranger; but yet if a Rent were reſerved on ſuch Leaſe for Years, and before actual Entry of the Leſſee, or Commencement of his Leaſe, the Leſſor ſhould releaſe to him all his Right in the Land; though this would not be ſufficient to carry the Reverſion † by way of Enlargement of his Eſtate, yet would it extinguiſh the Rent, becauſe every Deed muſt be taken moſt ſtrongly againſt the Grantor, and to be made to ſome Purpoſe or other; and ſince this cannot operate on the Eſtate to enlarge that, or carry any further Intereſt to the Leſſee, yet it may well operate upon the Rent which was iſſuing out of the Land, and coming to the Leſſor, in reſpect of the Land he had departed with, and therefore ſhall be conſtrued to extinguiſh and determine that rather than it ſhall be totally void.

† *Vide* the next Clauſe.

2 Mod. 251. 10 Mod. 265. 2 Vern. 519. Ld. Raym. 166, 799, 853. 2 Stra. 1086. Andr. 125. 2 Kel. 98, 99. 2 Barnard. *K. B.* 217. 2 Stra. 1128.

And this Way of executing Leaſes for Years, by an actual Entry, was always held neceſſary at the Common Law, and for a conſiderable Time after the Statute of Uſes likewiſe, till the Way was found out of conveying a Freehold by a Leaſe for a Year, and a Releaſe thereupon, according to the common Form now uſed; for it being found troubleſome and inconvenient to put the Leſſee under the Neceſſity of making an actual Entry in all Caſes before a Releaſe could be effectual thereupon to inlarge his Eſtate, eſpecially where the Lands lay at any conſiderable Diſtance from the Place where the Deeds were executed; therefore to prevent this Trouble and Inconvenience

convenience for the future, they began to conſtrue, that where the Words and Conſideration were ſufficient to raiſe a Uſe, though it were but for a Year, that the Statute would carry the actual Poſſeſſion after it, and conſequently make the Leſſee equally capable of enlarging his Eſtate, by a Releaſe thereupon, as if he had actually entered by Force and Virtue of the Leaſe; and the Conſideration, if it were valuable, though never ſo ſmall, was looked upon to be ſufficient for the Raiſing of a Uſe, and therefore 5*s.* or ſuch other Conſideration, came to be the Standard in a Leaſe for one Year, which in Time grew to be a Thing merely of Courſe and Form, as the inſerting of the 5*s.* was, which was ſeldom or never paid, though the Leſſee, by his Acceptance of the Leaſe upon ſuch Conſideration, was eſtopped to deny or aver againſt it; but becauſe there were ſome Opinions, that where a Conveyance might enure two Ways, either at the Common Law, or upon the Statute, that there the Common Law ſhall be preferred and take place. 1. Therefore to bring the Leaſe more effectually within the Statute, they likewiſe inſerted the Words therein *Bargain and Sell*, which, together with the Conſideration, were held even at Common Law ſufficient to raiſe a Uſe; and then the Statute, which came after, carried the Poſſeſſion accordingly, without any actual Entry made by the Leſſee; and ſo the Conveyance, by way of Leaſe and Releaſe, grew in Time to be the moſt common and eaſy Method of transferring a Freehold or Fee, and ſo has now continued for ſeveral Years, almoſt to the Diſparagement of Conveyance by Livery; and to bring the Leaſe ſtill more effectually within the Statute, it was afterwards uſed at the End of the Leaſe to ſay, *That ſuch Leaſe was made to the Intent, that by virtue of the Statute of Uſes, the Leſſee might be in actual Poſſeſſion, and be thereby enabled to accept and take a Grant and Releaſe of the Freehold and Inheritance thereof*, &c.

(N) Leaſes for Years, when to take Effect as a Reverſion, when as a future Intereſt, and when neither the one nor the other.

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IF one, having made a Leaſe for Life or Years to *A.* of Lands, does after make another Leaſe for Years to *B.* of the ſame Lands, or of the Reverſion of thoſe Lands, *Habend'* the ſaid Lands, or the Reverſion of thoſe Lands, to the ſaid *B. cum poſt ſive per Mortem, Reſignationem, ſurſum Redditionem, vel aliquo alio Modo vacare contigerit*; in this Caſe *B.* hath Election to take ſuch Leaſe either as a Reverſion or a Reverſionary Intereſt, if he can prevail for an Attornment of *A.* the Tenant in Poſſeſſion; or if not, yet as a future *Intereſſe Termini* ſuch Leaſe will be good to take Effect in Poſſeſſion upon the Determination of the firſt Leaſe, be it by Death, Surrender, Forfeiture, Effluxion of Time, or any other Way; the Reaſon whereof is, that when the Leſſor has expreſly departed with, and made over an Intereſt to the Leſſee for ſuch a Time, and this Intereſt cannot take Effect in Poſſeſſion, becauſe the Leſſor himſelf had not the Poſſeſſion to give, but muſt therefore be carved and derived out of the Reverſion which the Leſſor had, the Leſſee *prima facie* hath a Reverſion, or Reverſionary Intereſt for the Time, in the ſame Manner as the Leſſor or Grantor himſelf had; but then the perfecting ſuch Leaſe as a Reverſion, or a Reverſionary Intereſt, to draw after it the Rents and Services, depending on the Will and Pleaſure of the Tenant in Poſſeſſion, whether he will attorn, and become Tenant to ſuch Leſſee or Grantee, or not; and if he thinks fit not to attorn, it cannot paſs as a Reverſion or Reverſionary Intereſt; yet this ſhall

6 Co. 36. Cro. Jac. 72. Cro. Eliz. 152. Leon. 171. 3 Leon. 17. 4 Leon. 23. Bro. Tit. *Attornment* 41, 60. Lit. ſ. 576. Dyer 26. a. 58, 124. pl. 40, 125. pl. 44, 178, 233. pl. 10, 117. pl. 76, 350. pl. 18, 376-7. Bendl. 286. Plow. 148, 150, 151. Bro. Tit. *Leaſes* 71. Yelv. 85. Brownl. 136. 4 Co. 53. Dyer 46.

ſhall not totally invalidate and avoid ſuch Leaſe or Grant, if by any other Means it can be made good and become effectual; and this it may as a future *Intereſſe Termini*, to take Effect in Poſſeſſion on the Determination of the firſt Leaſe, when or what Way ſoever that happens; and therefore, as ſuch, it ſhall take Effect, rather than be abſolutely void, when the Leſſor or Grantor hath done all in his Power to diveſt himſelf of the Poſſeſſion for ſo much a longer Time; but then ſuch ſecond Leſſee hath only an Election to take it as a Reverſion, or Reverſionary Intereſt, when the Leaſe is made to him by Deed Poll or Indenture; for if it were made by Parol, then he can only take it as a future *Intereſſe Termini*, to take Effect in Poſſeſſion upon the Determination of the firſt Leaſe, when or which Way ſoever that happens, and not as a Reverſion, or Reverſionary Intereſt, to draw after it the Rents and Services, becauſe a Reverſion cannot be granted to paſs without Deed; for a Deed is of the very Eſſence of the Grant of a Reverſion, or Reverſionary Intereſt, and without it no Reverſion, or Reverſionary Intereſt can paſs out of the Leſſor.

And this introduces a threefold Diſtinction in the Manner of making ſuch Leaſes for Years, where there is a prior Leaſe or Eſtate then in Being: *1ſt*, When they are made by Parol. *2dly*, When by Deed Poll. And, *3dly*, When by Indenture or Fine.

Plow. 421. b. 422. b. Bendl. pl. 246. Cro. Eliz. 160. Plow. 432, 521. Hutt. 105. Bro. Tit. *Leaſes* 48. Moor 185. pl. 329. *Page 439 Dyer 112. pl. 49.

As to the firſt, if one makes a Leaſe to *A.* for ten Years, and the ſame Day makes a Parol ‡ Leaſe to *B.* for ten Years of the ſame Lands, this ſecond Leaſe is abſolutely void, and can never take Effect either as a future *Intereſſe Termini*, or as a Reverſionary Intereſt, though the firſt Leſſee ſhould forfeit or otherwiſe determine his Eſtate, or though the firſt Leaſe were on Condition, and the Condition broken within the ten Years; neither ſhall the Leſſor have the Rent reſerved upon ſuch ſecond Leaſe, but ſuch ſecond Leaſe is abſolutely void, as if none ſuch had been made; the Reaſon whereof is, becauſe the firſt Leaſe being made for ten Years, the Leſſor during that Time had nothing to do with the Poſſeſſion, or to contract with any other * for it; and the ſecond Leaſe being made the ſame Day, and for no longer Term than the firſt ten Years, could not paſs any Intereſt as a future *Intereſſe Termini* certainly; for the firſt Leſſee had the whole Intereſt during that Time; and his Forfeiture or Determination of it ſooner, which was perfectly contingent and accidental, ſhall never make good the ſecond Leaſe as a future *Intereſſe Termini*, when at the Time of making thereof it was abſolutely void, for want of a Power in the Leſſor to contract it; and as a Reverſionary Intereſt it cannot be good, for want of a Deed; for a Reverſion, whether it be granted for Life or Years, not being capable of Execution either by Livery of Seiſin, or Entry and Tranſmutation of the Poſſeſſion, there can be no Evidence of the Creation or Exiſtence of ſuch a Grant, without a Deed to aſcertain it; and therefore a Deed in ſuch a Caſe is as eſſential to the making good the Grant, as Livery of Seiſin or Entry in the other Caſes, where they deal for the Poſſeſſion; and by Conſequence this ſecond Leaſe not being good, either as a future *Intereſſe Termini*, or a Reverſion, muſt be abſolutely void; but now if ſuch ſecond Leaſe had been made for twenty Years, then it had been good as a future *Intereſſe Termini* for the laſt ten Years, and void for the firſt ten Years, for the Reaſons before given, but for the laſt ten Years it had been good; becauſe when the firſt ten Years were elapſed, the ſecond Leſſee might then execute, and reduce into Poſſeſſion by Entry, as well as if it had been at firſt made in Poſſeſſion; for it had been good for the whole twenty Years if the firſt Leaſe had not ſtood in the Way, and that can ſtand in the Way no longer than it continues, and therefore by its Determination lets in the ſecond Leaſe; but as a Grant of the Reverſion ſuch ſecond Leaſe could not be good, for want of a Deed, for the Reaſons before given; neither could any Attornment help it, or let in the ſecond Leaſe till the firſt ten Years run out by Effluxion of Time.

‡ See the laſt Clauſe under this Diviſion, fo. 440.

But

But now, 2*dly*, If ſuch ſecond Leaſe had been made by Deed Poll, then it might well enure as a Grant of the Reverſion, and draw after it the Rents and Services of the firſt Leſſee, if he would conſent to attorn, and by Conſequence, whenever the firſt Leaſe determined by Surrender, Forfeiture, or otherwiſe, ſuch ſecond Leſſee having the immediate Reverſion muſt come in for the Reſidue of his Term; but without ſuch Attornment to make it operate as a Grant of the Reverſion, this ſecond Leaſe, though by Deed Poll, would be abſolutely void, as if it were made only by Parol, becauſe during the firſt ten Years the Leſſor had no Power to contract for the Poſſeſſion; and therefore if this Grant could not take Effect as a Grant of the Reverſion, which was all the Leſſor had a Power of, it muſt likewiſe be abſolutely void; but if ſuch ſecond Leaſe by Deed Poll had been for twenty Years, then with Attornment this would be a good Grant of the Reverſion preſently, to take Effect in Poſſeſſion whenever the firſt Leaſe determined; or if no Attornment could be had, yet it would enure as a future *Intereſſe Termini* for the laſt ten Years, and would be abſolutely void for the firſt ten Years, as much as if it had been made by Parol. *Vide* the Authorities cited above.

But now, 3*dly* and laſtly, If ſuch ſecond Leaſe for ten Years had been made by Indenture or Fine, then this would have been good as a preſent Leaſe, by reaſon of the Eſtoppel to both Parties by the Indenture or Fine, and therefore whenſoever the firſt Leaſe determined, the ſecond Leaſe ſhould commence in Poſſeſſion; and in the mean Time the ſecond Leſſee, by reaſon of the Eſtoppel would be obliged to pay the Rent reſerved in an Action of Debt; and if ſuch ſecond Leſſee could prevail for an Attornment, then this Leaſe would enure as a Grant of the Reverſion, and draw after it the Rents and Services of the firſt Leſſee, and would take Effect in Poſſeſſion whenever that determined; but without ſuch Attornment, though the ſecond Leaſe would be good between the Parties, by reaſon of the Eſtoppel, yet not as a Reverſion; and therefore ſuch ſecond * Leſſee could have no Remedy for the Rents and Services of the firſt Leſſee. *Vide* the Authorities to the firſt Diſtinction. *Page 440

So if one had made a Leaſe for Life, or for eighty Years, if the Leſſee ſhould ſo long live, and after by Indenture let the ſame Lands to another for Years, to begin preſently, and then the firſt Leaſe determined by Death, Surrender or Forfeiture, the ſecond Leſſee ſhould have the Lands in Poſſeſſion preſently, for the Reſidue of the Years, becauſe ſuch ſecond Leaſe by reaſon of the Eſtoppel, took effect between the Parties preſently, and therefore ſhall come in Poſſeſſion whenever the firſt Leaſe is out of the Way; but if ſuch ſecond Leaſe were only by Deed Poll, then there muſt be an Attornment to make it good as a Grant of the Reverſion, as there muſt likewiſe in the other Caſe, where it was made by Indenture; and without ſuch Attornment the ſecond Leaſe could only take effect in Poſſeſſion upon the Determination of the firſt Leaſe by the Death of the Leſſee, according to the expreſs Limitation, and not upon any ſooner or other Determination by Surrender, Forfeiture, or otherwiſe; much leſs, if ſuch ſecond Leaſe were by Parol, could it take effect upon any other Determination of the firſt Leaſe; for though in theſe Caſes the firſt Leaſe, depending upon the Life of the Leſſee, was uncertain how long it would continue, yet ſo long as it did continue, the firſt Leſſee had the ſole and abſolute Poſſeſſion, and the Leſſor no Power to contract for any Thing but his own Reverſion during that Time; and therefore if his ſecond Leſſee cannot attain the Reverſion, the Contract can take no Effect for the Poſſeſſion till the Death of the firſt Leſſee, becauſe that being the Leſſor's own Limitation affixed to ſuch Leaſe, he cannot deal for the Poſſeſſion before that Times comes; and therefore no accidental Determination of the Leaſe ſooner ſhall let in the ſecond Leſſee, unleſs he can prevail for the Reverſion by Attornment of the firſt Leſſee, in caſe of the Leaſe by Deed Poll, or Co. 155. a. Cro. Eliz. 322. Plow. 422. a. 433. a.

unleſs

unleſs in caſe of the Indenture, which, by reaſon of the Eſtoppel, ſhall let him in whenever the firſt Leaſe is out of the Way, whether he obtained an Attornment or not.

3 Leon. 17. 4 Leon. 23. 5 Co. 113. *Mallorie's* Caſe.

But in all the Caſes before-mentioned, if ſuch Leaſe by Indenture or Deed Poll were by way of Bargain and Sale for Years, then, it ſhould ſeem, it would paſs as a Reverſionary Intereſt preſently, without any Attornment, by Force of the Statute of Uſes, and it being only for Years, there would need no Inrollment of the Indenture or Deed Poll: And *note*; By the Statute of Frauds and Perjuries, 29 *Car.* 2. *cap.* 3. no Parol Leaſe for above three Years is to have any other Effect than only as a Leaſe at Will; ſo that ſuch Parol Leaſes now for ten or twenty Years are out of Doors.

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*Page 441 * (O) **Leaſes for Years by Eſtoppel, how far and againſt whom ſuch Leaſes are good.**

Co. Lit. 47, 227. a. Plow. 434. 4 Co. 53. Cro. Eliz. 140. Sav. 98. Owen 96. Leon. 206. Cro. Eliz. 362. Moor, pl. 323. 2 Brownl. 150. Cro. Car. 110. 2 Rol. Abr. 871. Cro. Jac. 73.

IF one makes a Leaſe for Years, by Indenture, of Lands, wherein he hath nothing at the Time of ſuch Leaſe made, and after purchaſes thoſe very Lands, this ſhall make good and unavoidable his Leaſe, as well as if he had been in the actual Poſſeſſion and Seiſin thereof at the Time of ſuch Leaſe made; becauſe he having, by Indenture, expreſly demiſed thoſe Lands, is by his own Act eſtopped, and concluded to ſay he did not demiſe them; and if he cannot aver that he did not demiſe them, then there is nothing to take off or impeach the Validity of the Indenture, which expreſly affirms that he did demiſe them, and conſequently the Leſſee may take advantage thereof, whenever the Leſſor comes to ſuch an Eſtate in thoſe Lands as is capable to ſuſtain and ſupport that Leaſe; and this Eſtoppel by Indenture is ſo mutual and reciprocal, that if a Man takes a Leaſe for Years by Indenture of his own Lands, whereof he himſelf is in actual Seiſin and Poſſeſſion, this eſtops him during the Term to ſay the Leſſor has nothing in the Lands at the Time of the Leaſe made, but that he himſelf, or ſuch other Perſon, was then in actual Seiſin and Poſſeſſion thereof; for by Acceptance thereof by Indenture, he is, for the Time, as perfect a Leſſee for Years, as if the Leſſor had at the Time of making thereof the abſolute Fee and Inheritance in him; but if ſuch Leſſee of his own Lands, being ejected by the Leſſor, ſhould bring an Ejectment, and the Leſſor ſhould plead Not guilty, and give the Leaſe and ſome Matter of Forfeiture thereof, in Evidence, to ſupport his Plea without pleading, and relying on the Eſtoppel, and the Jury ſhould find the ſpecial Matter, *viz.* that the Defendant had nothing in the Lands at the Time of ſuch Leaſe made, but that the Plaintiff himſelf was then in actual Seiſin and Poſſeſſion thereof, whether the Court, upon this Verdict, are bound to adjudge according to the Truth of the Caſe, *viz.* that ſuch Leaſe by one who had then nothing in the Lands was void; or if they are to adjudge according to the Law, working by way of Eſtoppel upon ſuch Leaſe by Indenture, ſeems a Doubt upon all the Books; but my Lord *Coke* lays it down for a Rule, that the Jury do well to find the Truth, *viz.* that the Leſſor had then nothing in the Lands; but then, upon ſuch Finding, the Court is to adjudge, according to the Operation of Law upon the Eſtoppel wrought to both Parties by the Indenture, that they are bound; but if the Jury, underſtanding that the Leſſor had nothing in the Lands at the Time of the Leaſe made, and that therefore his Leaſe could not be good in fact, but only by way of Eſtoppel, and inferring from thence that they, who are ſworn to ſay the Truth, were not bound by ſuch an Eſtoppel, which was plainly againſt the Truth, ſhould therefore give a general Verdict againſt the Leaſe, that the

the Defendant was guilty of the Ejectment; in this Caſe, ſays my Lord *Coke*, ſuch Jury are liable to an Attaint; and this ſeems the better Opinion; for though it be true that the Jury are not bound by the Eſtoppel, and therefore may find that the Leſſor had nothing in the Lands at the Time of the Leaſe made, which is a Truth of Fact the Leſſee is eſtopped to affirm, and is the only ſubject Matter of the Eſtoppel; yet the Conſequence of ſuch Eſtoppel, and how far the Leaſe is made good thereby againſt the Parties, is Matter of Law, and not of Fact; and therefore if they take upon them, firſt, to find that the Leſſor had nothing in the Lands at the Time of the Leaſe made, and then to find that ſuch Leaſe is void; or, which is all one, to find that ſuch Leaſe was void, becauſe the Leſſor had then nothing in the Lands, as the eſſential Cauſe which induced them to find ſuch Leaſe to be void, or that there was no ſuch Leaſe; in this * they take upon them to judge the Matter of Law, and in ſo doing exceed their Duty, and, conſequently, if they are miſtaken, lay themſelves open to an Attaint; for, in Truth of Fact, there was ſuch Leaſe made, and, in Truth of Fact, the Leſſor had nothing in the Lands at the Time of making thereof; and all this is their Duty, and belongs to them to find; but whether ſuch Leaſe, ſo circumſtanced, be good, or void, is Matter of Law, for the Court to adjudge, upon theſe Circumſtances; and therefore, if they will take upon them to anticipate the Judgment of the Court, by giving their own Judgment thereon, they muſt do it at their own Peril, and if they miſtake, be liable to an Attaint.

4 Co. 53. *Rawlins's* Caſe. Co. Lit. 47. b. *Page 442

But if ſuch Leaſe for Years were made by Deed Poll of Lands wherein the Leſſor had nothing, this would not eſtop the Leſſee to aver that the Leſſor had nothing in thoſe Lands at the Time of the Leaſe made; becauſe the Deed Poll is only the Deed of the Leſſor, and made in the firſt or third Perſon; whereas the Indenture is the Deed of both Parties, and both are, as it were, put in and ſhut up by the Indenture, that is, where both ſeal and execute it as they may and ought; for otherwiſe, if the Leſſor only ſeals and executes the Indenture, the Leſſee ſeems to be no more concluded than if the Leaſe were by Deed Poll; for it is only the Sealing and Delivery of the Indenture as his Deed, that binds the Leſſee, and not his being barely named therein, for ſo he is in the Deed Poll; but that being only ſealed and delivered by the Leſſor, can only bind him, and not the Leſſee, who is not to ſeal and execute it; and it ſhould ſeem that ſuch Leaſe by Deed Poll binds the Leſſor himſelf as much as if it were by Indenture, becauſe it is executed on his Part with the very ſame Solemnity, and therefore it ſhould ſeem he is bound by ſuch Leaſe by way of Eſtoppel.

Co. Lit. 47. b. Rol. Abr. 871.

And yet it is generally ſaid, that theſe Eſtoppels ought to be mutual, or otherwiſe neither Party is bound by them; therefore if a Man takes a Leaſe for Years of his own Lands from an Infant or Feme Covert by Indenture, this works no Eſtoppel on either Part, becauſe the Infant or Feme, by reaſon of their Diſability to contract, are not eſtopped; therefore neither ſhall the Leſſee be eſtopped, becauſe all Eſtoppels ought to be mutual.

Cro. Eliz. 37, 700. Co. Lit. 352. a.

So if a Man takes a Leaſe for Years of his own Lands by Patent from the King, rendering Rent, this ſhall not eſtop the Leſſee, as an Indenture between common Perſons in ſuch Caſe would do: becauſe the King cannot be eſtopped; for it cannot be preſumed the King would do Wrong to any Perſon, and therefore being deceived in his Grant makes it abſolutely void; and if he be not eſtopped, neither ſhall the Leſſee; becauſe all Eſtoppels ought to be mutual; but perhaps there may be ſome Difference between theſe Caſes of a bare Acceptance of a Leaſe from ſuch Perſons, as by reaſon of their Imbecillity, Incapacity, or other Impediment ariſing from their own Perſons, could not make ſuch Leaſe, but that the ſame was either abſolutely void, or at leaſt voidable, on their Part; and therefore the Leſſee may ſhew ſuch Incapacity, to avoid them, as made by Perſons who wanted Power

Rol. Abr. 871.

or Ability to contract; and so the whole Contract must fail, not for want of a sufficient Estate in the Lessors, (for if they were of full Age, and sole, *&c.* that would not be material,) but for want of a sufficient Power or Ability to contract; but now when such Lease is made by a Man of full Age, though by Deed Poll, why this should not bind and estop him as well as if it were made by Indenture, seems hard to understand; for he hath executed it on his Part with the same Solemnity; and though it cannot bind or estop the Lessee, because he never executed it, yet why that should invalidate it on the Lessor's Part, whose Deed it was, and who did all he could to bind himself, does not seem very intelligible; besides that, the Books, which put the Case of the Lease by Deed Poll, saying only that the Lessee is not estopped thereby, seem to allow that the Lessor is notwithstanding
*Page 443 estopped; * for otherwise they would take notice of their being both at large, as they do in other Cases.

Rol. Abr. 871. *Style* and *Herring.* If Lessee for Years accepts a Lease for Years of a Stranger by Indenture, who hath nothing in the Reversion, this is a good Lease by way of Estoppel between them, and not a Confirmation; for nothing appears that the Lessor knew the Lessee then had any Thing in the Lands, and then it is the same with the other Cases, and works by way of a bare Estoppel; but *Fenner* thought it a Confirmation against all the other Judges.

Bro. Tit. *Leases* 36. 7 E. 4. 29. If one lets Lands to me, by Deed enrolled, unknown to me, and brings Debt upon the Lease, I may say *ne Lessa pas*, as *Littleton* held; but by all the Justices, he who made such Lease is concluded to say the contrary, which Case seems to be an Authority in point to establish what has been laid down, that in case of a Deed Poll, (as this which is called a Deed inrolled must be intended to be,) the Lessor himself is estopped, though the Lessee be at large; and this cannot be intended an Indenture, because then the Lessee would have been estopped likewise, if he had sealed it, which in this Case it appears he did not, because it was unknown to him, and therefore was not estopped, whether it were by Indenture or Deed Poll.

Co. Lit. 47. b. 4 Co. 54. a. 8 Co. 44. Cro. Eliz. 36. Rol. Abr. 877. These Estoppels continue no longer on either Part than during the Lease, for as they began at first by making of the Lease, so by Determination of the Lease they are at an End likewise; for then both Parts of the Indenture belong to the Lessor.

Co. Lit. 47. b. Vent. 358. & *vide* Skin. 3. Carth. 247, 248. Salk. 275. pl. 1. When an Interest actually passes by the Lease, there shall be no Estoppel, though the Interest, purported to be granted, be really greater than the Lessor at that Time had Power to grant; as if *A.* Lessee for the Life of *B.* makes a Lease for Years by Indenture, and after purchases the Reversion in Fee; and then *B.* dieth, *A.* shall avoid his own Lease, though several of the Years expressed in the Lease are still to come; for he may confess and avoid the Lease which took effect in point of Interest, and determined by the Death of *B.* So if Lessee for ten Years makes a Lease for twenty Years, and afterwards purchaseth the Reversion, yet it shall bind him for no more than ten Years, for the same Reason; because when he made a Lease for twenty Years, this was certainly a good Lease for ten Years, and so far an Interest passed, which he may confess, and avoid it for the Residue, by saying that he had no more than for ten Years in it himself; *sed Quære* of this, for the Reason seems not satisfactory.

2 Lev. 140. 3 Keb. 490. *Roe* and *Williamson.* In Ejectment, Plaintiff declared of a Lease for five Years, and upon Not guilty pleaded, the Jury found that the Lessor of the Plaintiff had only a Term for three Years in the Lands leased, *& si, &c. Hale* held this Verdict against the Plaintiff; for the Judgment should be, that the Plaintiff *recuperet Terminum suum prædictum*, which is five Years; and here the Lessor's Interest does not continue so long, and perhaps the Defendant may be the Reversioner after the five Years ended, and then by this Means the Plaintiff's Lessor will recover the Land for two Years more than he hath Right to do;

and

and ſaid, that for this Reaſon, he had before cauſed another Plaintiff to be nonſuit; *Wild* was of the ſame Opinion, but *Twiſden* inclined *cont. & Adjurnatur.*

If a Man takes a Leaſe for Years of the Herbage of his own Land by Indenture, this is no Concluſion to ſay that the Leſſor had nothing in the Lands at the Time of the Leaſe made, becauſe it was not made of the Lands themſelves. Co. Lit. 47. b. Rol. Abr. 871.

If Baron and Feme join in a Leaſe for Years by Indenture, rendering Rent, where the Baron hath all the Eſtate, and the Wife nothing; in this Caſe, after the Death of the Baron, the Leſſee, in an Action of Debt brought by *the Feme, ſhall not be concluded to ſay, that at the Time of the Leaſe made the Feme had nothing in the Lands; for this ſhall not enure by way of Eſtoppel, becauſe an Intereſt actually paſſed, though not from the Feme. But another Reaſon given is, becauſe the Feme being Covert was not eſtopped, and, by conſequence, neither ſhall the Leſſee, becauſe all Eſtoppels ought to be mutual. Rol. Abr. 877. Cro. Eliz. 701. *Breerton* ver. *Evans.* *Page 444

If Tenant of the Land, and a Stranger, join in a Leaſe for Years by Indenture, this is the Leaſe only of the Tenant, and the Confirmation of the Stranger; and yet the Leaſe operates, as to the Stranger, by way of Concluſion, and ſo it does to the Leſſee with reſpect to the Stranger, becauſe he having nothing in the Lands, the Indenture could no otherwiſe take effect as to him. Co. Lit. 45. a. Rol. Abr. 877. Cro. Eliz. 701.

If *A.* ſeiſed of ten Acres, and *B.* of other ten Acres, join in a Leaſe for Years by Indenture, theſe are ſeveral Leaſes, according to their ſeveral Eſtates, and no Eſtoppel is wrought by the Indenture to either Party, becauſe each have an Eſtate whereout ſuch Leaſe for Years or Intereſt may be derived; and the Reaſon why Eſtoppels at any Time are allowed, is, becauſe otherwiſe, when the Party hath nothing in the Lands, the Indenture muſt be abſolutely void, which would be hard to ſay, when he hath, under Hand and Seal, done all in his Power to make it good; and ſince it can be good no otherwiſe, it ſhall be good by Eſtoppel, rather than be abſolutely void; but when an Intereſt paſſes from each Leſſor, the Indenture works upon ſuch Intereſt to carry that, and therefore leaves no Room for its operating by way of Eſtoppel; but yet ſince both equally joined in the Leaſe, without diſtinguiſhing the ſeveral Intereſts they had therein, the Indenture works by way of Confirmation, with reſpect to each from whom the whole Intereſt did not paſs; that is, *A.*'s Confirmation for *B*'s Part, and as *B.*'s Confirmation for *A.*'s Part; for ſince the Leaſe of the Whole was undiſtinguiſhed, and by reaſon of the ſeveral Intereſts that paſſed from each excludes any Eſtoppel, therefore rather than the Indenture ſhall be void, with reſpect to the Part of each other, it ſhall be conſtrued a ſeveral Confirmation by one of the other's Part, and by the other of the other's Part, which is the leaſt Operation the Indenture can have with reſpect to each, from whom no Intereſt paſſes, without being abſolutely void. Co. Lit. 45 a. Rol. Abr. 877.

So if two Tenants in common of Lands join in a Leaſe for Years, by Indenture, of their ſeveral Lands; this ſhall be the Leaſe of each for their reſpective Parts, and the croſs Confirmation of each for the Part of the other, and no Eſtoppel on either Part; becauſe an actual Intereſt paſſes from each reſpectively, and that excludes the Neceſſity of an Eſtoppel, which is never admitted, if by any Conſtruction it can be avoided, as being one of thoſe Things which the Law looks upon as odious, becauſe it chokes and diſguiſes the Truth. Rol. Abr. 877.

But if two Joint-tenants for Life, or in Fee, join in a Leaſe for Years by Indenture, reſerving Rent to the one of them only, this ſhall give him the Rent excluſive of the other; and here the Eſtoppel turns not then upon the Intereſt paſſed by the Leaſe, for that is ſeveral, according to their ſeveral Rights, as in the other Caſes, which excludes any Eſtoppel; but it turns Co. Lit. 47. a. Rol. Abr. 878.

upon the Reſervation of the Rent, which being made in this Manner, to one excluſive of the other, by Indenture, works an Eſtoppel againſt all the Parties to ſay the contrary; and though the Rent iſſues out of one Part as well as the other, yet it not being Part of the Thing demiſed, but moving, as it were, rather by way of Grant from the Leſſee after the Leaſe made, the Leſſors are conſidered as accepting it in this Manner by Indenture, which concludes them as well as it doth the Leſſee; but if the Leaſe had been by Parol, or Deed Poll, reſerving Rent to the one Joint-tenant only, this would not have excluded the other Joint-tenant from an equal Share therein, becauſe this Reſervation coming, as it were, by way of Grant from the
Page 445 Leſſee, and being only by Parol, or Deed Poll, could not eſtop or conclude the Leſſors, who, with reſpect to the Rent, were as it were Grantees, and only paſſive therein; and the Rent ſhall follow the Reverſion in Proportion to their ſeveral Eſtates in that, as the Cauſe for which the Rent was reſerved or granted in that Manner, and ſo let in both to an equal Participation thereof.

Rol. Abr. 878. Moor, pl. 939. *Milliner* ver. *Robinſon.*

If two Coparceners join in a Leaſe for Years, by Indenture, of their ſeveral Parts, this is ſaid in one Book to be but as one Leaſe, becauſe they have not ſeveral Freeholds therein, but only one, as both making but one Heir, and therefore ſhall join in an Aſſiſe; but *Moor* is *cont.* where in Ejectment the Plaintiff declared of a Leaſe by two Coparceners *quod dimiſerunt*; and Exception being taken to it, the Exception was allowed, becauſe the Leaſe was ſeveral as to each Coparcener, for their own reſpective Moiety; and this ſeems the better Law, becauſe though they have but one Freehold with regard to their Anceſtor, and therefore if they are diſſeiſed ſhall join in an Aſſiſe, yet as to their diſpoſing Power thereof they have ſeveral Rights and Intereſts, ſo that neither of them can leaſe or give away the Whole ‡.

‡ Tenants in Common cannot make a joint Leaſe. *Heatherley* v. *Weſton.* P. 4 Geo. 3. 2 Wilſ. 232.

Rol. Abr. 874, 876. *Omelaughland* verſus *Hood.*

If *A.* mortgages Lands to *B.* upon Condition to re-enter on Payment of 10*l.* and after *A.* before the Day of Payment is come, being in Poſſeſſion, makes a Leaſe for Years, by Indenture, to *C.* and then after performs the Condition, this ſhall make the Leaſe to *C.* good againſt himſelf by Eſtoppel; and it was farther adjudged, that even the Feoffee of *A.* ſhould be bound by this Leaſe; which took its Effect only at firſt by Eſtoppel, becauſe he coming in under one who was eſtopped, ſhould be himſelf eſtopped likewiſe, which was ſtill a ſtronger Caſe than the firſt; and this was adjudged in *Ireland*, and afterwards affirmed on a Writ of Error here, and ſeems a very reaſonable Judgment; for if a ſubſequent Purchaſe ſhall make good a Leaſe of Lands by Indenture, though the Leſſor had nothing in thoſe Lands at the Time of the Leaſe, and therefore his Leaſe at firſt could only take Effect by Eſtoppel; much more in this Caſe, where the Leſſor had a Poſſibility of coming into the Lands again, ſhall his Performance of the Condition after make good the intermediate Leaſe; and ſo it ſhould ſeem too if the Condition were broken at the Time of the Leaſe, ſo as he had then nothing but an Equity of Redemption; yet if he ſhould after be admitted to redeem in Chancery, this would make good the intermediate Leaſe which took Effect at firſt only by Eſtoppel.

Co. Lit. 45. a. Dyer 234. Moor, pl. 196. Poph. 57. Moor, pl. 939. < Co. 14, 15.

B. Tenant for Life of *C.* and he in the Remainder or Reverſion in Fee join in a Leaſe for Years by Indenture; this, during the Life of *C.* is the Leaſe of *B.* who then only had the preſent Intereſt in the Lands, and the Confirmation of him in the Remainder or Reverſion; but after the Death of *C.* then this becomes the Leaſe of him in the Reverſion or Remainder, and the Confirmation of *B.* for the Leſſors having ſeveral Eſtates in them in

ſeveral

ſeveral Degrees, the Leaſe ſhall be conſtrued to move out of each one's reſpective Eſtate or Intereſt as they become capable of ſupporting thereof; which is the moſt natural and uſeful Conſtruction of the Leaſe, eſpecially as there can be no Eſtoppel in this Caſe, by reaſon of the ſeveral Intereſts which paſſed from each; and therefore during the Life of the Tenant for Life, if the Leſſee, being evicted, ſhould declare of a Leaſe by both, this would be againſt him, as was adjudged, becauſe for that Time it was only the Leaſe of the Tenant for Life.

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*(P) Leaſes for Years and future Intereſts, how far they may be barred or deſtroyed, and how far not; and where an Entry before the Term begun is a Diſſeiſin.

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IT has already appeared, that all Leaſes for Years at the Common Law, when they come *in eſſe*, are to be executed by the Entry of the Leſſee; we ſhall therefore now conſider what Care the Law has taken for the Preſervation and Security of ſuch Leaſes as are limited to begin at a future Time, and ſo cannot be executed by Entry preſently; what Power the Leſſee hath over ſuch an Intereſt, and whether, and by what Acts, either of the Leſſor, or Strangers, the ſame may be barred and prevented from ever taking Effect.

As to future Intereſts, if one make a Leaſe for Years, to commence after the Death of a Tenant for Life, or after the End of a Leaſe for Years then in Being; and after the Death of the Tenant for Life, or Expiration of the Term for Years, a Stranger enters by Tort, yet may the Leſſee of the future Intereſt grant over his Term for Years, before or without any Entry made, and thereby transfer over his Power of entering and reducing it into Poſſeſſion to the Grantee; for till Entry of the Leſſee of ſuch future Intereſt, the Leaſe is not executed, but remains in the ſame Plight as it was upon the firſt making thereof, and then no intermediate Acts, either of the Leſſor, or of Strangers, can diſturb or hurt it; becauſe whoever comes to the Poſſeſſion, whether by Right or Wrong, takes it ſubject to ſuch future Charge, which the Leſſee may execute by his Entry whenever he thinks fit, as by a Title Prior and Paramount to all ſuch intermediate Violations of the Poſſeſſion; but if the Leſſee of ſuch future Intereſt had once entered after the Death of the Tenant for Life, or End of the Leaſe for Years, and had after been put out, then he could not grant over his Term and Intereſt to a Stranger, becauſe by his Entry the Leaſe was actually executed, and being after defeated by the Entry of another, he had only a Right of Entry left in him; which Right of Entry the Law will not ſuffer him to tranſfer over to a Stranger no more than a Right of Action; and for the ſame Reaſon, becauſe in both Caſes it may encourage Champerty and Maintenance; but in the other Caſe, where he hath not entered, he only tranſfers over ſuch Intereſt as he himſelf had, and which the tortious Entry of the Stranger had not diſturbed or altered from what it was at the firſt making thereof.

Cro. Eliz. 15. 5 Co. 124. 3 Leon. 156, 158. 3 Mod. 198. See L. Raym. 728, 870. 10 Mod. 2, 177, 265. 12 Mod. 113, 125. *Barnes's Notes C. P.* 12. 2 Barnes, 13, 153, 154.

So if one makes a Leaſe for Years, to begin two Years hence, and after the two Years expired, before any Entry, and whilſt the Leſſor continues ſtill in Poſſeſſion, the Leſſee may grant over his Term and Intereſt to another, becauſe his *Intereſſe Termini* was not deveſted or turned

Cro. Eliz. 127. Leon. 118. *Wheeler* ver. *Thorough-good.*

ed to a Right, but continued in him in the ſame Manner as it was at firſt granted; and in the ſame Manner he transfers it over to another, who by his Entry may reduce it into Poſſeſſion whenever he thinks fit.

5 Co. 123. Cro. Jac. 60. *Saffin*'s Caſe. Leon 99. 3 Mod. 198. Ld. Raym. 179.

One made a Leaſe for Years, to begin after the End or Determination of a former Leaſe for Years then in being; the firſt Leaſe determined, and before Entry of the ſecond Leſſee, he in Reverſion entered, and made a Feoffment in Fee, and levied a Fine with Proclamations, and five Years paſſed without Entry or Claim of the ſecond Leſſee; and if his Term was barred, was the Queſtion. And it was adjudged, that by this Fine and Nonclaim his Term was barred, becauſe after the firſt Leaſe expired, the ſecond Leaſe was actually then come *in eſſe*, and reducible

*Page 447 * into Poſſeſſion by an Entry preſently; and then his not entering, which was his own Fault, and Laches, could not ſtop the Operation of the Fine from running againſt him; but if ſuch Fine had been levied during the Continuance of the firſt Leaſe, there it was agreed that the Operation thereof ſhould not begin to run out againſt the ſecond Leſſee till the firſt Leaſe were determined; becauſe till then the ſecond Leaſe was only an *Intereſſe Termini*, which the ſecond Leſſee could not reduce into Poſſeſſion by any Entry till the firſt Leaſe determined, and ſo was not obliged to take Notice of the Acts of Strangers, or of the Tenant in Poſſeſſion; for if ſuch future Intereſt might be diveſted before it came *in eſſe*, the Leſſee or Grantee thereof having never entered, would have no Means to reveſt it, and therefore till it comes *in eſſe*, the Law takes care and ſecures it to the Leſſee or Grantee in the ſame Manner as it was at firſt granted; but when the firſt Leaſe is at an End, then the ſecond Leſſee is to take care of it himſelf; and if he ſuffers five Years to elapſe after that Time without Entry or Claim, this will bar ſuch Intereſt, becauſe his Right then commences in Poſſeſſion, and from thenceforth the Operation of the Fine begins to run on againſt him; and where

Noy 123. *Archbold* ver. *Cook*. Vent. 81. Sid. 459.

in *Noy* it is held, that if *A.* leaſes to *B.* for Years, but yet *A.* ſtill continues in Poſſeſſion, and after levies a Fine with Proclamations, and five Years paſs, that this does not bar the Term of *B.* but only carries the Reverſion of *A.* this Caſe was denied by *Twiſden* to be Law, for till the Entry of *B.* the Leſſor hath no Reverſion; and therefore the Fine can only operate on the Poſſeſſion.

2 Leon. 99. Cro. Eliz. 169. Rol. Abr. 605. Dyer 89, 96. 2 Rol. Abr. 120.

As the Leſſee muſt enter when his Leaſe comes in Poſſeſſion, ſo if he enters before, this is a Diſſeiſin; therefore where one brought Debt for Rent, and declared upon a Leaſe 29 *Septemb. Habendum* from the Feaſt of St. *Mich'* next enſuing for twenty-one Years, rendering 10 *l. per Ann.* Rent, *Virtute cujus* Defendant 29 *Septemb.* entered, *&c.* on *Nil debet* pleaded, and found for the Plaintiff, it was moved in Arreſt of Judgment, that here, by the Plaintiff's own ſhewing, there is no Rent in Arrear, for he ſays *Virtute cujus* Defendant 29 *Septemb.* entered, which is a Day before the Commencement of the Term; and then ſuch Entry is a Diſſeiſin, becauſe he hath then no Right to enter; and this the Court clearly agreed, and that no Continuance of Poſſeſſion, though after the Term actually begun, would purge the Diſſeiſin or alter the Eſtate of the Leſſee; but yet they agreed that Debt lay for the Rent in reſpect of the Privity of Contract upon the Leaſe made, but that the Diſſeiſin having gained a tortious Fee, that ſhould not give way to the Term for Years, though it were legal, being but a Chattel.

Lev. 46. Keb. 54. *Hennings* ver. *Brabaſon*.

So where *A.* made a Leaſe to *B.* 23 *Septemb. Habendum* to him for Eighty-one Years from *Mich'* next enſuing, if *C.* ſhould ſo long live, and from and after the Day of the Death of *C.* for Thirty-one Years more; the Leſſee enters the 23 *Septemb.* and ſo, before the Commencement of the Term, continues in Poſſeſſion for ſome Years; then the Leſſor reenters, and the Leſſee being out of Poſſeſſion after the Death of *C.* and during

during the Continuance of Thirty-one Years, aſſigns over that Term to the Plaintiff's Leſſor, who being kept out of Poſſeſſion, brings Ejectment, and recovered. 1. It was held, that the Term not being to begin till *Mich'*, this was till then a future Intereſt, and the Leſſee's Entry before was a Diſſeiſin, and not a Poſſeſſion, by virtue of the Leaſe. 2. That whether this Leaſe for Thirty-one Years were only a Continuance of the firſt Term, and that both together made but one Term, as *Bridgeman* held, becauſe the laſt Day of the Life of *C.* ſhall be conjoined to the firſt Day of the Thirty-one Years, and ſo no Fraction be allowed, eſpecially being for Eighty-one Years, which *B.* cannot be ſuppoſed to out-live; or whether they were two diſtinct Terms, as others held; yet either Way it was not turned to a Right by the Entry of the Leſſor, becauſe *B.* was not poſſeſſed by virtue of the Term, but by Diſſeiſin, and to * purge that was the Entry of the Leſſor; for if a Stranger had entered after *Mich'*, and diſſeiſed the Leſſor, this would not have turned the Term to a Right, becauſe as to that the Time for Entry of the Leſſee was not come, nor was his Entry in reſpect of that; no more will the Entry of the Leſſor turn it to a Right, and then it was well aſſignable to the Plaintiff's Leſſor, eſpecially if it ſhould be taken as a future Intereſt, as ſome held it ſhould; for then the Leſſee was never in Poſſeſſion by virtue thereof, and conſequently the Leſſor's Entry could not turn it to a Right. *Page 448

But where one declared of a Leaſe 16 *April*, *Habendum* from the *Annunciation* laſt paſt for ten Years, *Virtute cujus intravit, & habuit tenementa prædict'* from the ſaid *Annunciation*; this was held good, and that the Leſſee was no Diſſeiſor; for it ſhall be intended that he entered and occupied before by Agreement, and took a Diverſity between this Caſe, where the Commencement of the Leaſe is limited from a Time paſt, and where it is limited to begin at a Time to come; there the Entry of the Leſſee before that Time, is a Diſſeiſin. Cro. Eliz. 905. *Waller* ver. *Campiam.*

(Q) How far, and by what Means, Leaſes for Years in Truſt to attend an Inheritance may be barred or deſtroyed.

IF Leſſee for Years aſſigns over his Leaſe in Truſt for himſelf, and after purchaſes the Inheritance, and occupies the Land, and then levies a Fine with Proclamations, and the Leſſee does not claim this Leaſe within five Years after the Fine levied, this Fine and Non-claim will bar the Intereſt of the Leſſee, though he who levied the Fine had himſelf the Poſſeſſion by reaſon of the Truſt; for this Truſt paſſed included in the Fine, and the Truſtee not making Claim within the five Years, his Intereſt is barred thereby, and conſequently ſo is the Intereſt therein of the *Ceſtui que Truſt*. But Note; it appears in other Books, where this Reſolution is cited, that the Conuzee was a Purchaſor of the Eſtate, and then having no Notice of the Term, nor having made any Agreement for it, to have it aſſigned in Truſt for himſelf, if the Fine had not barred it, but it ſhould have been ſet up againſt his Purchaſe, he would have been ſo far cheated and deceived in his Purchaſe; and therefore it is ſaid it would have been otherwiſe, if by Agreement this Term had been to be aſſigned in Truſt for the Conuzee, and that upon very good Reaſon; for he who hath the Inheritance, and in Truſt, for whom a Term or Eſtate by Extent Cro. Car. 110. *Iſham* ver. *Morris.* Sid. 459. 2 Vent. 329. S. C. cited, & *vide* Tit. *Uſes* and *Truſts*, and where Equity will ſet aſide Truſt Terms in Favour of Dowreſs, Jointreſs, &c. under theſe Titles.

Extent is assigned, must be taken as Tenant at Will to his Trustee, and consequently that his Possession is the Possession of the Trustee, and then a Fine levied by him who hath the Inheritance, will work only upon that, when it appears that it was so intended, and that the Term should be kept on Foot, and not barred; whereas in the Case of *Isham* and *Morris* there does not appear to have been any such Intention, nor does it appear that the Conuzee knew any Thing of the Term.

Hard. 400. *Focus* versus *Salisbury.*

A. seized of Lands, for Continuance thereof in his Name and Blood, &c. makes a Lease to *B.* for five Hundred Years, in Trust for himself during Life, and after in Trust for his Brother, and so to others; and after *A.* being in Possession according to the Trust, covenants with *D.* to stand seised of those Lands, upon the same Considerations as in the Lease, to the Use of himself for Life, with Remainders over, as in the Lease, and upon the same Trusts, and that the said Lease, and all Estates made or to

Page 449 be made by him should be to the same Uses and Trusts, and then *A.* levies a Fine, and five Years pass, *A.* still continuing in Possession according to the Trust, and after *A.*'s Death the Lessee enters; and if this Lease was barred by the Fine and Non-claim for five Years, was the Question: No Judgment appears to have been given; but *Hale* seemed to be of Opinion that it was not, because here appeared no Intent to bar it; for *A.* was but Tenant at Will, and the Fine did not displace the Lease; as if Lessee for Years levies a Fine, and five Years pass, the Lessor is not barred, because *Nihil operatur* by the Fine, and *Partes Finis nihil habuerunt* may be pleaded to it; otherwise it would be if such Fine had been levied by the Tenant for Life; therefore where Lessee for Years intends to levy a Fine, it is usual for him first to make a Feoffment, whereby he transfers the whole and present Possession and Fee to the Feoffee, and then the Fine operates upon the whole Estate so united in the Feoffee; but here *the Lease for Years was antecedent to the Estate of the Lessor* upon which the Fine operates, and was subsisting in another Person, *viz.* in the Lessee, at the Time of the Fine levied; and he cited the Duchess of *Richmond*'s Case in *C. B.* which is said to be the same *in Terminis*, and to be so adjudged, 1. Because the Lessor was only a Tenant at Will, and there was a mutual Confidence between them: 2. By reason of the Privity that was between them: And he also cited one *Heal*'s Case, where *A.* conveyed Lands in Fee to *B.* with a Covenant to make further Assurance, then *B.* lets to *A.* for forty Years, and then, on Request, *A.* makes further Assurance, the Lease is barred without precedent Agreement to the contrary, for that would have saved the Lease, and then the further Assurance would have been taken only to operate by way of Corroboration and further Confirmation of the Lease. But the principal Case in *Hard.* seems to be very darkly put in the Book; for it does not appear to whom the Fine was levied; and the Notion of the Term being antecedent to the Fine, and therefore not barred, for that Reason, seems strange; for if it were subsequent, it could not most certainly be touched by the Fine; and there in another Book this Case is cited as a Case in Point, that the Term was barred by the Fine; and this seems agreeable to some of the following Resolutions.

Lev. 271.

Keb. 24-5.

It was held *per Curiam*, that a Fine levied in pursuance of a Trust cannot destroy any Lease made by *Cestui que Trust*; but though a Fine levied by *Cestui que Trust* does not destroy or extinguish the Trust, yet it is not safe to do it, for the Danger of not being able to prove an Agreement to the contrary.

Vent. 55, 80. Sid. 349, 458. Lev. 270. 2 Keb. 521, 597, 650.

A. seised in Fee makes a Lease to *B.* for an hundred Years, in Trust to attend the Inheritance, *B.* enters, then *A.* enters, and receives the Profits, and after makes a Lease for fifty-four Years, and covenants to levy a Fine *sur Conuzance de Droit*, to confirm that Lease, and a Fine is afterwards levied accordingly, and five Years passed without any Claim made by *B.* And

it

it was adjudged in *C. B.* and affirmed afterwards upon Error in *B. R.* 1. That when *A.* entered upon *B.* he was but Tenant at Will to him, to which Eſtate it is not always requiſite that there be the expreſs Conſent of both Parties; but if there be any Thing tantamount, it is ſufficient; as here the Truſt implies, that the Leſſor ſhall take the Profits, being *Ceſtui que Truſt*, which includes at leaſt an Eſtate at Will. 2. That when *A.* made the Leaſe for fifty-four Years, though this would not be a Diſſeiſin, becauſe the Reverſion was in the Leſſor himſelf, who made that Leaſe, yet by this the Leaſe for an hundred Years was diveſted, diſplaced, and turned to a Right. And, 3. that being ſo diveſted, this was barred by the Fine and Non-claim; and it was held, that *A.* only ſhould have the Term of an hundred Years, diveſted or not, and not *B.* who was but his Truſtee; and in this Caſe *A.* hath made ſuch Election by levying the Fine to corroborate the Term of fifty-four Years, and there is no Reaſon that *A.* ſhould have the Land againſt his own Fine; beſides, if the Term of an * hundred Years ſhould not be barred by the Fine and Non-claim, then *B.* muſt have it, which was never intended; and it is but reaſonable ſuch Term ſhould be ſubject to be barred or extinguiſhed by *Ceſtui que Truſt* of that and the Inheritance; and a general Rule was taken in this Caſe, that when Leſſee at will, or he who enjoys the Land by expreſs or implied Aſſent of his Grantee or Feoffee, makes a Leaſe for Years, or levies a Fine, that this ſhall be conſtrued an Ouſter, Diſſeiſin or Bar, when ſuch Conſtruction tends to the Eſtabliſhing a lawful Eſtate, as in the principal Caſe; but when ſuch Conſtruction tends to the Deſtruction of an honeſt Eſtate or Intereſt, then ſuch Leaſe or Fine ſhall be no Ouſter, Diſſeiſin or Bar; and therefore *Keeling* Chief Juſtice put theſe two Caſes: If one makes a Leaſe for Years, for Security of Money by way of Mortgage, and as the Courſe is, continues in Poſſeſſion, and takes the Profits, and then levies a Fine to *J. S.* and pays the Intereſt duly, and the five Years without Notice or Claim paſs, that this ſhall be no Bar to the Leaſe of the Mortgagee: So if one purchaſe Lands, and for the better Security had a long Leaſe aſſigned to *J. S.* in Truſt to attend the Inheritance, and then takes the Inheritance to himſelf by Fine, and five Years paſs, and there are Mortgages made in Time after the firſt Leaſe made, and before the Fine levied; yet ſuch Fine does not deſtroy the firſt Leaſe to *J. S.* but that the Purchaſer may uſe it to defend himſelf againſt the Incumbrances; and thought this Difference would reconcile all the Books.

Freeman ver. *Barnes.* 3 Mod. 196. S. C. cited.

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One by Will deviſes Lands to Truſtees for ninety-nine Years, in Truſt for the Payment of his Debts and Legacies, Remainder to *A.* his Brother in Tail; but if *A.* gave Security to pay the ſaid Debts and Legacies, or ſhould pay the ſame within ſuch a Time, then the Truſtees ſhould aſſign the Term to him, *&c.* *A.* enters after the Death of his Brother, with the Aſſent of the Truſtees, and received the Profits, and paid all the Legacies, and alſo all the Debts but 18 *l.* and afterwards *A.* levies a Fine to the Uſe of himſelf for Life, Remainder to his Wife for Life, with divers Remainders over, and dies, leaving his Wife and one only Daughter his Heirs at Law; the Wife enters, and five Years were paſt without any Claim; and now the Daughter, in the Name of the Truſtees brought an Ejectment; and the Queſtions were, 1. Whether this Term for ninety-nine Years was bound by the Fine and Nonclaim. 2. Whether it was diveſted and turned to a Right at the Time of the Fine levied; for if it were not, then the Fine would not operate upon it: Now Judgment appears to have been given in it; but upon the Difference taken in *Freeman* and *Barnes*'s Caſe, it ſhould ſeem not to be barred; for then it muſt turn to the Prejudice of honeſt Creditors, who were Strangers and third Perſons, and *A.* by his Entry on the Truſtees could be only Tenant at Will, becauſe his Entry was with their Conſent, and no Manner of Intent appears in him to diveſt their Eſtate or Intereſt, and then his Fine ſhall operate only on his own Eſtate-Tail, like a

3 Mod. 195. *Smith* verſus *Pierce.*

Fine

Fine levied by a Mortgagor, who is but Tenant at Will to the Mortgagee, and whoſe Acts being by Permiſſion of the Mortgagee, ſhall not turn to his Prejudice; though ſome ſaid, the five Years and Nonclaim paſſing in the Life-time of the Wife, who was the Survivor, made a great Difference in the Caſe; *ideo Quære.*

2 Vent. 329, 330. *Dighton* ver. *Greenvil.* If one takes an Aſſignment of an Eſtate extended upon a Statute in the Name of *J. S.* in Truſt to attend the Inheritance which he hath in himſelf, and after he by Leaſe and Releaſe, and Fine levied in purſuance thereof, conveys that Reverſion and Inheritance to another, and five Years paſs without any Claim made by *J. S.* the Truſtee; yet this will not bar the Eſtate or Intereſt upon the Extent, if it appears that the Conuzee of the Fine was a Purchaſer of the whole Eſtate, and ſo after his Purchaſe *J. S.* to be Truſtee for him of the Statute Intereſt; but in ſuch Caſe the Fine ſhall operate only upon the Inheritance, and not to the barring the Statute Intereſt, which is to attend and go along with the Inheritance by way of
*Page 451 *Truſt for the Purchaſer; but if the Purchaſer had no Notice of ſuch Statute Intereſt ſtanding out, nor was by Agreement to have the Truſt thereof upon his Purchaſe, then, rather than he ſhould be cheated thereby, the Fine of *Ceſtui que Truſt* ſhould operate to the Barring his own Truſtee.

3 Keb. 564. Upon Evidence to a Jury at the Bar, on Trial of an Iſſue out of Chancery, it was agreed, that if one makes a Leaſe for an hundred Years in Truſt for himſelf and his Wife, and afterwards they both join in levying a Fine to a Purchaſer, for a valuable Conſideration, who had no Notice of this Leaſe in Truſt, though the Fine does not convey the Term itſelf to the Conuzee, the Eſtate in Law being in the Truſtee, yet this deſtroys the Truſt, ſo that the Leaſe ſhall not hurt the Purchaſer.

Hard. 400. Theſe Reaſons and Reſolutions ſeem to make it manifeſt, that in the Caſe of *Focus* and *Saliſbury*, if the Conuzee of the Fine were a Purchaſer for a valuable Conſideration without Notice of the Term, that then the Fine would ſo deſtroy the Truſt of that Term, that it ſhould not hurt him; but if the Fine were only in Purſuance and Corroboration of the former Eſtates, then there would be no Reaſon in the World that it ſhould operate ſo as to deſtroy the Term.

(R) Leaſes for Years, when merged by Union with the Freehold or Fee.

ANOTHER Way, whereby a Term for Years may be defeated, is by way of Merger, when there is an Union of the Freehold or Fee and Term for Years in one Perſon at the ſame Time; in this Caſe the greater Eſtate merges and drowns the leſſer, becauſe they are inconſiſtent and incompatible; and yet there are ſeveral Exceptions out of this Rule, not only where ſuch Union is tranſitory, but even where it is permanent and continuing

Co Lit. 52. a. Moor 11, 280, 605. Cro. Jac. 177. 2 Rol. Abr. 495. Firſt then, if a Man makes a Leaſe for Years to *A.* and afterwards makes a Feoffment in Fee to *B.* with a Letter of Attorney to *A.* to make Livery, and he makes Livery accordingly, yet this ſhall not drown or extinguiſh his Term, becauſe he did it only as Servant to the Leſſor and in his Stead and Right, and the Feoffee after Livery made is in by the Leſſor, and claims nothing from the Leſſee; neither ſhall his Term paſs merged or confounded in the Fee, which by the Livery he gave to the Feoffee, becauſe he gave it only in Right of the Leſſor, and not in his own Right; though perhaps, to ſecure his Term, and ſettle the Reverſion (which was all that was intended to paſs) in the Feoffee, it may be proper for him after

ter ſuch Livery to make an Entry for his Term, becauſe the Livery gave the actual Poſſeſſion, though the Agreement and Intent of the Parties will direct it ſo as to transfer only the Reverſion expectant upon that Term after the Leſſee hath re-entered.

If the Leſſor infeoffs his Leſſee for Years to ſeveral Uſes, the Intereſt of the Leſſee is ſaved by 27 *H.* 8. *cap.* 10. of Uſes which ſaves to all Perſons, and their Heirs, which be or ſhall be ſeiſed to any Uſe, all ſuch former Right, Title, Entry, Intereſt, *&c.* as they might have had to their own proper Uſe, in or to any Manors, Lands, *&c.* whereof they be or ſhall be ſeiſed to any Uſe, as if that Act had not been made; and therefore in ſuch Caſe his Term being ſaved expreſly by this Act, he may enter and enjoy it, as if the Feoffment to Uſes had been to any Stranger. 7 Co. 48. a. 66. a. Moor, pl. 345. *Cheney's* Caſe.

* *A.* leaſes to *B.* for Years, and after the Leſſor by Indenture inrolled and Fine conveys thoſe very Lands to the Leſſee, and others, and their Heirs, to the Uſe of them and their Heirs, to the Intent that a Common Recovery ſhould be had and ſuffered againſt them, with Voucher of the Leſſor, and that he ſhould vouch over the common Vouchee, to the Uſe of *D.* and *E.* and their Heirs; all which was done accordingly; and the Queſtion was, if by all or any of theſe Acts the Term were extinct and gone; for the Reverſioners, who were in under the Recovery, brought Debt againſt *B.* the Leſſee for Rent. And on *Nihil debet* pleaded, and all the ſaid ſpecial Matter found, it was adjudged, that the Term ſtill had Continuance, and was not merged; for although it was merged and extinct by the Union of Eſtates till the Recovery came, yet when that was ſuffered, the Uſes thereof were guided by the Bargain and Sale inrolled, and then it is all one as if it had been no Conveyance or Aſſurance to ſuch Uſes *ab initio*, and is within the Equity and Intent of the Saving of the 27 *H.* 8. *cap.* 10. and is like a Feoffment to Uſes, and then the Term and Rent are revived; for the Intent of the Statute was not to hurt thoſe who had Eſtates, but to preſerve them. And it was agreed *per totam Cur.* that if a Fine or Feoffment had been made or levied to the Leſſee for Years, that the Term would not have been extinguiſhed, but ſhould be preſerved by 27 *H.* 8. *cap.* 10. The Objection againſt all this was, that the Bargain and Sale and Fine were to his own Uſe, otherwiſe he could not have been Tenant to the *Præcipe* for ſuffering of the Common Recovery, and therefore, being to his own Uſe, there was nothing to be ſaved within that Statute. But it was anſwered and reſolved, for the former Reaſons, that his own Term was ſaved within the Equity and Intent of the Statute. *Page 452 Cro. Jac. 643. 2 Rol. Rep. 245. *Ferrers* and *Curſon.* 2 Mod. 234. decreed.

One ſeiſed of Lands in Fee makes a Leaſe to *B.* for ninety-nine Years, to ſuch Uſes as he ſhould by his laſt Will direct; afterwards he makes his Will in Writing, (having then no Iſſue by his Wife, but who however was *privement enſeint*,) and thereby deviſes theſe Lands to the Heirs of his Body on the Body of his Wife begotten, and for want of ſuch Iſſue, to *B.* and his Heirs, and dies; and about a Month after a Son was born, who by virtue of this Deviſe enjoys the Land, and after his full Age ſuffers a Common Recovery, and then deviſes the Lands to the Plaintiff, and dies; the Plaintiff brought this Bill againſt *B.* to have this Leaſe for ninety Years aſſigned to him; and for the Defendant it was objected, That an Eſtate in Fee being by the Will limited to *B.* who was alſo Leſſee for ninety-nine Years, the Term was thereby drowned. 2. That this was in Nature of a Deviſe to an Infant *in ventre ſa mere*, which, as was objected, is not good, if there be none born at the Time when the Deviſe ſhould take place: But notwithſtanding it was decreed, that the Defendant ſhould aſſign the Term to the Plaintiff; for that ſuch Deviſe to an Infant *in ventre ſa mere* is good as an Executory Deviſe, and though the Lands deſcend to the Heir at Law in the mean Time, or go to the Deviſee in this Caſe, yet it is ſubject to be defeated by the coming *in eſſe* of the Infant, and the Term for Years in the 2 Mod. 8, 9. *Nurſe* and *Yearworth.* 2 Vern. 711. Prec. Chan. 50. Eq. Caſ. Abr. 173. 2 Stra. 1092. 2 Eq. Abr. 294. pl. 34. Andr. 263. Keb. 566.

mean

mean Time was only ſuſpended, and by conſequence muſt revive in the Leſſee when the Acceſſion of the Inheritance, which occaſioned that Suſpenſion, is defeated; and the Term being created ſubject to the Uſes of the Will, muſt follow the Deviſe of the Inheritance, as a Truſt to be diſpoſed of as the *Ceſtui que Truſt* ſhall direct.

Lev. 111. If one make a Feoffment in Fee to the Uſe of himſelf for Years, without limiting any other Eſtate, the Uſe ſhall not reſult to him in Fee, becauſe that would merge the Term, againſt the expreſs Declaration and manifeſt Intent of the Parties; and therefore in ſuch Caſe the Reverſion in Fee muſt continue and ſettle in the Feoffee.

*Page 453 * In Ejectment the Caſe was thus: *Cook* let to *Fountain* for ninety-nine
2 Lev. 126. Years and two Years after by Leaſe and Releaſe *Cook* conveyed the Inhe-
Mod. 107. ritance to *Fountain* and another, to the Uſe of *Cook* and the Heirs of his
3 Keb. 283, Body, with divers Remainders over; and if by this Conveyance the Leaſe
309. for ninety-nine Years was merged and deſtroyed in all, or in part, was the
Vent. 195, Queſtion. Firſt, it was agreed, that if ſuch Conveyance to Uſes had been
280. by Fine or Feoffment, it would not have been deſtroyed, but would have
Cook verſus been preſerved by the Saving in 27 *H.* 8. *cap.* 10. So likewiſe they agreed,
Fountain. that if there had been no Leaſe for a Year, but the Releaſe had been imme-
8 Mod. 60. diate to the Leaſe for ninety-nine Years to ſuch Uſes, in this Caſe alſo the
10 Mod. 151. Leaſe for ninety-nine Years had been preſerved by Force of that Statute;
Vern. 20. but here being a Leaſe for a Year precedent, it was argued, that this was
2 Vern. 700. to the Uſe of the Leſſee, and then, by Acceptance thereof, he admitted
Eq. Caſ. Abr. the Leſſor's Power to make ſuch Leaſe, and by conſequence this was a
223. Surrender of the Leaſe for ninety-nine Years, before the Releaſe to the other
Stra. 34, 101. Uſes came to take place, and then the Releaſe after cannot revive it; and
2 Stra. 1253. it was ſaid, though this be all one Conveyance, yet it differs from a Feoffment; for it will not purge a Diſſeiſin, nor make a Diſcontinuance; and if before the Releaſe the Leſſee grants a Rent-charge, acknowledges a Statute, confeſſes a Judgment, or makes a Leaſe for half a Year, and then a Releaſe is made to him and his Heirs to ſuch Uſes; yet it was ſaid, that he who hath the Inheritance would have no Remedy to avoid theſe Charges, but in Chancery. On the other Side it was argued, that this was no Merger of the ninety-nine Years Leaſe; or if it were, yet for no more than a Moiety; for the Reaſon of Merger and Extinguiſhment is not, as hath been argued, the Party's Admittance of the Leſſor's Power to make a Leaſe, but becauſe of the Acceſſion of the immediate Reverſion to the particular Eſtate a Merger is effected; and therefore a new Leaſe by the Leſſor to his Leſſee is not a Merger or Surrender of the firſt Term, if there be any interpoſing or intermediate Term; and yet, in that Caſe, the Leſſee admits the Leſſor's Power to make the Leaſe preſently, as much as in the other; and then if the Union and Acceſſion of the two Eſtates be the Cauſe of the Merger, the *Quantum* of the Thing granted will be the Meaſure of that Merger, and by conſequence, the firſt Leaſe here ſhall be extinguiſhed but for a Moiety of the Lands. But *2dly*, it was argued, That it was not extinguiſhed for any Part; for his Term is ſaved within the Letter, or at leaſt within the Equity of 27 *H.* 8. *cap.* 10 for the Intent of the Saving therein was to preſerve the Balance between the *Ceſtui que Uſe* and his Feoffees, according to the Rule of Equity by which they were governed before: Now ſuppoſe that *Fountain* had a Leaſe for ninety-nine Years before this Statute, and that *Cook* had deſired him to accept a Feoffment to his Uſe, without Doubt the Chancery would not have compelled him to aſſign till the ninety-nine Years expired; and the ſame Right ſeems now to be preſerved by the Saving, and the Words are general, *all that ſhall be ſeiſed to any Uſe*, not all that ſhall be ſeiſed by Feoffment or Fine; ſo that *the Seiſin to Uſe* is the only Thing the Statute regarded, and *not by what Sort of Conveyance*; and Leaſe and Releaſe are now a common Conveyance; and the Leaſe being expreſly ſaid to

be

be to enable him to accept a Releaſe to other Uſes, ſhall not be conſtrued to any other Intent, or to be to his own Uſe, otherwiſe than to enable him to accept ſuch Releaſe; and then if it ſhould be admitted that the Leaſe for ninety-nine Years were extinguiſhed by the Leaſe for a Year, yet by the Releaſe it is revived; for being but one Conveyance, it is within the Equity of the Statute; and *Cro. Jac.* 643. is a ſtronger Caſe and yet reſolved there, that though the Bargain and Sale had deſtroyed the Term for a Time, yet by the Recovery it was revived, becauſe then but one Conveyance *ab initio*; ſo here. To all this it was replied, That the very Reaſon of Merger was the Admittance of the Leſſor's Power to demiſe, and then the Whole is * ſurrendered, becauſe he admits the Leſſor to have Power to demiſe the Whole, though he had but a Moiety, to himſelf; and that where there is an intermediate Eſtate, no Merger ſhall be, does not make againſt it, for the intermediate Eſtate diſproves his Admittance, that the Leſſor hath ſuch Power; but here is no ſuch intermediate Eſtate or Impediment, and being Joint-tenants *per my & per tout*, by the Leaſe, the Whole is merged by Admittance of the Leſſor's Power to demiſe the Whole, though they agreed that a Merger may be of one's Part of an Eſtate or Term, and not for another's Part. *Hale* cited a Caſe, 6 *Car.* 1. *Hele Sevam*, where *A.* mortgaged Lands to *B.* for Years, *B.* re-demiſes to *A.* upon Condition, if he does not pay ſuch a Sum, that he ſhall re-enter; and in the firſt Conveyance were Covenants for farther Aſſurance by *A.* Then *B.* deſires him to levy a Fine, which *A.* does accordingly; and there it was agreed, that the Term re-demiſed was extinguiſhed; but if it had been expreſſed to what Intent the Fine was, it was agreed there would have been no Extinguiſhment of the Term; and in this Caſe, the Leaſe is found to be *ea Intentione* to enable him to take a Releaſe, but no Judgment appears to be given; but it ſeems reaſonable that the Leaſe for ninety-nine Years, in this Caſe ſhould not be merged; or at leaſt but for a Moiety; and even in that Caſe, Equity would ſet up the Moiety or the whole Term again.

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If Tenant *pur auter vie* makes a Leaſe for Years, and dies, living *Ceſtui que vie*, by this the Leſſee for Years is become Occupant, and then this Acceſſion of the Freehold merges his Eſtate for Years, becauſe they cannot conſiſt together in one Perſon; but if, in that Caſe, the Leſſee for Years had made a Leaſe at Will, and then the Tenant *pur auter vie* had died, (which was the principal Caſe) it was adjudged that the Tenant at Will was the Occupant, and by conſequence, the Leaſe for Years, which was in another Perſon, not drowned or merged, there being no Union of the Term for Years, and the Freehold in one Perſon; and then the Leſſee for Years may, by Determination of his Will, enter and enjoy his Term, and the Occupant cannot prevent or hinder him, becauſe he claims in *quaſi* by the firſt Leſſor, who had made ſuch Leaſe for Years, and to which the Eſtate for Life, during the Life of the *Ceſtui que vie*, was ſubject and liable.

2 Bulſ. 12. *Chamberlain* ver. *Ewer.*

If Tenant *pur auter vie* makes a Leaſe for Years, to *A.* Remainder to *B.* for Years, and *A.* enters, and then the Tenant *pur auter vie* dies, here *A.* the Tenant for Years, ſhall be Occupant, by reaſon of the Poſſeſſion he had in him when the Life fell; and yet his Term for Years is not drowned, by reaſon of the intermediate Remainder to *B.* for Years; for this Eſtate by Occupancy is in the Nature of a Reverſion expectant upon both the Terms for Years, as it was in the Tenant *pur auter vie* himſelf after theſe Leaſes made; and, in ſome Caſes, a Term for Years and a Freehold may conſiſt together in one Perſon; as if Leſſee for twenty Years makes a Leaſe to his Leſſor for five Years, this Term for five Years is not drowned in the Freehold or Fee of the Leſſor, by reaſon of the intermediate Reverſion for fifteen Years in the firſt Leſſee.

Bro. Tit. *Surrender* 52. 2. Bulſ. 12. Bro Tit. *Leaſes* 63.

The Caſe, in Effect, was this; *A.* ſeiſed in Fee, grants an *Intereſſe Termini* to *B.* for one Hundred Years, to begin at ſuch a Time, and before that Time

Cro Jac. 619. *Salmon* ver. *Swann.*

Time makes a Leaſe for twenty-one Years to *C.* to begin in Poſſeſſion preſently; then *B.* before the Commencement of his Term, grants it to *A.* who after grants a Rent-charge, and the Grantee of the Rent-charge diſtrains *C.* for it; and the only Queſtion was, whether the *Intereſſe Termini* were drowned in the Inheritance, or if it had any Exiſtence in *A.* ſo that he might thereout grant the Rent, for then it would avoid the ſecond Leaſe for Years, being before it, and, by conſequence, be liable to the Payment of the Rent; and it was reſolved that it was drowned in the Inheritance; for, notwithſtanding the ſecond Leaſe for Years, the *Intereſſe Termini* is not ſo ſevered from the Reverſion, but that by Grant thereof to him who
*Page 455 hath the * Inheritance, ſuch future Term or Intereſt is drowned, and ſhall never riſe again; and, by conſequence, this Rent ſhall not charge the Poſſeſſion of the Termor, who had the Eſtate before the Rent granted, and comes paramount it; for though there was a Severance of Poſſeſſion by the ſecond Leaſe, yet the *Intereſſe Termini* being granted before that Leaſe, and to continue for a longer Time, that ſecond Leaſe was ſubject to be defeated by the *Intereſſe Termini* when it took Effect; therefore the *Intereſſe Termini* was *quaſi* immediate to the Freehold and Inheritance, and therefore might drown in it.

Co. Lit. 339. Plowd. 418. *Bracebridge ver. Cook.* My Lord *Coke* lays it down for a general Rule, that one cannot have a Term for Years in his own Right, and a Freehold *in auter droit*, but that his own Term ſhall drown in the Freehold; and puts theſe Caſes: If a Man, Leſſee for Years, intermarries with the Feme Leſſor, this ſhall merge and drown his own Term for Years; but if a Feme Leſſee for Years intermarries with the Leſſor, her Term is not thereby drowned, becauſe, ſays he, one may have a Term for Years *in auter droit*, and a Freehold in his own Right, as the Huſband in this Caſe ſhall have; ſo if Leſſee for Years make the Leſſor his Executor, the Term is not thereby drowned, becauſe the Leſſor hath a Term *in auter droit*. So alſo if a Maſter of an Hoſpital, being a ſole Corporation, by the Conſent of his Brethren, makes a Leaſe for Years of the Poſſeſſion of the Hoſpital, and afterwards the Leſſee for Years is made Maſter, the Term is drowned *Cauſa qua ſupra*; but if it had been a Corporation aggregate, the making of the Leſſee Maſter had not extinguiſhed the Term, no more than if the Leſſee had been made one of the Brethren; but if a Leſſee for Years of the Glebe be made Parſon, the Term is merged, by reaſon of the Union of the Term and Freehold in him to his own Right and Uſe, though he has them in ſeveral Capacities.

Plow. 419, 420. 3 Leon. 111.

Cro. Jac. 275. Bulſ. 118. *Plott* verſus *Sleep.* But this Rule ſeems to admit of divers Exceptions; for where the Huſband, poſſeſſed of a Term for Years, took Wife, and after the Inheritance deſcends or comes to the Wife, the Term for Years of the Huſband is not thereby drowned or merged, becauſe the Deſcent was an Act of Law, which the Huſband could not prevent and therefore ſhall not turn to his Prejudice; but he ſhall have the Inheritance in Right of his Wife, and the Term for Years in his own Right, as he had before, and therefore may give away or diſpoſe of the Term as he thinks fit, notwithſtanding ſuch Deſcent of the Inheritance to his Wife; and this was the Opinion of *Fenner*, *Croke*, and *Fleming*, Chief Juſt. and ſo given in Direction to a Jury in a Trial at Bar; and upon a general Verdict to that Purpoſe, they gave Judgment accordingly; and *Croke* ſeemed to make a Queſtion, if the Huſband, in this Caſe, had Iſſue by his Wife after the Inheritance deſcended to her, ſo as thereby he was intitled to be Tenant by the Curteſy, and to have a Freehold in his own Right, if this ſhould merge the Term till the Wife's Death; and yet he ſaid this was a much ſtronger Caſe; but *Williams totis viribus* againſt the Judgment, and held the Term clearly extinct; but notwithſtanding Judgment was given *ut ſupra*; and in this Caſe all the Court agreed, that if the Leaſe had been made upon Truſt, for the Advancement of ſuch a Woman, and the Leſſee had after intermarried with that Woman, and then the Inheritance had

had deſcended to her, that this would not merge the Term, but that he might clearly diſpoſe thereof to the Purpoſe intended; becauſe he had it *in auter droit*, and to another Uſe; ſo in another Book it ſeems to be agreed, that if a Man, being poſſeſſed of a Term for Years in Right of his Wife, purchaſes the Inheritance, that by this the Term for Years, though in Right of his Wife, is merged and extinct, becauſe the Purchaſe was the expreſs Act of the Huſband, and therefore amounts in Law to a Diſpoſition of the Term, by reaſon of the Merger conſequent thereupon; but a bare Intermarriage of the Feme Termor with the Reverſioner will not work a Merger of the Term, becauſe by the Intermarriage the Term is caſt upon the Huſband by Act of * Law, without any Concurrence or immediate Act done by him to obtain the ſame; and therefore, in ſuch Caſe, the Law will preſerve the Term in the ſame Plight as it gave it to the Huſband, till he by ſome expreſs Act deſtroys or gives it away. Godb. 2. *Page 456

But where the Huſband himſelf is Leſſee for Life, and intermarries with the Leſſor, this merges his own Term, becauſe he thereby draws to himſelf the immediate Reverſion, in nature of a Purchaſe by his own voluntary Act, and ſo undermines his own Term; whereas in the other Caſe, the Term being exiſting in the Feme till the Intermarriage, is not thereby ſo drawn out of her, or annexed to the Freehold, as to merge therein; becauſe that Attraction, which is only by Act of Law conſequent upon the Marriage, would, by merging the Term, do wrong to a Feme Covert, and ſo take the Term out of her, though the Huſband did no expreſs Act to that Purpoſe, which the Law will not allow; but in ſuch Caſe, if the Feme ſhould ſurvive, and have Dower of thoſe Lands, this ſeems a Merger of her Term for a third Part, at leaſt, becauſe now ſhe hath the Term and Freehold both in her own Right, and then the Acceſſion of the Freehold muſt *pro tanto* merge and drown the Term. Co. Lit. 338. Plow. 418. b.

So alſo in caſe where the Leſſee for Years makes the Leſſor Executor, the Term is not merged, becauſe caſt upon him without any Act or Concurrence of his, as a Conſequence of his being made Executor; and therefore the Act of Law, which caſt it upon him, ſhall preſerve it in the ſame Manner as if he had been a Stranger, without any Regard to the immediate Freehold he had in his own Right, which was only accidental. Co. Lit. 338. Plow. 418. b. 420. a.

But if a Feme Executrix takes Huſband, and the Huſband after purchaſes the Reverſion, and dies, yet the Feme ſurviving ſhall not have the Term to any other Purpoſe but as Aſſets to pay Debts; for as to any Right of her own therein, the Term is extinct by ſuch Purchaſe of the Huſband, becauſe that was his own expreſs voluntary Act, and therefore amounts to a Diſpoſition of the Term by the Merger wrought thereupon; and ſo it was held by all the Juſtices. Moor, pl. 157.

So if one who hath a Leaſe for Years as Executor purchaſe the Inheritance, this merges the Term, becauſe the Purchaſe was his own expreſs Act; nay, Baron *Clerk* held, that though the Inheritance in ſuch Caſe had deſcended on the Executor, that this likewiſe would merge the Term, which how far it is Law, may be a Queſtion; but as well in the Caſe of the Purchaſe, as of the Deſcent, all agree that the Term would not be extinct as to Creditors, much leſs in Caſe where the Leſſor is only made Executor of the Leſſee for Years; though *Plowden* ſeems to inſinuate, that even in that Caſe, the Term is ſuſpended during the Life of the Leſſor; for he ſays, that after his Death the Term ſhall be revived. Bro. Tit. *Leaſes* 63. Tit. *Surrender* 52. 3 Leon. 111, 112. Plow. 419. b. 420. a.

Land was given to the Huſband and Wife, and to the Heirs of the Huſband; the Huſband makes a Leaſe for Years, and dies, the Wife enters and intermarries with the Leſſee; and it was holden that his Term was not extinct, becauſe the Entry of the Wife put a total Interruption to the Intereſt of the Leſſee, and avoided the Term intirely as to herſelf, becauſe ſhe was in of the Freehold by Survivorſhip paramount the Leaſe; and 3 Leon. 157, 158. Bro. Tit. *Leaſes* 58.

then

then the Leaſe cannot take place again, till after her Death, againſt the Heirs of the Huſband, and whether ſhe will outlive the Term or not is uncertain; ſo that during her Life, the Leſſee had no Intereſt, but only a bare Poſſibility, which cannot be touched or hurt by the Intermarriage, but continues juſt as it was before.

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*Page 457 *(S) **Of Surrenders of Leaſes for Years:** And herein,

1. Of Surrenders in Fact or Expreſs: *And herein again,*

1. By what Words ſuch Surrender may be made.

Co. Lit. 337. b. 2 Vent. 206. 3 Mod. 298. Perk. ſ. 584. See 2 Stra. 1201. 2 Ld. Raym. 1145.

IT will not be here neceſſary to enter into a particular Inquiry concerning the Nature of a Surrender, or of the ſeveral Words whereby ſuch Surrender may be made, it being ſufficient to ſay in general, that a Surrender is a Yielding up of an Eſtate for Life, or Years, to him who hath the immediate Eſtate in Reverſion or Remainder, wherein the Eſtate for Life, or Years, may drown by mutual Agreement.

Perk. ſ. 607, 608. Cro. Eliz. 156, 488. Leon. 179, 280. 2 Leon. 50. Rol. Abr. 497. 2 Vent. 206. 3 Mod. 301.

So that any Form of Words, whereby ſuch an Intent and Agreement of the Parties may appear, will be ſufficient to work a Surrender; and the Law will direct the Operation and Conſtruction of the Words accordingly, without the preciſe or formal Mention of the Word *Surrender* in the Conveyance; but then the Party, who would have the Benefit of ſuch Conveyance to work as a Surrender, muſt plead it by the very Words *Surſum reddidit*, becauſe that only can properly deſcribe the Operation of the Conveyance as a Surrender; and whoever would take Advantage of a Thing in Pleading, muſt determine it to that particular Species of Operation whereof he would ſo have the Advantage; therefore if Leſſee for Life or Years, ſay to the Leſſor that his Will is, that the Leſſor ſhall enter into his Lands, and ſhall have the ſame, or is content that the Leſſor ſhall have again the Land, and by virtue thereof the Leſſor enters into the Land, this is a ſufficient Surrender; ſo if the Leſſee ſay to him in the Reverſion or Remainder, that he will occupy the Lands no longer, or that I ſurrender to you ſuch Lands, *&c.* and he in the Reverſion or Remainder thereupon enters into the Land, theſe were ſufficient and effectual Surrenders at the Common Law; but if ſuch Words had been ſpoken privately by the Leſſee, or by a Stranger, and not by way of Addreſs to him in Reverſion or Remainder, this could not amount to a Surrender, becauſe there could appear no mutual Agreement of the Parties for that Purpoſe.

Dyer 251. pl. 91, 93. Cro. Eliz. 2. Cro. Jac. 169. Lev. 144. Keb. 807.

So if Leſſee for Years Remiſe, Releaſe, Diſcharge, and for ever Quit-claim to his Leſſor all his Right, Title and Eſtate in or to ſuch Lands; this has been held to amount to a Surrender, becauſe a Leaſe for Years conſiſting only in Contract, theſe Words are ſufficient to diſſolve that Contract, and let in the Reverſioner; but ſuch Words, in caſe of a Leaſe for Life, would not amount to a Surrender, becauſe that being an Eſtate created by Livery, muſt be defeated by Act of equal Notoriety, or expreſs Words of Conveyance of the Freehold, which the before-mentioned Words are not, but rather applicable to a Thing which lies only in Grant, but of that *Quære*; for it hath been adjudged, that if Tenant for Life grant, ſurrender and releaſe to him in the Reverſion, that

that this was ſufficient, and ſo would have been though there had not been the Word *Surrender*, becauſe the Word *grant* would operate as a Surrender after the Conveyance executed; and that ſuch Surrender, though without Notice or expreſs Agreement of the Surrendree, would be good till actual Diſagreement thereto. Show. Par. Ca. 150. 3 Lev. 284. *Thompſon* ver. *Leach.*

But now by the Statute of Frauds and Perjuries it is provided, That no Leaſes, Eſtates or Intereſts, either of Freehold or Terms for Years, ſhall be ſurrendered, unleſs it be by Deed, or Note in Writing, ſigned by the Party who makes ſuch Surrender, or ſome other lawfully authorized thereunto, or by an Act and Operation of Law; ſo as Surrenders in Law, or implied Surrenders, remain as they did at Common Law, if the Leaſe, which is to draw on ſuch Surrender, be in Writing purſuant to that Statute. *Page 458

2. Upon what Eſtate ſuch Surrender may operate.

It appears by the Definition before given of a Surrender, that the ſame is a Yielding up of an Eſtate for Life, or Years, to him in the immediate Reverſion or Remainder; but here a Queſtion may ariſe, what Eſtate in the Reverſion or Remainder will be ſuſceptible of ſuch Surrender; for if the Eſtate in Reverſion or Remainder be but for Years, it ſeems a great Doubt in the Books, whether a Leaſe for Years in Poſſeſſion may be ſurrendered, ſo as to merge and drown therein; and it is commonly ſaid, that Years cannot drown in Years; therefore where Leſſee for twenty Years made a Leaſe for ten Years, and the Leſſee for ten Years ſurrendered to his Leſſor, this has been held to be no Surrender, ſo as to merge the ten Years in Poſſeſſion, but only to transfer them by way of Aſſignment or Acceſſion to the Number of Years then left in the Leſſor; becauſe they held, that Years could not drown in Years; but the contrary to this has been held with ſome Clearneſs, and ſeems to be now ſettled, that ſuch Surrender is good, and ſhall merge the firſt Term; wherein they agreed, 1. That if the Term in Reverſion were greater than the Term in Poſſeſſion, that the greater would merge the leſſer, as ten Years may be ſurrendered and merge in twelve or fourteen Years. 2. It was held by *Gawdy*, *Fenner* and *Popham*, that though the Reverſion were for a leſs Number of Years, yet the Surrender would be good, and the firſt Term drowned; as if one were Leſſee for twenty Years, and the Reverſion expectant thereupon were granted to one for a Year, who granted it over to the Leſſee for twenty Years, that this would work a Surrender of the twenty Years Term, as if he had taken a new Leaſe for a Year of his Leſſor; for the Reverſionary Intereſt, coming to the Poſſeſſion drowns it, and the Number of Years is not material; for as he may ſurrender who hath the Reverſion in Fee, ſo he may to him who hath the Reverſion for any leſſer Term; and therefore *Popham* held, that where Leſſee for twenty Years makes a Leaſe for ten Years, and the Leſſee for ten Years ſurrenders to his Leſſor, *viz.* the Leſſee for twenty Years, that this is good, and the Leſſor ſhall have ſo many of the Years as were then to come of his former Term of twenty Years, that is, as it ſeems, ſo many Years as were to come of his Reverſion ſhall now be changed into Poſſeſſion; and he held further, that if ſuch Leſſee for twenty Years had made ſuch Leaſe for ten Years, and then granted over the Reverſion for ten Years only, *viz.* no longer than the Leaſe for ten Years was to continue, and ſuch Leſſee for ten Years had attorned, then the Grantee of the Reverſion ſhould have the Rent and Services, and the Grantor the Reſidue of the twenty Years; and that the Leſſee for ten Years might ſurrender to the Grantee of the Cro. Eliz. 173. Leon. 303. Owen 97. *Perry* ver. *Allen.* Leon. 323. Poph. 30. Co. Lit. 218. b. Cro. Eliz. 302. 2 Vent. 326.

Reverſion for ten Years, and he thereby would have in Poſſeſſion ſo many Years, as were then to come of his Reverſion; and if he had a leſſer Term in the Reverſion than the Leſſee himſelf had in the Poſſeſſion, it ſhould go to the Benefit of the firſt Termor for twenty Years, who was his Grantor; for the Term in Poſſeſſion is quite gone and drowned in the Reverſion, to the Benefit of thoſe who have the Reverſion thereupon, having Regard to their Eſtate in the Reverſion, and not otherwiſe: to all which *Fenner* agreed; and it appears by the Caſe of *Cook* and *Fountain ſupra*, to be taken for clear Law, that a Leaſe for Ninety-nine Years might be drowned by his Acceptance of a Leaſe from the Reverſioner even for one Year.

*Page 459 *But now, whether a Leaſe for Years in Poſſeſſion may be ſurrendered, ſo as to be merged in a Leaſe in Remainder, be the Term in Remainder greater or leſſer than the Term in Poſſeſſion, ſeems to be no where ſettled; indeed my Lord *Coke* ſays, that if there be a Leaſe to *A.* for twenty Years, Remainder to *B.* for ten Years, and *B.* releaſe all his Right to *A.* that here *A.* hath an Eſtate for thirty Years, for one Chattel cannot drown in another, and Years cannot be conſumed in Years; but whether if *A.* had granted and ſurrendered his Eſtate and Term to *B.* it would have been merged, does not appear; and *Perkins* holds, that if a Leaſe for Life be of Lands, the Remainder to a Stranger for Years, and the Leſſee for Life ſurrenders his Eſtate to him in the Remainder for Years, it cannot take Effect as a Surrender, becauſe an Eſtate for Life cannot drown in an Eſtate for Years; which Reaſon ſeems to prove, that an Eſtate for Life cannot be ſurrendered to or merge in a Reverſion, if it be only for Years: *ideo Quære.*

Co. Lit. 173. b.

Perk. ſ. 589.

3. Of Surrenders in Law, or implied Surrenders: *And herein,*

1. *With regard to Leaſes in Poſſeſſion.*

Bro. Tit. *Leaſes* 14. Dyer 93. pl. 28. Perk. ſ. 617. 3 Leon. 244. 5 Co. 11. Cro. Eliz. 521, 605. 2 Rol. Abr. 495.

As to the Surrender in Law of Leaſes in Poſſeſſion, this is wrought by Acceptance of a new Leaſe from the Reverſioner, either to begin preſently, or at any Diſtance of Time, during the Continuance of the firſt Leaſe; and the Reaſon ſuch Acceptance of a new Leaſe amounts to a Determination and Surrender of the firſt is, becauſe otherwiſe the Leſſee would not have the full Advantage he hath contracted for by Acceptance of the ſecond Leaſe, if the firſt ſhould ſtand in the Way, and conſume any of theſe Years comprized in the ſecond Leaſe; for which Reaſon, and to enable the Leſſor to perfect and make good his ſecond Contract, the Leſſee muſt be ſuppoſed to waive and relinquiſh all Benefit of the firſt; therefore if Leſſee for thirty Years takes a new Leaſe, though but for three Years, and to begin ten Years hence, yet this is preſently a Surrender and a Determination of the whole firſt Term of thirty Years, becauſe thereby he admits the Leſſor's Power to make ſuch Leaſe, which, if the firſt ſhould ſtand in the Way, would be void, becauſe the Leſſee had the Lands already for a Term of a much larger Duration; and though ſuch ſecond Leaſe be made to him *in futuro*; and at Common Law, tho' it were even by Parol, yet it would be a preſent Surrender of the firſt Leaſe, becauſe the Admittance of the Leſſor's Power to make ſuch a Leaſe, which is the Cauſe of the Surrender, is then at the Time of the Contract made for ſuch ſecond Leaſe, and therefore the Operation of it, to cauſe a Surrender of the firſt, muſt be then preſently too, or not at all; and it cannot be a Surrender of the laſt twenty Years, and remain good for the firſt ten Years, becauſe that would make a Fraction and Severance of the Leaſe, which at firſt was intire, and paſſed by one intire Contract,

Contract, and therefore cannot either by any Surrender in Law, or even by any expreſs Surrender, be curtailed and divided; the Conſequence of which is, that ſuch Acceptance of a new Leaſe being a preſent Surrender of the firſt, the Leſſor may enter and take the Profits for the whole thirty Years, ſaving only the three Years compriſed in the ſecond Leaſe. Another Reaſon perhaps of ſuch Surrender may be, becauſe the Leſſor, having already made a Leaſe for thirty Years, cannot, during the Continuance of that Term, make any other Leaſe to transfer the Poſſeſſion; but yet having the Reverſion expectant upon that Term, he may transfer that for any leſſor Time, or to begin at any Diſtance he thinks fit; and then if the ſecond Leaſe be by Deed, it may as well be ſuppoſed to * carry the Reverſion, the Union whereof, with the Poſſeſſion, though for never ſo ſhort a Time, will, as has already appeared, merge the Poſſeſſion; and though the ſecond Leaſe, which may be ſuppoſed to carry the Reverſionary Intereſt, is not to commence till ten Years hence, yet the firſt Leſſee has the Intereſt and Right thereof in him immediately, and then Poſſeſſion and Reverſion being inconſiſtent in one Perſon at one and the ſame Time, the one muſt merge and drown the other. * Page 460

A Huſband, ſeiſed of Lands, made a Leaſe for ninety Years by Indenture, and after enfeoffed certain Perſons, and took an Eſtate to him and his Wife in Tail, and after the Termor took a new Leaſe by Parol of the Huſband for eighteen Years only, to begin preſently; then the Huſband died, and his Wife evicted the Termor; and it was held ſhe lawfully might, for the firſt Leaſe was ſurrendered and drowned in Law by the Acceptance of the ſecond, and then the Wife's Eſtate, by Survivorſhip, came in paramount the ſecond Leaſe; and though the ſecond Leaſe, which was the Cauſe of the Surrender of the firſt, was voidable by the Wife after her Huſband's Death, yet the Surrender of the firſt, wrought by the Acceptance thereof, was abſolute and preſent. Dyer 140. 2 Rol. Abr. 495.

One let Lands to *A.* for Life and twenty Years over, and after let the ſame Lands to *B.* for forty Years, to commence after the Death of *A.* and the End of the ſaid twenty Years; then *B.* intermarries with *A.* and *A.* dies, and *B.* the Huſband hath the Term for twenty Years, yet his Term of forty Years, is not ſurrendered by it, becauſe that was not begun, but was a future *Intereſſe Termini*, to begin wholly after the firſt Leaſe ended; ſo there was no Union at all of the Terms. Bendl. pl. 59. And. 32.

If Leſſee for Years makes a Leaſe to his Leſſor for all but a Day, this is clearly no Surrender of his Leaſe, becauſe the Day diſjoins the Union and prevents the Merger, which would have followed if the Leaſe had been for the whole Term; for then the Leſſor would have had the whole Eſtate intire in him, as he had before he made the Leaſe, and conſequently the Leaſe would be merged and drowned in the Reverſion. 3 Bulſ. 203-4. Rol. Rep. 387. 2 Rol. Abr. 497, 498. 2 Mod. 176.

Leſſee for twenty-one Years took a Leaſe of the ſame Lands for forty Years, to begin immediately after the Death of *J. S.* it was held in this Caſe, that this was not any preſent Surrender of the firſt Term, becauſe *J. S.* might wholly outlive that Term, and then there would be no Union to work a Surrender; and it being *in Equilibrio* in the mean Time, whether he will ſurvive it or not, the firſt Term ſhall not be hurt till that Contingency happens, for if *J. S.* die within the firſt Term, then what remains of it is ſurrendered and gone by the taking place of the ſecond. 4 Leon. 30.

A Man makes a Leaſe for one hundred Years, the Leſſee makes a Leaſe for twenty Years, rendering Rent, with Clauſe of Re-entry, and after grants his Reverſion to the firſt Leſſor, he ſhall neither have the Rent nor Re-entry, becauſe the Reverſion, to which it was annexed, is extinct and gone by way of Surrender; otherwiſe it would be, if one make a Leaſe for Years, rendering Rent, and after grants the Reverſion for Life, Moor 94, 139. *Lord Treaſurer* and *Barton.*

or Years, to which an Attornment is had, and after ſuch Grantee ſurrenders; yet the Grantor ſhall have again the Rent, becauſe it was once a Rent incident to the Reverſion, which by the Surrender is reſtored whole again as it was before.

Plow. 107. Co.Lit. 218. b. If one makes a Leaſe for forty Years, and the Leſſee takes a new Leaſe for twenty Years, upon Condition, that if he does not do ſuch an Act, that the Leaſe ſhall be void; and after he breaks the Condition, whereby the ſecond Leaſe is avoided, yet the Surrender of the firſt continues, for that was abſolute by Acceptance of the ſecond, and the Condition was only annexed to the ſecond Leaſe; ſo if the Leſſor had granted the Reverſion to the Leſſee upon Condition, and after the Condition were broken, yet the Surrender of the Term would continue, becauſe the Condition was annexed only to the Grant of the Reverſion, and moved from the Leſſor as his Terms of the Leſſee's Enjoyment of ſuch Grant; but the Surrender, which is wrought by Acceptance of ſuch Grant, and moves from the Leſſee himſelf, was abſolute; and the Diverſity is, when the Leſſor grants the Reverſion to the Leſſee upon Condition, and when the Leſſee grants or ſurrenders his Eſtate to the Leſſor upon Condition; for a Condition annexed to a Surrender may reveſt the particular Eſtate, becauſe the Surrender itſelf is conditional.

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Dyer 140. pl. 43. 2 Rol. Abr. 495. So if ſuch ſecond Leaſe were by Baron ſeiſed in Right of his Wife, and after the Baron died, and the Feme avoided the ſecond Leaſe, yet the Surrender of the firſt, by Acceptance thereof, is abſolute.

Cro. Eliz. 264. *Brewſter* and Sir *Thomas Parrot.* Leſſee for Life made a Leaſe for Years, rendering Rent, and after ſurrenders to the Leſſor upon Condition, then the Leſſee for Years takes a new Leaſe for Years of the Leſſor, and after the Leſſee for Life performs the Condition, and evicts the Leſſee for Years, who re-enters, and the Leſſee for Life brings Debt for the firſt Rent reſerved; and it was ruled, that it was not maintainable, for the Leaſe out of which it was reſerved is determined and gone; for though the Surrender of the Tenant for Life, which made the Leſſee for Years immediate Tenant to the firſt Leſſor, and ſo enabled him to make ſuch Surrender, was conditional, yet the defeating of the Eſtate for Life, by Performance of the Condition, cannot defeat the Eſtate of the Leſſee for Years, which was abſolute, and well made, and then the Rent reſerved thereon is gone likewiſe.

Cro. Eliz. 873. Moor 636. Keb. 285. If one be Leſſee for Life or Years, and take a new Leaſe of the ſame Lands, though ſuch ſecond Leaſe be void for any Defect in the Making or Execution of it, as if it were for Life, to begin at a future Day, *&c.* yet it is a Surrender of the firſt Leaſe, for the Acceptance of the Indenture in the Contracting and Agreement to have a new Leaſe, makes a Surrender of the firſt Leaſe before the Livery is made; and therefore though that be void, yet it cannot ſet up the firſt Leaſe again, which was before ſurrendered; and ſuch Contract for a new Leaſe is a good Evidence to a Jury of a Surrender.

Hutton 104. *Watt* and *Maidwell.* But if ſuch ſecond Leaſe were void for want of Power in the Leſſor to make it, then notwithſtanding ſuch Admittance of the Leſſee the firſt Leaſe would not be ſurrendered; therefore where one made a Leaſe for forty-one Years by Indenture 14 *Nov.* 1616, to *A.* to commence from the *Annunciation* which ſhould be *Anno* 1619, and after, the ſame Year, by another Indenture bearing Date 3 *Dec.* made a Leaſe to *B.* for ninety-nine Years, to commence from the *Annunciation* then laſt paſt, by virtue whereof *B.* entered and was poſſeſſed, and then the Leſſor by another Indenture 16 *Nov.* 1617, made another Leaſe of the ſame Lands to *A.* to commence from 17 *Nov.* 1619, for forty-one Years, who accepted thereof, and after the Commencement of his Term *A.* entered and was poſſeſſed, and made his Will, and his Executors let to the Plaintiff, *&c.* and the only Queſtion was, if the Acceptance of the ſecond Leaſe by *A.* had determined, diſcharged

charged or extinguiſhed the firſt Leaſe, ſo as to let in the Intermediate Leaſe to *B.* And it was adjudged, that it had not, becauſe by the Leaſe to *B.* for ninety-nine Years, and his Entry, the Leſſor had but a Reverſion, and could not by his Contract after with *A.* give any Intereſt to *A.* and the firſt Leaſe to *A.* was good as a future *Intereſſe Termini*, to take effect in Poſſeſſion when the Time came, and thereby *pro tanto* to defeat the Leaſe for ninety-nine Years to *B.* and if it had not been for the Leaſe to *B.* there had been no Queſtion but that the firſt Leaſe to *A.* had been by ſuch Acceptance of the ſecond Leaſe ſurrendered and gone; but that intermediate Leaſe, being for ſo great a Number of Years, diſables him, during that Time, to contract for any leſſer Number of Years, as the Leaſe for forty-one Years was.

If *A.* lets to *B.* for ten Years, who lets to *C.* for five Years, *C.* cannot ſurrender to *A.* by reaſon of the intermediate Intereſt of *B.* but in ſuch * Caſe *B.* may ſurrender to *A.* and after ſo many Years *C.* likewiſe, becauſe then his Leaſe for five Years is become immediate to the Reverſion of *A.* Perk. ſ. 604. *Page 462

2. *With regard to Leaſes* in Futuro.

Surrenders in Law of Leaſes *in futuro*, or future Intereſts; and theſe can no ways be ſurrendered, for an expreſs Surrender of ſuch future Leaſe or Intereſt is not good; (except as after mentioned) therefore if one makes a Leaſe for Years, to begin at *Michaelmas* next, this future Intereſt cannot by any expreſs Surrender be merged, becauſe there is no Reverſion wherein it may drown; for till the Entry the Leſſee hath no Poſſeſſion, and by Conſequence there can be no Reverſion wherein that Poſſeſſion may drown; but yet if ſuch Leſſee before *Michaelmas* take a new Leaſe for Years, either to begin preſently, or at *Michaelmas*, this is a Surrender in Law of the firſt Leaſe preſently; becauſe thereby he preſently admits the Leſſor's Power to make ſuch Leaſe, which if the firſt Leaſe ſhould ſtand he could not do; and ſince ſuch Leſſee hath contracted for a new Intereſt, inconſiſtent with the firſt, his Acceptance of ſuch new Intereſt waves and diſſolves the firſt, becauſe the Contract whereby it was made was intire, and therefore the whole firſt Leaſe is ſurrendered preſently. Co. Lit. 338. 5 Co. 11. 10 Co. 53. Cro. Eliz. 522, 605. Poph. 9. 2 Rol. Abr. 496.

Leſſee for Years, to begin preſently, cannot till Entry or Waver of the Poſſeſſion by the Leſſor merge or drown the ſame by any expreſs Surrender, becauſe till Entry there is no Reverſion wherein the Poſſeſſion may drown; but if the Leſſee had entered, and aſſigned his Eſtate to another, ſuch Aſſignee before Entry might have ſurrendered his Eſtate to the Leſſor, becauſe by the Entry of the Leſſee the Poſſeſſion was ſevered and divided from the Reverſion, which Poſſeſſion, being by the Aſſignment transferred to the Aſſignee, may without any other Entry be ſurrendered, and drown in the Reverſion. 2 Rol. Abr. 494, 495. a Leaſe in *futuro*.

3. *With regard to the Thing itſelf ſo ſurrendered.*

As to the Nature of the Thing ſurrendered, herein we muſt obſerve, that the Acceptance of a new Leaſe, which will work a Surrender of the firſt, ought to be of ſomething of the ſame Nature and Kind with the firſt; otherwiſe there can be no Surrender of the firſt, becauſe there is no Inconſiſtency but that both may ſtand together; therefore if Leſſee for Years accepts a Grant of a Rent, Common, Eſtovers, Herbage, or the like, for Life or Years, out of the ſame Lands, or if ſuch Leſſee for Years accepts of a Leaſe of the ſame Lands at Will only, all theſe amount to a Surrender Cro. Eliz. 873. Moor 636. Cro. Jac. 84, 177. 2 Rol. Abr. 496.

and

and Determination of the firſt Leaſe, becauſe they admit the Leſſor's Power to deal or contract for the Lands, or a certain Charge out of it, which being inconſiſtent with the Intereſt of the Leſſee under the firſt Leaſe, diſſolve and deſtroy it.

Hutt. 105. Cro. Jac. 84. So where Leſſee for ſixty Years of an Advowſon did, after the Church became void, take a Preſentation to himſelf of the Leſſor, and was admitted, inſtituted and inducted, this was adjudged to be a Surrender of his Leaſe, for by the Acceptation of the Parſonage he thereby gains a new Intereſt for Life in that which was the chief Fruit of his Leaſe, and conſequently ſuch Intereſt, being inconſiſtent with his Intereſt under the firſt Leaſe, amounts to a Determination aud Surrender thereof.

Cro Jac. 177. 2 Rol. Abr. 496. Rol. Rep. 83. Godb. 419, 425. *Page 463 2 Rol. Rep 357, 361. But if Leſſee for Years of a Park accepts a Grant of the Office of Park-keeper of the ſame Park for Life or Years, this is ſaid to have been adjudged no Surrender of the Leaſe for Years, becauſe ſuch Office is collateral to the Land, and not any ways iſſuing out of it; and yet *Coke* and *Doddridge* thought, that whether he had the Office of Park-keeper firſt, or * the Leaſe for Years of the Park itſelf firſt, that the Acceſſion of the other to it would merge and drown the firſt, for the Inconſiſtency that a Man ſhould be Park-keeper to himſelf; *ideo Quære.*

Cro. Jac. 84, 177. Noy 12. 2 Rol. Abr. 496. So where one made a Leaſe for ninety-nine Years of a Manor, and after made the Leſſee Bailiff of the ſame Manor for twenty-one Years, this was adjudged to be no Surrender of his firſt Leaſe: 1. Becauſe the Bailiff, as ſuch, had no Intereſt in the Lands, but an Authority only. 2. Becauſe the Bailiwick was no Part of the Thing demiſed, but of another Nature; for the Bailiff, as ſuch, is a mere Servant, and all he doth is for the Benefit, and in the Name of his Maſter: So if ſuch Leſſee of a Manor were made Surveyor or Steward for Life, this would not determine his Leaſe; becauſe in theſe Capacities he is only a Servant, and acts in the Name of his Maſter, and therefore no Inconſiſtency therein with his having a Leaſe of the Manor.

Dyer 200. pl. 62. Cro. Jac. 177. 2 Rol. Rep. 357. But where Leſſee for Years of a Houſe or Caſtle accepted a Grant of the Cuſtody thereof for Life or Years, this was adjudged a Surrender thereof; becauſe the Cuſtody is of the ſame Thing which was leaſed, and a Man cannot be Keeper to himſelf.

2 Rol. Abr. 498. *Fiſh verſus Campion.* If Leſſee for Years of Lands accepts a new Leaſe by Indenture of Part of the ſame Lands, this is a Surrender for that Part only, and not for the Whole, becauſe there is no Inconſiſtency between the two Leaſes for any more than that Part only which is ſo doubly leaſed; and though a Contract for Years cannot be ſo divided or ſevered, as to be avoided for Part of the Years, and to ſubſiſt for the Reſidue, either, by Act of the Party, or Act in Law, yet the Land itſelf may be divided or ſevered, and he may ſurrender one or two Acres, either expreſly or by Act in Law, and yet the Leaſe for the Reſidue ſtand good and untouched, becauſe here the Contract for the Reſidue remains intire, whereas, in the other Caſe, the Contract for the Whole would be divided, which the Law will not allow.

(T) Leaſes, when determined by cancelling the Deed.

Bro. Tit. *Leaſes* 6, 16. CroCar. 399. Jon. 355. Moor 35. pl. 116. AS to Leaſes for Years, owing their Exiſtence to the Deed or Indenture whereby they are created, ſo that the Cancelling or Deſtruction thereof ſhall deſtroy and avoid the Leaſe, a Diverſity ſeems to be taken in the Books between ſuch Things as lie in Livery, and may be executed by actual

actual Entry, and ſuch Things as lie only in Grant, whereof no actual or manual Occupation can be had; therefore if one had made a Leaſe for Years, at Common Law, of Lands or Houſes by Deed or Indenture, and tear, raſe or cancel it, yet this would not deſtroy the Continuance of the Leaſe itſelf, becauſe ſuch Leaſe of Lands or Houſes lying in Manurance and actual Occupation might at firſt have been made by Parol only, without any Deed or Indenture: And therefore ſuch Deed or Indenture being not of the Eſſence of the Leaſe, the Deſtruction or Cancelling thereof ſhall not defeat or deſtroy the Leaſe or Intereſt of the Leſſee, becauſe his actual Entry into the Land, and Continuance of the viſible Poſſeſſion and Occupation thereof, gives ſufficient Sanction and Notoriety to the Contract, as to the Intereſt of the Leſſee in the Lands and Houſes themſelves, though thereby the Deed itſelf, and all Covenants, which had their Exiſtence only by the Deed, are defeated and avoided; but if the King made a Leaſe of ſuch Lands or Houſes by Letters Patent, which are Matter of Record, if the Letters Patent and Inrolment are deſtroyed or cancelled, the Leaſe itſelf falls to the Ground, becauſe theſe Letters Patent and In-
*rolment, which were of the Eſſence of the Creation and Continuance of *Page 464
the Leaſe, are deſtroyed and loſt: So if a common Perſon had made a Leaſe for Years, or a Grant for Years, of Tithe, Common, Advowſons, or other Things which lay merely in Grant, in ſuch Caſes the Cancelling or Deſtruction of the Deed, whereby they were created and ſubſiſted, muſt neceſſarily deſtroy the Intereſt of the Grantee likewiſe, becauſe ſuch Deed was of the very Eſſence of the Deed or Grant, without which it could not have been made at firſt, nor can ſubſiſt afterwards, ſuch Deed being the only Evidence of the Contract, which could not be executed by any actual Poſſeſſion or manual Occupation; but now, ſince the Statute of Frauds and Perjuries, which makes all Leaſes for above three Years to have only the Force and Effect of Leaſes at Will, unleſs they be in Writing, and ſigned by the Party, *&c.* the Deed or Writing whereby ſuch Leaſe is made ſeems to be of the ſame Eſſence as the Leaſe itſelf; and therefore the Cancelling or Deſtruction of that ſeems to deſtroy and avoid the Leaſe itſelf, becauſe it deſtroys all Evidence allowed by Law for the Support thereof; though in ſuch Caſe, Chancery frequently ſets up the Leaſe again, or decrees the Party to execute a new one for the Reſidue of the Term, which is not againſt the Prohibition of the Act, becauſe there was once a good and effectual Leaſe made purſuant to the Statute.

And though that Statute excepts Leaſes not exceeding the Term of three Years, yet not abſolutely even thoſe; for it goes on, "not exceeding the "Term of three Years from the making thereof, whereupon the Rent re- "ſerved to the Landlord during ſuch Term ſhall amount unto two third "Parts at leaſt of the full improved Value of the Thing demiſed, and "that no Leaſes, Eſtates or Intereſts, either of Freehold or Terms for "Years, or any uncertain Intereſt, not being Copyhold or Cuſtomary In- "tereſt of, in, to or out of any Meſſuages, Manors, Lands, *&c.* ſhall be "aſſigned, granted or ſurrendered, unleſs it be by Deed or Note in Writing, "ſigned by the Party ſo aſſigning, granting or ſurrendering the ſame, or "their Agents thereunto lawfully authorized by Writing, or by Act and "Operation of Law." 29 Car. 2. c. 3. A Leaſe for three Years to commence in *futuro*, by Parol is void by this Statute. 12 Mod. 610. Lord Raym. 736.

LEGA.

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*LEGACIES.

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* (A) What a Legacy properly is.

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A (*a*) Legacy is defined a Gift or Bequeſt of a (*b*) particular Thing by Teſtament, in which an Executor is (*c*) named, or by a Writing in Nature thereof, called a Codicil, and in which no Executor is named. Swinb. 17. Godolph. 271.

(*a*) The Word *Deviſe* is ſpecially appropriated to a Gift of Lands, the Word *Legacy* to a Gift of Chattels; though both are uſed promiſcuouſly. Godolph. 271. (*b*) For if a Man diſpoſe or transfer his whole Right or Eſtate upon another, this, according to the Civil Law, is called *Hæreditas*, and he to whom it is transferred is termed *Hæres*; but by our Law he only is called *Heir*, who ſucceeds to Lands and Tenements. Godolph. 271-2. (*c*) But though a Writing, in which a Perſon expreſſes his Mind to grant ſuch and ſuch Things after his Death, cannot be called a Teſtament, unleſs an Executor is named, yet it is of Force and Effect ſufficient to paſs what he therein declares, and Adminiſtration ſhall be granted, with the ſaid Writing or Codicil annexed, to the next of Kin, and ſuch Adminiſtrator is obliged to obſerve the Directions of ſuch Writing, and pay the Legacies as far as he has Aſſets. *Vide* Tit. *Executors* and *Adminiſtrators*.

A *Donatio Cauſa Mortis* is a Gift *in præſenti*, to take Effect *in futuro* after the Party's Death, and is in Nature of a Legacy, and waits upon the Death of the Teſtator, and is ambulatory and open till his Death, and may therefore be revoked, as a Will may, but has no Dependance on the Will; and therefore by a general Revocation of all former Wills ſeems not to be revoked, without added, and all Gifts, Legacies, &c. But if one juſt before his Death give any Money, or other Goods, to another abſolutely, this was not a *Donatio Cauſa Mortis*, becauſe not revocable; otherwiſe if he had ſaid, *This ſhall be yours, if I die*, or any Thing to that Purpoſe. Swinb. 22. Preced. Chan. 269, 300.

If one by his Will in Writing deviſe a certain Legacy in Money, and afterwards ſays to his Executor, *I have by my Will given ſuch particular Legacies, I would have you increaſe the ſame to ſuch a Sum*, this by the Civil Law is termed *Commiſſum Fidei*, and a good Legacy. Cro. Jac. 345. 6. 2 Bulſ. 207. Godb. 246. but *vide* now the Statute 29 Car. 2. c. 3. and Tit. *Wills and Teſtaments* †.

† Nuncupative Wills, where the Eſtate amounts to 30*l.* muſt be atteſted by three Witneſſes and made in the Teſtator's laſt Sickneſs, &c. 29 Car. 2. c. 3. ſ. 19. But Soldiers and Mariners may diſpoſe of their Eſtates as before the Act. *Id.* ſ. 23.

If a Man covenants with *J. S.* to pay him 20*l.* and afterwards by Will he deviſes to him 20*l.* in Diſcharge of the ſaid Covenant, this is not a Legacy ſuable in the Spiritual Court, but remains ſtill a Debt, recoverable at Common Law. 2 Leon. 119.

But if *A.* covenants with *J. S.* that he will pay 20*l.* a-piece to *B. C.* and *D.* and afterwards he deviſes 20*l.* a-piece to *B. C.* and *D.* in Diſcharge of this Covenant, theſe are good Legacies, and recoverable in the Spiritual Court, 2 Leon. 119. *Davies* and *Percie's* Caſe; & *vide infra* Letter (M).

Court, the Covenant in this Caſe being with a Stranger, and therefore *B. C.* and *D.* have no Remedy, but by applying as Legatees.

(B) Where a Legacy ſhall be ſaid to be well given: And herein,

1. What Words create a good Bequeſt.

Godolph. 281. 2 Vern. 467. HERE we muſt obſerve, that although in Grants and Deeds of Gift the Law requires a ſet Form of Words, yet in laſt Wills and Teſtaments, which are preſumed to be made at the Time when the Teſtator is *Inops Concilii*, the Law regards chiefly the Intention of the Teſtator, *Page 467 * and therefore any Words, which manifeſt his Intention to create or give a Legacy, will be ſufficient for that Purpoſe.

Godolph. 281. As if a Man by his Will ſays, *I do give, bequeath, deviſe, order or appoint to be paid, given or delivered*; or *My Will, Pleaſure or Deſire is, that he ſhall have and receive, or keep or retain*; or *I diſpoſe, or aſſign, or leave ſuch a Thing to ſuch a one*; or *Let ſuch a Perſon have ſuch a Thing*; theſe, or the like Words, are ſufficient to create a good Bequeſt.

Godolph. 282. Where it is ſaid, So if the Teſtator ſays, *I depute ſuch a Thing to* A. B. or *I aſſign ſuch a Thing to* C. D. theſe are good Bequeſts or Legacies.

that a Legacy may be given by Signs, Becks, or Nods, by the Heads, Hands, or Eyes, or by ſhewing a pleaſed or diſpleaſed Countenance, or by other Motion of the Body; becauſe the Law regards more the Meaning and Intention, than the Words of the Teſtator. Godolph. 282-3.

Godolph. 282. So if a Man by Will gives 100*l.* beſides the Cloak, *&c.* this is a good Bequeſt of the Cloak, *&c.* as well as of the 100*l.*

Godolph. 282. So if a Man ſays, *Out of the* 100l. *which I bequeathed* A. *I give* B. 50l. this is a good Bequeſt of the 50*l.* to *B.* becauſe only a falſe Demonſtration in an immaterial Circumſtance, which ſhall not vitiate the Legacy; but in this Caſe *A.* takes nothing; for Words of Diminution ſhall never be conſtrued to give a Legacy by Implication.

Godolph. 282. But if the Demonſtration be totally falſe, as if the Teſtator ſays, *I bequeath to* A. *the* 100l. *which I have in my Cheſt*, and there is not any Money in the Cheſt, the Legacy is void.

Godolph. 283. If the Teſtator ſays thus, *If my Son* A. *marries* B. *let not my Executor give him* 100l. theſe Words, on *A.*'s not marrying *B.* are ſaid to be ſufficient to give him the 100*l.*

Godolph. 284. If a Legacy be given by the Teſtator to the Son of one who is indebted to him, and the Teſtator adds theſe Words, *I ſhould or would leave him more, if his Father had paid me what he owes me*, it is held, that if afterwards that Son happens to be his Father's Executor, he is by theſe Words freed from that Debt, which his Father owed the Teſtator.

2 Vern. 467. If there be a Deviſe of a Perſonal Thing to *A.* for Life, directing him at his Death to give it to *B.* this amounts to a Deviſe of the Uſe of it only to *A.* for Life, Remainder to *B.*

2 Vern. 181. *Robinſon* ver. *Duſgale*; & *vide* Hob. 9. *A.* deviſes his Land to *B.* in Fee, paying 400*l.* whereof 200*l.* to be at the Diſpoſal of his Wife, in and by her laſt Will and Teſtament, to whom ſhe ſhall think fit to give the ſame; theſe Words veſt an abſolute Intereſt in the Wife, ſo that though ſhe dies inteſtate, her Adminiſtrator ſhall have the 200*l.*

If

If a Man gives Legacies to his Children, to be paid at Twenty-one or Marriage, and if any of them die before Twenty-one or Marriage, the Legacy of ſuch Child to be diſpoſed to two or more of the Children then living, in ſuch Manner as his Wife (whom he made Executrix) ſhould think fit, and one of the Children dies under Age, and unmarried, the Mother (*a*) may appoint ſuch Legacy to any one of the other Children, and it will be good. 2 Vern. 515. *Thomas* and *Thomas.*

(*a*) But if an Executor has a general Power to diſtribute a Sum of Money amongſt Children at Diſcretion, and he makes an unreaſonable or indiſcreet Diſpoſition, it will be controuled in a Court of Equity. 2 Vern. 513.—As where a Man having two Daughters, one by a former Wife, and another by a ſecond Wife, deviſed his Eſtate to his Wife, to be diſtributed between his Daughters as his Wife ſhould think fit, and ſhe having given 1000*l.* to her own Daughter, and but 100*l.* to the other, the Court decreed an equal Diſtribution. Vern. 355. *Cragrave* and *Perroſt*; & *vide* 2 Vern. 421. S. P.

If a Man deviſe 40*l.* to be paid *J. S.* by him to be diſpoſed of in ſuch Manner as the Teſtator ſhould, by a private Note, acquaint him with, and dies without ſuch Appointment, this is ſaid to be a good Bequeſt to the Party. 2 Chan. Ca. 198. *Martin* and *Clerk.*

But it has been held, if *A.* by Will gives a Houſe at *F.* to *B.* his Wife for Life, and declares that he will diſpoſe of the Goods and Furniture in that Houſe, after the Death of *B.* by a Codicil, and makes *B.* reſiduary Legatee of * all the *Reſidue of his perſonal Eſtate whatſoever not before diſpoſed of, or reſerved to be diſpoſed of by his Codicil*, then makes two Codicils, but takes no Notice of the Goods and Furniture in the Houſe at *F.* and makes his Wife one of his Executors, that the Wife ſhould not have the abſolute Intereſt in the Goods and Furniture in the Houſe at *F.* but that it ſhould be diſtributed after her Death as an undiſpoſed Intereſt, and ſhe to have her Widow's Part thereof only. 3 P. Will. 40. Trin. 1730. *Davers* and *Dewes & al'*, decreed. * Page 468

If one deviſe his Land for Payment of his Debts and Legacies, and deviſes 400*l.* a-piece to two of his Siſters, and to his third as much as his Executor ſhall think fit; the third ſhall have 400*l.* alſo, and be made equal to her other Siſters, if the Eſtate will hold out. 2 Vern. 153. *Wareham* and *Brown.*

2. What ſhall be a ſufficient Deſcription of the Perſon to take.

It ſeems agreed, that if a Man deviſes Legacies to all his Children and Grand-children, that this extends only to thoſe who were *in eſſe* at the Time when the Will was made, for then the Will ſpeaks, and none born after are to be let in, unleſs there had been future Words in the Will, *to all his Children or Grand-children which ſhould be born or be living at his Death.* Dyer 177. Co. Lit. 112. b. Preced. Chan. 470. But in 2 Vern. 105. where a Man deviſed 20*l.* a-piece to all the Children of his Siſter; it is there ſaid to have been decreed, that a Child born after the Will, and before the Death of the Teſtator, ſhould take, the Word *Children* comprehending all.

If a Man deviſe the Surplus of his Eſtate to his Grand-children living at his Death, Grand-children born after his Deceaſe ſhall not take it; for if he had ſo intended it, he would not have reſtrained it to Children living at his Death. 2 Vern. 710. *Muſgrave* ver. *Parry.*

If one deviſe the Surplus of his Perſonal Eſtate to the Children of *A.* and *B.* and neither of them has a Child at the Time of making the Will, or the Death of the Teſtator, the Deviſe is executory, and ſhall extend to any Children that *A.* and *B.* ſhall afterwards have; and the Children of each ſhall take *per Capita*, and not *per Stirpes*, they claiming in their own Right, and not as repreſenting their Parents. 2 Vern. 405. *Weld* and *Bradbury.*

If *A.* deviſe 1500*l.* in Truſt for the Children of *B.* and *B.* has only one Child, and ſeveral Grand-children, the Child only ſhall take, 2 Vern. 106.

and

and the Grand-children ſhall not come in for Shares; but if *B.* had not a Child living, the Grand-children might have taken by the Name of Children.

2 Vern. 431. *Nevil* and *Nevil*, decreed. If a Legacy of 500*l.* is given to the eldeſt Son of *A.* to be begotten, to place him out Apprentice, and *A.* has a Son born after the Teſtator's Death, the Legacy ſhall be paid him though not born in the Teſtator's Life, and though it was given to him for a particular Purpoſe.

3 Chan. Rep. 1. *Bretton* ver. *Bretton*. If Money is deviſed to younger Children, where there are divers Daughters, and a Son, who by Birth is a younger Child, but is Heir at Law to a conſiderable Eſtate of Inheritance, he ſhall not be conſidered as a younger Child, ſo as to take by the Deviſe.

Vern. 35. *Danvers* ver. Earl of *Clarendon*. A Man by Will deviſed all his Goods in ſuch a Houſe to *G.* for Life, and after his Deceaſe to the Heir of *J. S.* and the Point was, whether he that was Heir of *J. S.* ſhould take theſe Goods as Deviſee, and the ſaid Goods to go to his Executors, although ſuch Heir die in the Life-time of *G.* or whether he who was Heir to *J. S.* at the Time of *G.*'s Death ſhould have them; and though it was urged, that thoſe Goods were only the Furniture of the Capital Houſe; yet my Lord Chancellor was of Opinion, that they abſolutely veſt in him that was Heir of *J. S.* at the Time of the Death of *J. S.* and decreed accordingly.

2 Vern. 546. *Page 469 The Duke of *Bolton*, by Will, deviſed in theſe Words, *viz.* Item, *I give and bequeath unto ſuch of my Servants, as ſhall be living with me at the Time of my Death, one Years Wages*; *per* Lord Keeper, Stewards of Courts, and ſuch who are not obliged to ſpend their whole Time with their Maſter, but may alſo ſerve any other Maſter, are not Servants within the Intention of the Will; but I will not narrow it to ſuch Servants only that lived in the Teſtator's Houſe, or had Diet from him.

2 Vern. 381. *Jones* and *Beale*. *A.* gave Legacies of 15*l.* a-piece to each of his Relations of his Father and Mother's Side, and gave the Surplus of his perſonal Eſtate to *B.* and made *C.* his Executor; the Executor paid 15*l.* to the Teſtator's Couſin-German, and 15*l.* a-piece to her four Children; and the Court allowed the Payment to the Children, and would not reſtrain the Deviſe to the Relations within the Statute of Diſtributions.

Preced. Chan. 401. *Reach* ver. *Hammond*. But notwithſtanding this Caſe, it ſeems the eſtabliſhed Doctrine of the Court of Chancery, to make the Statute of Diſtributions the Rule and Meaſure of ſuch general Deviſe; as where *A.* deviſed all his Real and Perſonal Eſtate for the Uſe of his Relations, without ſpecifying any in particular, or uſing any other Words; and it was agreed to be the Rule of the Court, in the Conſtruction of ſuch Deviſes to Relations, that thoſe, who by the Statute of Diſtributions would be intitled to the perſonal Eſtate in caſe he died inteſtate, ſhould, upon ſuch general Deviſes, be let into the ſame Proportions only; and my Lord Chancellor ſaid, he thought it the beſt Meaſure for ſetting Bounds to ſuch general Words, and that it had been often ruled accordingly.

3. What ſhall be a ſufficient Deſcription of the Thing given, and what ſhall be ſaid to be bequeathed.

Godolph. 272. *Godolphin* ſays, that in order to find out the Teſtator's Meaning, with reſpect to the Things he intended to give away, it is neceſſary chiefly to regard the (*a*) Time when the Will is made; for it is a Preſumption of Law that the Teſtator's Mind was not altered, unleſs it otherwiſe appear by ſufficient Evidence; therefore, ſays he, if a Father bequeath to his Son (who

(*a*) But in another Place he ſays, that this Rule muſt be underſtood as the Teſtator makes uſe of Words in the preſent Tenſe or future Tenſe; and that if it be doubtful, whether they refer to the Time paſt or the Time to come, they ſhall be underſtood to relate unto the Time that is to come; and that therefore if a Man deviſe his Corn indefinitely, it ſhall be underſtood all ſuch as he hath at the Time of his Death. Godolph. 273.

(who is a Student) all his Books, and afterwards buys other Books, the Books ſo bought paſs not.

But it ſeems clear, both by our Law and the Civil Law, that a Deviſe of all a Man's perſonal Eſtate paſſes whatever he died poſſeſſed of, and not that only which he had at the Time of making his Will; for the perſonal Eſtate being tranſient and fleeting, and, from the Neceſſity of Dealing and Traffic, liable to daily Alterations: if the contrary Reſolution ſhould prevail, it would put Men under the Difficulty of making a new Will every Day, and create the greateſt Perplexity imaginable. Swinb. 418. Salk. 237. pl. 16. & *vide* Tit. *Deviſes* Letters (B) and (H).

Alſo it hath been determined in Chancery, that if a Man deviſes to his Wife all his Perſonal Eſtate, at a Place called *W.* all his Perſonal Eſtate, as Coaches, Horſes, *&c.* there at the Time of his Death, ſhall paſs, though not there at the Time of making the Will, the perſonal Eſtate being fluctuating and varying until the Time of the Teſtator's Death. 2 Vern. 688.

But where a Man deviſed to his Niece all his Goods, Chattels, Houſhold-Stuff, Furniture, and other Things, which then were or ſhould be in his Houſe at the Time of his Death; and ſome Time after died, leaving about 265*l.* in ready Money in the Houſe; it was decreed, that this ready Money did not paſs, for by the Words *other Things*, ſhall be intended Things of like Nature and Species of thoſe before-mentioned. Abr. Eq. 201. *Trafford* and *Berrige*.

* If a Man deviſe his Houſe, and all his Goods and Furniture therein, to his Wife for Life, and after her Deceaſe, to his Son *R.* and his Heirs, except his Pictures, which he gives to his Sons *A.* and *B.* and he has Pictures in Boxes as well as thoſe hung up in the Houſe, and likewiſe Pictures at his Death, which he had not at the Time of making his Will; and it is proved in the Cauſe that he had Skill in Pictures, and frequently bought Pictures and ſold them again; the Exception of the Pictures ſhall extend as well to the Pictures hung up as Furniture as to thoſe in Boxes, and as well to thoſe in the Houſe at the Time of the Will, as to thoſe bought in after the Will made. *Page 470 2 Vern. 538. *Gayre* and *Gayre*.

(C) What ſhall be an Ademption or Extinguiſhment of a Legacy.

Swinburne diſtinguiſhes between the Ademption and Tranſlation of a Legacy; the firſt, he ſays, is the Taking away a Legacy which was before bequeathed, which may be done by an expreſs Revocation thereof, or it may be done ſecretly and by Implication, as by giving away or voluntarily alienating the Thing deviſed. Tranſlation of a Legacy is the Beſtowing of the ſame upon another, which is likewiſe an Ademption; and therefore there may be an Ademption without a Tranſlation, but there can be no Tranſlation without an Ademption. Swinb. 522, 526.

The Ademption of a Legacy is no more to be preſumed than the Revocation of the Teſtament, unleſs it be proved; and therefore if the Teſtator bequeath all the Corn in his Barn, and lives after the making of his Will till the Corn is ſpent, and other Corn is put in the Place thereof, this ſpending of the Corn is no Ademption of the Legacy, and therefore the Legatee ſhall have ſuch Corn as is found in the Barn when the Teſtator dieth, unleſs the Corn found in the Barn at the Death of the Teſtator be greater in Quantity than was the Corn at the Time of the Will made, for ſo much is due, but not a greater Quantity than was the firſt. Swinb. 522.

So if the Teſtator bequeath a Ship, and afterwards, by Piece-meal, repairs and renews the ſame, ſo that there remaineth nothing of the old Ship but Swinb. 522.

but only the Bottom Tree, here is no Ademption of the Legacy, but the Legatee may recover the whole Ship.

Swinb. 523, 524. If a Man bequeath a Houſe, which afterwards he voluntarily pulls down, or which is blown down by the Wind, or is conſumed by Fire, and afterwards he erects a new Houſe where the old Houſe ſtood; *Swinburn* is of Opinion, that the Legatee in neither of theſe Caſes can have the new Houſe; it being a general Rule of the Civil Law, that a Houſe bequeathed being deſtroyed, if the Teſtator build another in the ſame Place, the Legacy is extinguiſhed, unleſs the Meaning of the Teſtator were otherwiſe.

Swinb. 523. But if the Teſtator do bequeath an Houſe, and afterwards, by Piecemeal, repair the ſame, ſo that there is no Part of the old Matter or Stuff remaining, the Will of the Teſtator is not hereby preſumed to be changed; and therefore the Legatee may recover the Houſe ſo repaired, for it is deemed to be the ſame Houſe ſtill in Law.

Swinb. 524. Alſo if the Teſtator, being conſtrained by Neceſſity, as for the Payment of his Debts, ſupplying himſelf or his Family with Food and Neceſſaries, *&c.* alienate the Thing bequeathed; this is no Ademption of the Legacy, and therefore is the Executor bound to redeem the ſame, or to pay the juſt Value to the Legatee.

*Page 471 Swinb. 525. * So if the Thing bequeathed be not fully alienated, as if it be pledged or pawned, the Legacy is not thereby extinguiſhed; and therefore the Executor in this Caſe is bound to redeem the ſame, and to reſtore it to the Legatee, or to pay the Price thereof, if he ſuffer it to be forfeited.

Swinb. 528. If a Legacy be given to one Perſon, and afterwards in the (*a*) ſame Will the ſame Thing is given to another, this is an Ademption of the Legacy as to the firſt Perſon, for the utmoſt Conſtancy ſhall be preſumed in the Teſtator, till the contrary appears; and therefore in this Caſe they ſhall divide the Legacy between them †.

(*a*) So if by Teſtament he had given it to one Perſon and by Codicil to another, this would be no Ademption, unleſs it appeared the Teſtator's Intention that it ſhould be ſo, as if he had ſaid, *that which I did bequeath to* A. *I give* B. theſe or the like Words wholly take away the Legacy. Swinb. 529.——† If it was a ſpecific Thing that was bequeathed, ſhall not the ſecond Deviſee take, as the laſt Words in a Will are to govern?

Raym. 335. *Pawlet's* Caſe. If a Man bequeath a Legacy in theſe Words, *viz. I give to my Niece* A. 500*l.* *which my Siſter* B. *hath now in her Hands of mine, as by Bond appears*; and after the Money is paid, and ten Years after Payment thereof the Teſtator dies, yet the Legacy is good, though the Security is altered; for by the Words no more is intended but that the Legacy ſhould be as ſure as he could make it.

Abr. Eq. 302. *Orme* and *Smith.* 2 Vern. 681. S. C. So where a Man deviſed in the following Manner, *viz. I give and deviſe to* A. *my good and only Uncle, the Sum of* 500*l.* that is to ſay, that Bond and Judgment he gave me for 400*l.* and 100*l.* in Money, and makes his Wife Executrix, and deſires her to be kind and aſſiſting to his Uncle, that he might live as became a Gentleman; the Uncle ſome Time after ſold an Eſtate, and with the Money paid off 320*l.* and took up the Bond, and had the Judgment vacated, and gave a new Bond for the remaining 80*l.* and ſome Time after the Teſtator died, and the Uncle having Notice of this Will, brought his Bill for this Legacy of 500*l.* For the Executrix it was inſiſted, that this was a ſpecific Legacy of that particular Bond and Judgment, and they being cancelled and altered before the Teſtator's Death, was an Ademption of the Legacy as to ſo much; and beſides, they urged that this Payment of the 320*l.* amounted to a Releaſe, ſo that he could only be intitled to the Reſidue. On the other Side it was inſiſted, that the Diverſity is where the Money is voluntarily paid in by the Perſon who owes it, and where the Teſtator ſues for and recovers it; in the firſt Caſe, the Legacy continues ſtill good, becauſe the Money only comes home to the perſonal Eſtate; but in the other Caſe, the Teſtator ſuing for it, ſhews that he intended

tended to make it his own, and therefore would not leave it to the Legatee to recover; and the Juſtice of the Uncle ought not to prevent the Affection of the Nephew; and no Alteration of his Intention appeared. My Lord Keeper was clear of the ſame Opinion, and decreed the 80*l.* Bond to be delivered up, and the Reſidue of the Legacy to be paid.

One by Will deviſed thus: *Item I give and bequeath to my Grand-daughter* Mary Ford (*the Plaintiff*) *the Sum of* 40l. *being Part of a Debt due and owing to me for Rent from* G. M. *ſhe allowing what Charges ſhall be expended in getting the ſame. Item, I give and bequeath unto my Grandſons* A. *and* B. *the Reſt and Reſidue of what is due and owing to me from the ſaid* G. M. *which is about* 40l. *to be equally divided between them, they allowing Charges as aforeſaid.* After the Teſtator received the whole Debt owing for Rent from *G. M.* and for the Plaintiff it was inſiſted, that there was a Difference between a ſpecific and a pecuniary Legacy; that though the diſpoſing of a ſpecific Legacy might be an Ademption of it, yet this being a pecuniary Legacy, the paying the Money to the Teſtator would not be a Loſs of it. On the other Side it was inſiſted, the Difference between a voluntary and compulſory Payment, that though the firſt was no Ademption, yet the ſecond was, and that the Teſtator obliged *G. M.* to pay in the Money. But my Lord Chancellor was of Opinion, that there was no Foundation for the * Difference taken in the Books between a voluntary and compulſory Payment, for the latter might be with an Intent to ſecure the Legacy at all Events, and decreed the Plaintiff the 40*l.* Legacy. Abr. Eq. 302. *Ford* and *Fleming*. *Page 472

If Teſtator bequeath 100*l.* to a Man, and in the ſame Teſtament gives him 100*l.* without taking notice of the firſt 100*l.* the ſecond Diſpoſition is underſtood to be but a Repetition of the former, and all but one Legacy, unleſs it appears that the Teſtator intended him 200*l.* in all. Swinb. 530.

A. deviſes to his younger Son 750*l.* and afterwards buys him a Cornet of Horſe's Commiſſion, and paid 650*l.* for it; and it was proved to be intended this 650*l.* ſhould be diſcounted out of the Legacy, and that he would ſtrike ſo much out of his Will as ſoon as the Accounts came from *London* to him, but died before they came, without altering his Will; and it was held, that this Money paid for the Commiſſion ſhould go in Diminution of the Legacy, and be taken in Payment and Satisfaction for ſo much. Preced. Chan. 263. *Hoſkins* and *Hoſkins*.

If *A.* by Will deviſe 200*l.* to his Daughter, and afterwards on her Marriage gives her more than that Sum, this is an Extinguiſhment of the Legacy. 2 Vern 115. *Jenkins* and *Powel*, and there the Caſe of *Elkin Head* cited, where Payment in the Teſtator's Life-time was adjudged a Satisfaction of the like Sum deviſed.

So where the Teſtator directed that 400*l.* ſhould be laid out in finiſhing a Houſe which he was building; and living, after the making of the Will, to expend a greater Sum in that Service, it was agreed againſt the Heir at Law, that this was an Extinguiſhment and Satisfaction of the 400*l.* although the Houſe was not compleatly finiſhed at the Teſtator's Death. Vern. 95. *Huſbands* ver. *Huſbands*.

(D) Where a Legacy ſhall be preſumed to be a Satisfaction of a Debt or Duty owing from the Teſtator.

THE Intention of the Teſtator being the prevailing Rule to go by in the Conſtruction of Wills, it has been from thence eſtabliſhed as Doctrine, that wherever a Perſon, by his Will, gives a Legacy as great Abr. Eq. 203. Salk. 155. pl. 5. 2 Salk. 508.

or

2 Vern. 177, 258, 298. or greater than the Debt he owes to the Legatee, that ſuch Legacy ſhould be a Satisfaction of the Debt, on the Preſumption that a Man muſt be intended juſt before he is bountiful, and that his Intent is to pay a Debt, and not to give a Legacy.

2 Vern. 111. *Bloyet* and *Bloyes* cited to have been adjudged. As where a Man by Marriage Settlement provides 400*l.* for Daughters, and having two Daughters, by Will gives them 200*l.* a-piece for their Portions, without taking notice of the Settlement; and it was held, that the 200*l.* a-piece ſhould be a Satisfaction of the Portion by the Settlement.

2 Vern. 498. Preced. Chan. 240. S. C. *Brown* ver. *Dawſon.* So where a Man had prevailed on his Wife to join in ſelling 7*l.* 10*s.* *per Ann.* of her Jointure, and after 6*l.* 10*s.* *per Ann.* more, and having given two ſeveral Notes, that his Executor ſhould pay her the ſaid two ſeveral Sums during Life, he after makes his Will, and thereby gives her 14*l.* *per Ann.* during Life, out of certain Lands; and this was held to be a Satisfaction of the Notes.

*Page 473 Preced. Chan. 138. *Bromley* ver. *Jeffereys.* * So where one ſettles his Eſtate on Truſtees, to be ſold for Payment of his Debts, with Power of Revocation; then he marries a Daughter, gives her a Portion, and covenants that the Huſband ſhall have the Eſtate 1500*l.* cheaper than any other; after be, by Will, revokes the Settlement, gives the Huſband 1500*l.* and dies; and this Legacy was held to be in Satisfaction of the 1500*l.* ſecured by the Settlement.

2 Vern. 555. *Herne* ver. *Herne.* So if *A.* by Marriage-Articles, agrees to leave his Wife 800*l.* and her Jewels, *&c.* but it is declared, that, notwithſtanding the Articles, ſhe ſhould not be debarred of any Thing he ſhould give her by Will; and *A.* by Will, makes a Diſpoſition of his whole Eſtate among his Children, *&c.* and gives his Wife 1000*l.* The Wife muſt wave the Articles, or the Will, for ſhe cannot have both; for his making a Diſpoſition of the whole Eſtate, ſhews that he intended that every Part ſhould be performed.

2 Vern. 556. So where a Child, intitled by his Father's Marriage-Articles to a Share of his Father's Perſonal Eſtate, has a Legacy given to him by the Will of his Father; and it was held, that, if he will have the Legacy, he muſt wave the Benefit of the Articles.

Trin. 1729. *Nicholls* ver. *Nicholls.* So where a Freeman of *London* made his Will, and deviſed Legacies to his Children more than their Orphanage Parts would amount to, without taking any Notice whatſoever of the Cuſtom; and it was held by the Maſter of the Rolls that theſe Legacies ſhould be a Satisfaction of their Orphanage Shares, to which they were intitled by the Cuſtom in the Nature of a Debt; and that the Legacies ſhould not come out of the Teſtamentary or dead Man's Part, becauſe it is held in this Court, that they ſhall not take both by the Will and the Cuſtom too; but where ſuch Legacies are leſs than their Orphanage Shares, whether they ſhall be *pro tanto* a Satisfaction, he was in great Doubt, and ſent it to the City to certify, though he ſeemed rather to think they ſhould in that Caſe take both, eſpecially if none of the Deviſees in the Will were thereby diſappointed.

But though the Caſes on this Head have prevailed thus far on the Circumſtances attending them, and the (*a*) Intention of the Teſtator, yet, as a Legacy is a Gift of Gratuity, it is to receive the moſt favourable Conſtruction; and therefore if it be leſs than the Sum due, payable on a (*b*) Contingency or future Day, on theſe and the like Circumſtances it will be conſtrued an additional Bounty, and not a Satisfaction.

(*a*) That in all theſe Caſes the Intention of the Party ought to be the Rule. Salk. 508.

(*b*) Though the Contingency does actually happen, and the Legacy thereby become due, yet it ſhall not go in Satisfaction of the Debt, becauſe a Debt which is certain, ſhall not be merged or loſt by an uncertain and contingent Recompence; for whatever is to be a Satisfaction of a Debt ought to be ſo in its Creation, and at the very Time it is given, which ſuch contingent Proviſion is not. Preced. Chan. 298.

2 Vern. 478. *Atkinſon* ver. *Webb.* As if *A.* give a Bond to *B.* her Servant, to pay her 20*l.* *per Ann.* Quarterly, for her Life, free from Taxes; and by Will, without taking Notice of

of the Bond, gives 20*l. per Ann.* for her Life, payable Half-yearly, but not ſaid free of Taxes; *B.* ſhall have both the Annuities, for that, by the Will, not being ſo advantageous as the firſt, cannot be preſumed a Satisfaction. Preced. Chan. 236. S. C. and the Reaſons there given, becauſe the ſecond Annuity being payable Half-yearly, and charged on Land, by which it will be liable to Taxes, cannot be ſo advantageous.

So where *A.* on his Marriage covenanted to purchaſe and ſettle a Jointure of 20*l. per Ann.* on his intended Wife, and if he died before ſuch Purchaſe or Settlement made, ſhe ſhould have 300*l.* out of his Eſtate for her own Uſe: The Marriage was had, and the Huſband died before any ſuch Settlement was made; but by his Will he deviſed to his Wife 330*l.* for her Life, with Power to diſpoſe of 30*l.* Part thereof, at her Death; and it was held, 1. That ſhe had a right to 300*l.* and Intereſt, and that the Executor could not now be at Liberty to ſettle 20*l. per Ann.* as the Teſtator * might have done. 2. That ſhe ſhould have the 330*l.* as an additional Bounty and Proviſion for the Wife. 2 Vern. 505. *Perry* ver. *Perry*. *Page 474

By a Marriage Settlement, in caſe of Failure of Iſſue Male, Remainder of the Eſtate was limited to Daughters, until they ſhould raiſe 3000*l.* for Portions; there was Iſſue of the Marriage a Son and two Daughters; the Father deviſed 700*l.* a-piece to the Daughters, and died; the Son afterwards made his Will and deviſed to the Daughters to the Amount of 7000*l.* without any Mention of its being in Lieu or Satisfaction of any Thing due to them, and gave his Land to his Heirs Male, and died without Iſſue. And it was held clearly that the Father's Legacy could be no Satisfaction, not being adequate in Value; beſides the Father had a Son then living, and it was altogether contingent and uncertain whether 3000*l.* would ever ariſe and become payable or not, and therefore it was but reaſonable that the Father ſhould make ſome certain Proviſion for his Daughters; but as to the Son's Legacy of 7000*l.* it was by two Lords Commiſſioners, againſt *Rawlinſon*, decreed a Satisfaction; but upon an Appeal to the Lords the Decree was reverſed, for the Daughters being Heirs at Law, and diſinherited, there was no Ground for the Court to make a ſtrained Conſtruction to their Prejudice, in favour of a voluntary Deviſee. 2 Vern. 258. *Duffield* and *Smith*.

H. owed to his Niece *A.* 100*l.* by Bond, and having two other Nieces *B.* and *C.* makes his Will, and bequeaths 300*l.* to his Niece *A.* and to his two other Nieces 200*l.* a-piece; after that he borrowed another 100*l.* of his Niece *A.* and being indebted to her in 200*l.* died; and to prove that the 300*l.* ſhall go in Satisfaction of the Debt, it was inſiſted on as a Rule in Equity, that where a Teſtator, being indebted, gives his Debtee a Legacy greater than his Debt, it ſhall go in Satisfaction; for a Man ſhall be intended to be juſt before he is kind; otherwiſe where a Legacy is leſs, for that is neither to be juſt nor kind, and ſhall not be taken to go in Satisfaction of any Part. But *per Cowper*, Lord Chancellor, it might be as good Equity to conſtrue him to be both juſt and kind, if he intended to be both; that if any Part of this 300*l.* be applied to the Payment of the Debt, as for ſo much it is not a Gift; whereas a Legacy muſt be taken to be a Gift or Gratuity, and there being Aſſets, and ſome (*a*) Proofs of the Teſtator's greater Kindneſs to *A.* than his other Nieces, his Lordſhip decreed her the whole 300*l.* over and above her Debt. Salk. 155. pl. 5. *Cuthbert* ver. *Peacock*. 2 Vern. 593. S. C.

(*a*) But whether any Parol Evidence ought to be admitted in thoſe Caſes, *vide* Tit. *Evidence* ‡.

If

‡ Words of a Will applicable to two Perſons, or Things, may be aſcertained by Averment; as if a Deviſe be to *John* his Son, and he has two Sons of that Name. *Vide* Eq. Ca. Abr. 1. v. 212, 231, 2. 5 Co. 68. 2 P. W. 137.—If the Words of a Will are not effectual, they ſhall not be ſupplied by Proof. 2 Com. Dig. 137.—But a Deviſe may be explained by Witneſſes; as, if a Man deviſes his Manor of *D.* and he has two Manors of that Name. 5 Co. 68. 2 P. W. 137.—If the Deviſe is *to the right Heirs of his*

Preced. Chan. 514. If a Legacy of 100*l.* is given to *A.* by *J. S.* and another of 50*l.* by *J. D.* and of both Wills *A.*'s Father is made Executor, who having by a Marriage Settlement Power to charge his Land with 2000*l.* for Portions, deviſes 1000*l.* equally between his Daughters; by deviſing it to them equally, according to the Marriage Settlement, he ſhews that he intended them an equal Benefit, and therefore the 1000*l.* ſhall not be in Satisfaction of the Legacies given *A.*

2 Salk. 508. pl. 4. *Cranmer's* Caſe. *A.* indebted to *B.* 50*l.* left him a Legacy of 500*l.* and made him Executor, and after the making of his Will borrowed 150*l.* more of him; and the Maſter of the Rolls held, that the Legacy ſhould be a Satisfaction of both Debts: But *Harcourt*, Lord Chancellor, reverſed his Decree, and held, that a Court of Equity ought not to hinder a Man from diſpoſing of his own as he pleaſes; and when he ſays he gives a Legacy, it cannot contradict him, and ſay he pays a Debt; and it was alſo held in thoſe Caſes, if a Legacy be leſs, it ſhall not be a Satisfaction. So if the Thing given be of a different Nature, as Land, it ſhall not go in Satisfaction of Money; ſo if the Legacy be upon Condition, for by the Breach he may be a Loſer, whereas the Will intended it for his Benefit.

Trin. 1729. *Crompton* ver. *Sale.* *A.* By Will, gave ſix ſeveral Annuities for Lives, three of 10*l.* each, and three of 5*l.* each, to be paid out of his Perſonal Eſtate, and gave all the Reſt of his Real and Perſonal Eſtate to *E.* his Wife, whom he made ſole Executrix: The Annuitants were his Siſters and their Children; and about two Years after the Wife makes her Will, and gives two Annuities *Page 475* * of 5*l.* each to two of the 5*l.* a-year Annuitants in her Huſband's Will, but gives them to them and their Heirs, in caſe they happen to overlive ſuch a one, who by her Huſband's Will had 10*l. per Ann.* for Life; ſhe likewiſe gives another Annuity of 10*l. per Ann.* to one and her Heirs, and another of 5*l.* to another and her Heirs, who had each of them the like Annuities for Life by the Huſband's Will; but in the Diſpoſition of theſe Annuities ſhe takes no manner of Notice of her Huſband's Will, or that they had any Annuities thereby given them; and the only Queſtion was, whether the four Annuities given to the Perſons in Fee, by the Wife's Will, ſhould be taken to be only in Satisfaction of the like Annuities for Life, given to the ſame Perſons by the Huſband's Will; and it was argued that they ſhould, becauſe the Huſband's Annuities being payable only out of his perſonal Eſtate, and the Wife being his Executrix, ſhe was in the Nature of a Debtor for them; and wherever a Perſon, by his Will, gives a Legacy as great or greater than the Debt he owes to the Legatee, it has always been taken to be a Satisfaction of the Debt. But *per* Lord Chancellor, this Doctrine has already been carried too far, and he would never carry it farther; for though it is true, a Man ought to be juſt before he is bountiful, and therefore ſhall be preſumed to pay a Debt rather than give a Legacy to the ſame Perſon, when it is the ſame Sum, or more, than he owes him; yet why may he not be both juſt and bountiful when there are Aſſets to anſwer

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his Mother's Side for ever, when the Deviſor was Heir to his Mother's Mother; it may be proved that he intended his Heir of the Mother of his Mother, and not of the Father of his Mother. R. 2 P. W 137.—So, if a Deviſe is of perſonal Eſtate to a Wife, who is made Executrix, on a Bill brought by the Heir, that it ſhould firſt be applied for Payment of Debts, there may be Proof by Witneſſes, that it was intended to be exempt from Debts, but it was imagined not neceſſary to ſay ſo. 1 P. W. 9, 115. R. 2 P. W. 210.—But, generally, an Averment ſhall not be allowed to expound the Words of a Will: as, if *A.* deviſes *to his youngeſt Son in tail, afterwards to the Heirs of the Body of his eldeſt Son*, Remainder *to his Daughter in Fee*, and the youngeſt dies without Iſſue in the Life of his elder Brother; Evidence ſhall not be admitted to prove that it was the Intent that the Daughter ſhould not take 'till both the Sons died without Iſſue. R. 2 Leo. 70.—Parol Evidence ſhall not be admitted to explain the Words of a Will; as, if Teſtator deviſes 1000*l.* to *A.* and in caſe of his Death to his Wife, and *A.* ſurvives. Teſtator, dies, and his Wife receives the 1000*l.* it ſhall be Aſſets in her Hands, and Evidence ſhall not be admitted to prove Teſtator intended only the Intereſt of 1000*l.* to *A.* for Life, and his Wife to have the Principal, if ſhe ſurvived. *Lowfield* v. *Stoneham.* M. 20 Geo. 2. Stra. 1261.

ſwer both, as in the preſent Caſe; and there can be no Pretence to ſay, that the two firſt Annuities of 5 *l.* each can be a Satisfaction of the like Annuities given by the Huſband, becauſe they are given upon the Contingency of over-living ſuch a one, which has not yet happened, and poſſibly never may; and then ſhall the Annuities for Life, which are certain, be extinguiſhed, by giving the ſame Perſons Annuities in Fee, on a Contingency that may never happen; and if that be ſo, as to theſe Annuities, there is no reaſon to imagine the Wife had a different Intention as to the others, or that ſhe intended two of them ſhould go in Satisfaction of the like Annuities given by her Huſband, and the other two not; and the Caſes where a Legacy has been held to be a Satisfaction of a Debt, are where the Debt was owing by the ſame who gave the Legacy; but if ſuch Legacy be given upon a Contingency, or to take place at a future Day, it is no Satisfaction of the Debt; and therefore in the principal Caſe it was decreed, that the Annuities given by the Wife were diſtinct additional Annuities, and not an Enlargement only of the Huſband's Annuities from an Intereſt for Life to an Intereſt in Fee, as it was urged to be, and therefore ſhould go in Satisfaction of thoſe Annuities; which the Court held they ſhould not, but that the Annuitants ſhould take both.

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* (E) Of Legacies veſted or lapſed: And herein, *Page 476

1. Where it ſhall be a lapſed Legacy by the Legatee's dying in the Life-time of the Teſtator, and where in ſuch Caſe it ſhall veſt in another Perſon, to whom it is limited over.

IT ſeems by the Rule of the Civil Law, and by the Caſes on this Head, that if a Legacy be deviſed to *J. S.* and he dies in the Life-time of the Teſtator, that the Legacy is lapſed, there being no ſuch Perſon to take at the Time, when the Will is to take effect. Abr. Eq. 296, 297.

So where *A.* by Will, reciting that *B.* owed him 400 *l.* gave and bequeathed that 400 *l.* to him, provided he out of the 400 *l.* paid ſeveral Sums in the Will mentioned to his Wife and Children, and the Reſt and Reſidue he freely and abſolutely gave to him, and willed and required the Executor to deliver up the Security immediately upon his Death, and not to claim or meddle with the Debt, or any Part thereof, but to give ſuch Releaſe or Diſcharge as *B* his Executors or Adminiſtrators, ſhould require or think fit; *B.* died in the Life-time of the Teſtator; and it was held, that the Money directed to be paid the Wife and Children was well deviſed; but as to the Reſidue deviſed to the Debtor himſelf, that it was a lapſed Legacy, he dying in the Life-time of the Teſtator; although it was admitted, that if the Teſtator had ſaid, *I forgive ſuch a Debt*, or that *my Executor ſhall not demand it*, or *ſhall releaſe it*, that would have been a good Diſcharge of the Debt, though the Debtor died in the Life-time of the Teſtator. 2 Vern. 521. *Elliot* and *Davenport.*

A. deviſed an Eſtate to his Wife for Life, and after to the Plaintiff, his Niece, and her Heirs, upon Condition and to the Intent that ſhe pay 400 *l.* to ſuch Perſon as his Wife by her Will in Writing, or any other Writing, ſhould direct and appoint, and dies; the Wife after marries a ſecond Huſband, and then makes a Will in Writing, and thereby reciting the Power given her by her former Huſband's Will, appoints the 400 *l.* to be paid to her Huſband, his Executors or Adminiſtrators, and that when he ſhall have fully received the 400 *l.* he ſhall pay 100 *l.* out of it to *B.* 50 *l.* to *C.* and Abr. Eq. 296. *Burnet* and *Holgrave.*

50*l.* to *D.* and makes her Husband her Executor; and then goes on, and says, that she has published this her last Will and Testament in the Presence of three Witnesses; and the Husband subscribed that he does approve of this Will; afterwards the Husband dies before her, and makes her Executrix of his Will, and Residuary Legatee; then *B.* and *C.* die both intestate, and afterwards the Wife dies, and the Defendants take out Administration to her, with the Will annexed, and also Administration to *B.* and *C.* and the Question was, whether this Appointment being made by Will, and the Appointee dying before the Appointer, this should be in the Nature of a Legacy, and so the Appointment void, the Testatrix surviving the Nominee. And my Lord Keeper held, that if it was a Thing purely Testamentary, it would be plainly a lapsed Legacy, but that in this Case the 400*l.* was not in its own Nature Testamentary, but they take as Nominees, and it is but the Execution of a Trust; and decreed the Money to be paid.

2 Vern. 466-7. *Earles* ver. *England.* Prec. Chan. 200. S. C.

So where *E.* made her Will, and devised in these Words, *I give unto my loving Kinsman* R. H. *the Sum of* 300 l. *one* 100 l. *Part whereof, he doth owe me, which I intend to give to my Cousin* S. H. *his youngest Daughter, but my Will and Desire is, that he will give the said* 300 l. *to his Daughter* S. H. *at the Time of his Death, or sooner, if there be Occasion, for her better Advancement and Preferment*; the Testatrix at the Time of making her Will was in *England*, and it happened that *R. H.* died in *Ireland*, eight * Days before the Death of the Testatrix; afterwards *S. H.* died, at the Age of sixteen, and unmarried, and the Plaintiff was her Administrator; and it was decreed at the *Rolls*, and affirmed by my Lord Chancellor, that the Words *I desire*, or *I will*, amount to an express Devise, and that the 100*l.* Bond to the Testatrix should be assigned to the Plaintiff, and the 200*l.* paid him, with Interest, from the Time of exhibiting the Bill; although it was insisted upon, that a Benefit was designed *R. H.* and that he was not a bare Trustee; for he was to have the Interest of the 300*l.* for his Life, unless his Daughter had Occasion for it before his Death, which she had not.

*Page 477

2 Vern. 116. *Birkhead* ver *Coward.*

But if the Testator gives his Sister 350*l.* upon Condition that she, at or before her Death, give to her Children 200*l.* thereof, and the Sister dies in the Life-time of the Testator, the whole Legacy is lapsed; although it was insisted, that if the Devise had been only of the Interest of the 200*l.* to the Testator's Sister for Life, and the Principal to the Children, that had been a good Devise to the Children as to the 200*l.* and it would not have been lost by the Mother's dying in the Testator's Life-time, and the Intention of the Testator in this Case amounted to as much; but it was adjudged *ut supra*, the Court taking it, that, being a Devise of Money, the absolute Property vested in the first Legatee: *Quære.*

Preced. Chan. 470, 471.

But however a Legacy may become void or lapsed by the Legatee's dying in the Life-time of the Testator, yet it is plain, that if in such Case there be a Limitation over to another, that the Limitation over is good, though the first Legatee die in the Life-time of the Testator; as where *A.* devised 500*l.* a-piece to his two Grandchildren by Name, and if either of them die, his Share to go to the Survivor; one of them died in the Life-time of the Testator; and it was held, that his Share should go to the Survivor, and was not a lapsed Legacy.

2 Vern. 207, *Miller* and *Warren*, decreed. 2 Vern. 611. *Ledsome* and *Hickman.* S. P. decreed.

So if *A.* devise 1500*l.* a-piece to the four Children of *J. S.* by Name, to the Sons to be paid at their Age of twenty-one Years, and to the Daughters at eighteen, or Days of Marriage; and in case one or more of the aforesaid Children shall happen to die before his, her, or their respective Legacy or Legacies shall become due, then such Legacy or Legacies shall go to the Survivors of them; and in case three should die, then the Survivor to take the Whole; if one of the Children dies in the Life time of the Testator, the Survivors shall take that Share, and it shall not be a lapsed Legacy.

So

So where a Legacy of 50 *l.* was given to *A.* at Twenty-one, or Marriage, and 50 *l.* to *B.* at Twenty-one, or Marriage, and in the Close of the Will the Testator added, *If any Legatee dies before his Legacy is payable, the same shall go to the Brothers and Sisters of such Legatee*; *A* dying in the Life-time of the Testator, it was adjudged no lapsed Legacy, but that it should go to the Brothers and Sisters. 2 Vern. 378. *Dorrel* and *Molesworth*. Vern. 425. 2 Vern. 653, 744. S. P.

So where a Man devised 100 *l.* to *A.* and *B.* the two Daughters of his Brother *G.* to be paid within a Year after the Death of his Wife, *viz.* 50 *l.* to *A.* and 50 *l.* to *B.* if they shall be both alive at the Time of Payment, but if either of them should die before, then the said 100 *l.* to the Survivor of the said two Daughters; one of the said two Daughters died in the Life-time of the Testator; and the only Question was, whether the surviving Daughter should have the whole 100 *l.* or only the 50 *l.* and *Rawlinson* and *Hutchins*, Lords Commissioners, were clearly of Opinion, that she should have the whole 100 *l.* they said, that by the first Clause of the Will it is a joint Devise to them of the 100 *l.* in which Case, if the Will had gone no farther, if one had died, it would have survived to the other; then the *viz.* that comes after is only a Severance of it, in case they should both live to the Time of Payment, which they did not; and then the last Clause of the Will, in case either died before the Time of Payment, is a new Substantive Devise of the whole 100 *l.* to the Survivor; and decreed accordingly Abr. Eq. 298. *Scoolding* and *Green*.

* So where one made his Will, and, after several Legacies, gave and devised all the Rest, Residue, and Remainder of his personal Estate to three Persons, whom he thereby made his Executors, one of them died in the Life-time of the Testator; and the only Question was, whether the two surviving Executors shall have the Whole, or whether the third Part should be distributed, according to the Statute, amongst the next of Kin. And the Master of the Rolls, on Time taken to consider of the Case, and citing most of the Authorities, both out of the Civil and Common Law, was of Opinion, and decreed accordingly, that the two surviving should take the Whole. * Page 478 Abr. Eq 243. Trin. 1730. *Hunt* and *Berkley*.

2. Where a Legacy shall be said to be vested or lapsed, being to be paid at a future Time, to which the Legatee did not arrive.

The Rule and Distinction which hath obtained in these Cases, and which is agreeable to the Rule of the Civil Law, is, that if a Legacy be devised to one generally, to be paid or payable at the Age of Twenty-one, or any other Age, and the Legatee dies before that Age, yet this is such an Interest vested in the Legatee, that it shall go to his Executor or Administrator; for it is *debitum in præsenti*, though *solvendum in futuro*, the *Time* being annexed to the *Payment*, and not to the *Legacy* itself; but if a Legacy be devised to one at Twenty-one, or if, or when he shall attain the Age of Twenty-one, and the Legatee dies before that Age, the Legacy is lapsed; and though, says my Lord *Cowper*, this Distinction was at first introduced upon very slender Reasons, and probably upon no other but from a constant Willingness in the Civil Law to stretch in Favour of a particular Legatee against the Residuary Legatee, who went away with the whole Surplus of the personal Estate; yet, it being the Rule of the Ecclesiastical Courts, it is fit that the same Rule should be observed in Chancery, (as this Court has now a concurrent Jurisdiction with the Ecclesiastical Courts in Matters of this Nature) and therefore there ought to be a Conformity in their Resolutions, that the Subject might have the same Measure of Justice, in which Court soever he sued. This Distinction is laid down in Dyer 59. Leon. 177. Swinb. 311, 313. Off. Ex. 347. Godb. 182. 2 Vent. 342. *Cloberie's* Case. 2 Chan. Cases 155. 2 Salk. 415. pl. 2. Carth. 52. Vern. 462. 2 Vern 673. Preced. Chan. 21. Abr. Eq. 294, 295. Bur. Rep. 227. Atk. Rep. 504.

But

Paſch. 7 Annæ, *Strick* ver. *Hudſon*, in *Canc.*

But if Legacies are given to Children, and if any die, their Legacies to ſurvive, yet after Twenty-one, or Marriage, there ſhall be no Survivorſhip, though the Words are general.

2 Vern. 673. *Stapleton* ver. *Cheele.*

So if a Legacy of 50 *l.* is deviſed to *J. S.* when of the Age of ſixteen Years, and Intereſt in the mean Time, to be paid Quarterly, this is a Legacy veſted, and ſhall go to the Repreſentative of the Legatee, becauſe it carries Intereſt.

2 Salk. 415. *Snell* and *Dee*, pl. 2.

But if *A.* deviſe in theſe Words, *viz. I give* 100 l. *a-piece to the two Children of* J. S. *at the End of ten Years after my Deceaſe*, and the Children die within the ten Years, this is a lapſed Legacy, and is ſo in all Caſes where the *Time* is annexed to the *Legacy* itſelf, and not to the *Payment* of it; though it was objected, that this differed from the Caſe where a Man deviſes 100 *l.* to *J. S.* at his Age of Twenty-one; becauſe it is a Contingency whether he will attain to that Age; but the Expiration of the ten Years is inevitable.

Abr. Equ. 295-6. *Onſlow* ver. *South.*

So where one being poſſeſſed of a very conſiderable Eſtate, Part in *Jamaica*, and Part in *England*, and being himſelf reſiding in *Jamaica*, made his Will, and thereof appointed ſeveral Executors, ſome for his Eſtate in *Jamaica*, and others reſiding in *England*, for his Eſtate here, and, amongſt other Things, deviſed in theſe Words, *viz. I give and bequeath to* J. S. *now under the Cuſtody of* R. D. the Sum of 2000 l. *at the Age of twenty-one Years, to be paid by my Executors in* England, and deviſed all *Page 479 * the Reſt and Reſidue of his Eſtate to the Plaintiff, and died. *J. S.* having attained the Age of eighteen, made his Will, and thereby deviſed this Legacy, and all his Eſtate, to the Defendant. And my Lord Chancellor held this a lapſed Legacy, and that it was a vain Endeavour in the Defendant's Counſel to conſtrue it a preſent Legacy, and therefore veſted by the Word *now*, becauſe it was a plain Deſcription of the Condition of the Legatee, *viz. now* under the Cuſtody of, *&c.* for otherwiſe they muſt ſtop at *now*, which would be playing with the Words; and though the Word *paid* was made uſe of, yet it was plainly intended a Deſignation of the Perſons by whom the Legacy was to be paid, *viz.* by his Executors in *England*, which was proper, he having two Sets of them.

Where Legacies or Portions charged on the real Eſtate are veſted, or ſhall ſink in the Inheritance, for the Benefit of the Heir at Law, *vide* Title *Heir and Anceſtor.*

(F) Of Conditional Legacies, and how far the Condition muſt be complied with, otherwiſe the Legacy will be forfeited.

2 Vern. 91.

IF a Legacy be given on Condition not to diſpute the Will, and the Legatee commences a Suit, whereby he diſputes the Validity of the Will, yet this is no (*a*) Forfeiture of the Legacy, if there was *probabilis Cauſa Litigandi.*

(*a*) If the Lord of a Copyhold Manor comes to a Copyholder, and requires him to do his Services, and the Copyholder anſwers, if they are due, he will do them, but it ſhall be tried at Law firſt, whether they are due or not; this is no Forfeiture, being no wilful Refuſal. Rol. Abr. 506. Rol. Rep. 429. 3 Bulſ. 80, 268. 4 Co. 21. b.

But what we are here chiefly to conſider is, how far Conditions, annexed to Legacies which reſtrain Marriage, are to be performed, and how, and in

in what Caſe, the Neglect or Non-performance of them will forfeit the Legacy.

And here we muſt obſerve as a general Rule, that all Conditions in Reſtraint of Marriage are to be conſidered ſtrictly, being prejudicial to Society, as they hinder the Propagation of the Species. Swinb. 266.

Therefore by our Law, as alſo by the Civil Law, a Deviſe upon Condition not to marry, or not to marry a Perſon of ſuch a Profeſſion or Calling, is void, whether there be a Limitation over, or not; for (*a*) every Perſon ought to be at liberty to marry when he pleaſes; and therefore Conditions reſtrictive of that Power are againſt Law, and void. Godolph. Orph. Leg. 45. Swinb. 266. Vern. 20. Mod. 86. Ld. Raym. 181, 442, 743, 753, 1545. 8 Mod. 43, 166, 242, 295, 307, 362, 373. 9 Mod. 60. 10 Mod. 109. Stra. 214, 441, 515, 648. 2 Stra. 733 Moſely 1. Sel. Caſ. in Chan. 69. 2 Stra 792, 817. Barnard. *K. B.* 87. 2 Stra. 910, 946. 2 Stra. 955 Caſ. Temp King *C.* Ld. Raym. & Hardw. C. J. 136. 2 Barnard. 320. 2 Stra. 1000, 1051, 1087, 1195, 1211, 1246. (*a*) If an Annuity be bequeathed by a Man to his Wife for ſo many Years, if ſhe ſhall remain a Widow ſo long, this is a good conditional Bequeſt, becauſe of the particular Intereſt every Huſband has in his Wife's remaining a Widow; for thereby ſhe will the better take Care of the Concerns of his Family, in reſpect of which he may well allow her a Maintenance for that Time, to ceaſe when ſhe removes herſelf into the Intereſt of another Family. Godolph. Orph. Leg. 45.——But if a Stranger gives a Legacy upon ſuch a Condition, it is not good; for there is no more Reaſon for reſtraining a Widow from marrying, than a Maid Godolph. 46.—Where a Man deviſed, after Debts and Legacies paid, the Surplus of his Eſtate to his Wife and his Son *John*, equally betwixt them, and adds, *whom I make my Executors*, and farther wills, that ſhe ſhould continue his true Widow; but if ſhe marry again, *my Will is, ſhe ſhall render the Right of being my Executrix to my Son* Roger, *to be Partner with his Brother* John *in the Executorſhip*; and it was held, that by the Wife's marrying again, ſhe had as well loſt her Share of the Surplus, as her Right to the Executorſhip. 2 Vern. 308. *Barton* ver. *Barton*.

* Alſo by the Civil Law, a Gift or Deviſe upon Condition not to marry without (*b*) Conſent is void, though there be a Limitation over; for the Maxim there is, *Matrimonium debet eſſe liberum*. *Page 480 Swinb. 267.

(*b*) If one be appointed Executor or Legatee, upon Condition he marry with the Conſent and Approbation of another, and if he marry againſt their Conſent, that the Executorſhip or Legacy ſhall go to another; yet he ſhall have the Executorſhip or Legacy: But in this Caſe it is ſaid, that he is bound to aſk Conſent, and to marry; for both theſe Parts of the Condition are lawful, though the Part is not, that reſtrains him from marrying againſt the Conſent of another. Godolph. 46.

But though Conditions which reſtrain Marriage generally are void, yet both by our Law and the Civil Law, a Condition, that reſtrains Marriage as to Time, Place or Perſon, is good; as not to marry before twenty-one, not to marry at *York*, not to marry a Papiſt, *&c.* Swinb. 267-8. Vern. 20,

But the prevailing Diſtinction in the Courts of Equity as to this Matter is, between ſuch Conditions as are good, and bind the Legatee, and ſuch as are only *in Terrorem*; as to which it is clearly agreed, that if a Legacy be given to a Perſon upon Condition that he or ſhe marry with the Conſent of *J. S.* that in ſuch Caſe the Condition is only *in Terrorem*, and the Legatee does not forfeit, tho' the Marriage was without ſuch Conſent; but if in this Caſe the Legacy had been limited over to another, the Marriage without Conſent had been a Forfeiture; and the Reaſon thereof is, not only from the Intention of the Teſtator appearing more ſtrongly in the latter, than in the firſt Caſe, but alſo becauſe the Courts cannot in this Caſe relieve againſt the Forfeiture, without doing an Injury to the Perſon to whom it is limited over. 2 Chan. Ca. 22, 138. Vent. 199. Vern. 20. 2 Vern. 293. 5 Vin. Abr. 343. pl. 41. Atk. Rep. 502. Preced. Chan. 565. the ſame Diſtinction; and there ſaid that though a Lawyer may know it to be no Forfeiture, not being limited over, yet the Parties themſelves might not be ſo learned, and therefore it would be ſome Terror to them to venture to break it; and without this Diſtinction, Strangers, Executors, might run away with a great Part of a Man's Eſtate from his Children.

If by Leaſe 9000*l.* is ſecured for a Feme Sole, in caſe ſhe marries not contrary to the liking of *A.* and if ſhe doth, then for ſuch Perſon as *A* ſhall 1 Chan. Ca. 58. *Fleming* and *Waldgrave*.

2 Vern. 573. S. C. cited; and there ſaid that there may be a Difference between a Condition that a Perſon cannot marry without Conſent, and where it is that the Party ſhall not marry againſt Conſent.

ſhall nominate, and for want of ſuch Nomination, for *A.* and ſhe marries without the Conſent of *A.* yet he cannot diſpoſe of the Leaſe otherwiſe than for her Benefit; for it would be the moſt unreaſonable Thing imaginable that his giving or refuſing his Conſent ſhould have any Influence in an Affair that was to turn ſo much to his own Advantage.

Vent. 199. Mod. 300. 1 Chan. Ca. 138. *Fry* and *Porter*. Raym. 236. 2 Keb. 756, 787, 814. 2 Chan. Rep. 26. Gilb. Eq. Rep. 26, 147.

If *A.* deviſe a Meſſuage, *&c.* to *B.* his Wife for Life, Remainder to *C.* his Grand-daughter in Tail, upon Condition that ſhe marry with the Conſent of his Wife and *D.* and *E.* or the major Part of them, and if ſhe marry without their Conſent, or die without Iſſue, the ſame to remain to *F.* and her Heirs; and *C.* marries without the Conſent of any of them, who, as ſoon as they hear of it, declare their Diſlike to the Marriage, but afterwards conſent to it; yet *C.* ſhall not be relieved in Equity, for the ſubſequent Aſſent cannot diveſt the Eſtate which was before veſted in *F.* neither can there be any collateral Averment that the Condition was intended only *in Terrorem*.

11 Mod. 48. pl. 16. 12 Mod. 182. Wil. Rep. 284. pl. 67. 2 Wil. Rep. 419. pl. 134, (626,) (628.) Caſ. Temp. Talb. 164, 212. Comyns 726. pl. 281, 757. 3 Wil. Rep. 65. pl. 16, 238. Lord *Nettleville*'s Caſe in the Houſe of Lords, *April* 1737. 2 Lev. 21. Vent. 199. 2 Show. 316. See 2 Danv. Abr. 30. (I) pl. 2. 111. pl. 42, 112. pl. 43. Leon. 269. 3 Co. 19. 3 Bulſ. 123. 2 Rol. Rep. 223, 427.

Vern. 580. *Miſgret* ver. *Miſgret*.

A. deviſed 300*l.* to *B.* her Daughter, and that if ſhe married under twenty-one, without Conſent of the Executors, or the major Part of them, the Legacy to go to the Children of her Siſter, the Wife of *C.* and made *C.* and two others Executors; *B.* being at the Houſe of *C.* there marries his Son, by a former Wife, with his Privity, being under twenty-one; *B.* and her Huſband bring a Bill for the Legacy, *C.* in Favour of his other Children, inſiſts that the Legacy is forfeited; the other Executors confeſſed they had Notice of the Courtſhip, and did not contradict or

*Page 481 * diſapprove of it, and the 300*l.* was decreed the Plaintiffs, there being at leaſt a tacit Conſent.

Abr. Eq. 112. *Amos* ver. *Horner*.

A. deviſed to his Daughter *M.* 100*l.* to be paid by his Executors upon her Day of Marriage, or Age of twenty-five Years, which ſhould firſt happen, upon Condition that ſhe ſhould marry with the Conſent of ſuch and ſuch Perſons; and if ſhe married without their Conſent, then to have 50*l.* only, and no more, and gave the Reſidue of his Perſonal Eſtate to the Defendants; *M.* married the Plaintiff, without ſuch Conſent, before ſhe was twenty. And it was held by the Maſter of the Rolls, that this was more than a Clauſe *in Terrorem*, and that the Deviſe of the Surplus of the Perſonal Eſtate was a Deviſe over of the 50*l.* on *M.*'s Diſobedience.

Mich. 1688. *Pawlett* and *Dogget in Can.*

One by Will deviſed 1300*l* to his Daughter *A.* to be paid at her Age of twenty-one Years, and if ſhe died without Iſſue before twenty-one, then to go over to *B.* provided that if ſhe married before twenty-one, without Conſent of certain Perſons, then to go over to *C.* She did marry before twenty-one, without ſuch Conſent; and upon a Bill brought by *B.* it was decreed that *A.* ſhould give Security, *&c.* for the Money, if ſhe died before twenty-one without Iſſue; and the Maſter of the Rolls, who heard the Cauſe, ſaid the Law was now ſettled accordingly; but the Decree was ſo ordered as to ſerve both Contingencies, *viz.* that upon her Marriage before twenty-one without Conſent, the Money ſhould go to *C.* yet ſo that if ſhe died before twenty-one without Iſſue, it ſhould go to *B.* according to the Deviſe.

2 Vern. 452. *Aſton* and *Aſton*.

A. by Will gave Portions to his Daughters, without mentioning any Time of Payment, upon Condition that they married with the Conſent of his Wife; and if any married without ſuch Conſent, her Portion to go over. On a Bill brought by the Daughters for their Portions, it was decreed accordingly, but on Security to refund in caſe the Condition ſhould be broken; for it was held, that though the Marriage without Conſent was but

a Con-

a Condition ſubſequent, yet the Court could not relieve againſt the Forfeiture, by reaſon of the Deviſe over, although it was admitted to be a hard Condition, no Time being limited, but goes to a Marriage at any Time, even after the Age of twenty-one Years.

The Defendant's Father deviſed to him, who was his Heir at Law, all his Lands, &c. (except ſuch and ſuch Parts) charged with the Sum of 2500*l.* to his Daughter (ſince married to the Plaintiff) at her Age of twenty-one Years, or Marriage, which ſhould firſt happen; and deviſed the excepted Lands, in Truſt, to be ſold for the Payment of his Debts, provided that if his ſaid Daughter ſhould marry in the Life-time of her Mother, without her Conſent firſt had in Writing, then 500*l.* Part of the ſaid 2500*l.* ſhould ceaſe, and ſhould be applied towards Payment of his Debts charged on the ſaid excepted Lands, and appoints his Wife to be Guardian of his ſaid Daughter, and makes her Executrix, and dies; the Daughter attains her Age of twenty-one Years, and without the Conſent or Privity of her Mother intermarries with the Plaintiff, who was a Gentleman of ſome Eſtate, and called to the Bar, but had made no Settlement or Proviſion for his Wife; and therefore the Defendant, the Heir at Law, refuſed to raiſe or pay any Part of his Siſter's Portion; and inſiſted likewiſe, that by her Marriage without her Mother's Conſent, 500*l.* Part of her Fortune, was become forfeited. Whereupon the Plaintiffs brought their Bill to have the whole Portion raiſed by Sale of the Land charged therewith. *Per* Lord Keeper, this is a Portion to be raiſed out of Lands, and therefore to be conſidered as Land: And though it be to go towards Payment of Debts on Breach of the Condition, and there appear one hundred and twenty Creditors concerned, yet none that are in danger of loſing their Debts; and it is then to be conſidered as it ſtands upon the Condition itſelf, and therefore the Plaintiff muſt have her whole Portion; for the Teſtator has appointed two Periods of Time to intitle her to it, *viz.* Marriage, or * the Age of twenty-one; and as ſhe has attained that Age, it becomes a veſted and ſettled Intereſt in her, not to be diveſted by the Marriage without the Conſent of the Mother, for that Conſent cannot, in any Reaſon, be carried farther than during her Minority. Abr. Eq. 112, 113. *King* ver. *Withers.* *Page 482

A. having Iſſue three Daughters *B. C.* and *D.* deviſed 1000*l.* to be paid to *B.* at the Age of twenty-one, or Marriage, upon Condition that ſhe married with the Conſent of his Executors; and likewiſe deviſed to her ſeveral Meſſuages, &c. upon the like Condition, and after ſeveral other Legacies and Bequeſts he deviſed the Reſidue of his Eſtate to his Executors, for the Benefit of his Children. *B.* married, againſt the Conſent of the Executors, a Perſon who made his Addreſſes to her in her Father's Life-time, which the Father knew, and was diſſatisfied at; ſhe had likewiſe Notice given her by the Executors of her Father's Will, and that by marrying without their Conſent ſhe would be in danger of forfeiting her Legacy; and that they could not approve of that Match, becauſe they knew that her Father diſliked it in his Life-time; yet it was held, that there being no expreſs Limitation over, the Deviſe of the Reſidue being after Debts and Legacies paid, that the Condition was only *in Terrorem*, and that the Marriage, without Conſent, did not amount to a Forfeiture of the Legacy, &c. Preced. Chan. 562. *Semphil.* ver. *Bayley.* Decreed in the Duchy Court by *Lechmere* Chancellor, and *King* C. J. againſt the Opinion of Juſtice *Dormer.*

(G) Of

(G) Of Specific and pecuniary Legacies, and the Difference between them.

2 Chan. Ca. 25, 171. Vern. 31. 2 Salk. 416. pl. 3.

A Specific Legacy is a Gift or Bequeſt of a particular Thing, ſuch as the Teſtator's Horſe, Cow, &c. and differs from a pecuniary Legacy, or a Sum of Money, in that the Legatee is not, in caſe of Deficiency of Aſſets, to (a) abate in Proportion, as pecuniary Legatees muſt do.

(a) But tho' a Specific Legatee has a Preference, and is not to abate in Proportion with other Legatees, where the Eſtate falls ſhort, as to the Payment of Debts, yet he cannot in any Caſe have more than the Teſtator could or did deviſe to him; and therefore where a Freeman of *London* deviſed a Leaſe for Years to *J. S.* who was evicted of a Moiety thereof by the Widow claiming it by the Cuſtom; and it was held, that the Specific Legatee ſhould have no Satisfaction for this Eviction out of the Surplus, the Teſtator having Power to diſpoſe only of a Moiety. 2 Vern. 111.

2 Vern. 688. *Sayer* and *Sayer*. Preced. Chan. 392. S. C.

So if a Man deviſe his perſonal Eſtate at *W.* this is as much a Specific Legacy, as if he had enumerated the ſeveral Particulars of it; and though the other Legacies fall ſhort, yet the Legatee muſt have this Specific Legacy intire.

Preced. Chan. 393.

But if the Teſtator deviſe his Perſonal Eſtate at *A.* and his Perſonal Eſtate at *B.* and then deviſes a Legacy out of his Perſonal Eſtate, and has no Perſonal Eſtate but what lies in thoſe two Places, the Pecuniary Legacy muſt be paid out of theſe Specific Legacies thus particularly deviſed.

Preced. Chan. 393-4.

So if after ſeveral Specific Legacies the Teſtator deviſes a Pecuniary Legacy, or Sum of Money, out of all his Perſonal Eſtate whatſoever; in this Caſe the Pecuniary Legacy ſhall come out of the Eſtate at large.

If a Horſe or Term for Years, which is ſpecifically deviſed to another, be taken in Execution by Creditors on a Judgment obtained, (as they may be) the Specific Legatee ſhall have Recompence in Equity againſt the Executors, or Reſiduary Legatees, for the Value, who are to have nothing till after the Debts and Legacies are paid.

*Page 483 Abr. Eq. 298. Lord *Caſtleton* ver. Lord *Fanſhaw*.

* *J. S.* having 4000*l.* ſecured to him by Bond in the Names of *A.* and *B.* in Truſt for himſelf, deviſed it to his Daughter, (now married to the Plaintiff) and made her Reſiduary Legatee, and by the ſame Will deviſed a Leaſe he had in Farm to *R. D.* and there not appearing Aſſets at his Death to pay his Debts, this Farm deviſed to *R. D.* was ſold for Payment of Debts; afterwards, by Decree of this Court, the 4000*l.* was adjudged to be Aſſets to pay Debts, and was brought into Court, there to remain for that Purpoſe. The Plaintiff propoſed to have what remained of the 4000*l.* paid out of Court to him, all Debts being (as it was ſaid) paid, and the Defendant *R. D.* oppoſed it till he had firſt had a Satisfaction out of it for the Value of the Farm deviſed to him, and ſold for the Payment of Debts. The Court held, that the Deviſe of this Sum of Money was a Specific Legacy, and therefore *R. D.* can have but a proportionable Part of the Value of his Specific Legacy out of it.

(H) Of abating, refunding, and giving Security for that Purpoſe.

PEcuniary Legatees ſhall abate in Proportion to the Deficiency of Aſſets; and therefore if the Eccleſiaſtical Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition will be granted; for though an Executor may pay a Legacy without ſuch Caution or Security, yet he is not obliged to do it. Cro. Eliz. 467. Moor 413. Owen 72. Allen 40.

So if a Man deviſe ſeveral Legacies, as 100*l.* to one, and 50*l.* to another, *&c.* there although he directs the Legacy of 100*l.* to be paid in the firſt Place, yet if the other Legacies fall ſhort, then the Legatee of the 100*l.* muſt make a proportionable Abatement of his Legacy. Vern. 31. *Brown* and *Allen.*

So if a Legacy be given to Executors for Care and Pains, yet this ſhall give ſuch Legacy no Preference, but the Executors muſt abate in Proportion. 2 Vern. 434. *Fretwel* and *Stacey.*

As to Refunding and Abating, it ſeems clear, that Creditors may compel Legatees in Equity to refund when Aſſets become deficient, although there was no Proviſion made for refunding at the Time the Legacies were paid. Vern. 94. 2 Vent. 358, 360. 2 Vern. 205.

So where *A.* being indebted to *B.* made *C.* his Executor, and *C.* waſted the Eſtate, and died, having deviſed ſeveral Legacies, and made *D.* Executor, which Legacies *D.* paid, and *B.* having exhibited a Bill againſt *D.* the Executor of *C.* for his Debt due from the firſt Teſtator, and againſt the Legatees in the Will of *C.* to compel them to refund their Legacies, there not being ſufficient Aſſets of the firſt Teſtator, it was decreed accordingly; (*a*) for a Creditor may follow the Aſſets in Equity, into whoſe Hands ſoever they come. Vern. 162. (*a*) 2 Vern. 205. laid down as a Rule.

Alſo one Legatee may compel a Pecuniary Legatee to refund where the Aſſets become deficient, though there was no Proviſion made for Refunding, and although he hath ſtill Remedy againſt the Executor, and may compel him to pay it out of his own Purſe, if he voluntarily paid away the Aſſets to the other Legatees. Chan. Ca. 136, 248. 2 Chan. Ca. 132. Vent. 360.

But it ſeems to be agreed, that an Executor who voluntarily pays a Legacy, or aſſents to the Deviſe thereof, cannot, either in Favour of other Legatees or Creditors, compel the Legatee to refund, but that in ſuch Caſe he muſt bear the Loſs himſelf. 2 Chan. Ca. 9, 145. Vern. 90, 453, 460. 2 Vern. 205.

* But it is ſaid, that if an Executor pays out the Aſſets in Legacies, and afterwards Debts appear, of which he had no Notice at the Time of Payment of the Legacies; or if he had been compelled by a Decree in Equity to pay Legacies; that in theſe Caſes he may by Bill in Equity, compel the Legatees to refund, although he took no Caution or Security for that Purpoſe. * Page 484 Chan. Ca. 136. 2 Vern. 205.

(I) Of Reſiduary Legacies and Legatees.

THE Teſtator's making his Will, and appointing an Executor, is a Diſpoſition of all his Perſonal Eſtate, after Debts and Legacies paid, to ſuch Executor, without more Words; but if the Teſtator appoints, that after his Debts and Legacies paid *J. S.* ſhall have the Surplus, or what remains; *Vide* Tit. *Executors and Adminiſtrators.*

mains; then is *J. S.* Reſiduary Legatee, and may ſue for and recover ſuch Surplus or Reſidue, and is alſo, upon the Executor's Refuſal to prove the Will, intitled, from his Intereſt therein, to Adminiſtration, with the Will annexed.

Carth. 52. *per Curiam.* If a Reſiduary Legatee die before the Debts are ſatisfied, ſo that it doth not appear to how much the Surplus will amount, yet the Executor or Adminiſtrator of ſuch Legatee ſhall have the whole Reſidue of the Perſonal Eſtate which remains over, *&c.* and not the Executor of the firſt Teſtator.

Palm. 409. Alſo if there be a Reſiduary Legatee, and the Executor omits Part of the Teſtator's Effects out of the Inventory, or undervalues thoſe which he puts in, the Reſiduary Legatee may file a Bill of Diſcovery againſt him before he has paid the Teſtator's Debts.

Abr. Eq. 305. Lord *Caſtleton* ver. Lord *Fanſhaw.* If a Man deviſe all the Reſt and Reſidue of his Perſonal Eſtate, after Debts and Legacies paid, to *J. S.* and ſeveral of the Creditors are barred by the Statute of Limitations, who notwithſtanding bring Actions againſt the Executor, and he refuſes to plead the Statute of Limitations, yet Equity will not, in Favour of *J. S.* to whom the Surplus is deviſed, compel the Executor to plead the Statute.

(K) Of the Payment of Legacies: And herein:

1. What ſhall be a good Payment, and to whom to be made.

Preced. Chan. 228. AN Executor, in the Payment of a Legacy, ought to be careful that he takes a proper Receipt, or has ſufficient Vouchers of the Payment; and the rather, becauſe it is held to be ſuch an equitable Demand as is not (*a*) barred by the Statute of Limitations.

(*a*) Vern. 256. — But where after Length of Time a Legacy was preſumed to have been paid, *vide* 2 Vern. 21, 484.

Chan. Ca. 245. Alſo an Executor ought to be careful that he pay it to the proper Hand that has Authority to receive it, and that without a Decree or Order of a Court of Equity he cannot pay it to the (*b*) Father, or any other Relation of an Infant.

(*b*) Where a Father libelled in the Spiritual Court that his Childrens Legacies, being Infants, might be paid to him, and a Prohibition granted. Godb. 243.

*Page 485 Abr. Eq. 300. *Doyly* ver. *Tollferry.* Will. Rep. 285. pl. 68. Gilb. Rep. 103. 2 *Burn's* Eccleſ. Law. 694. * As where a Legacy of 100*l.* was deviſed to an Infant of about ten Years of Age, the Executor paid this Legacy to the Father, and took his Receipt for it; when the Infant came of Age, the Father told him he had ſuch a Legacy of his in his Hands, but could not pay it immediately, but however would not have him trouble the Executor about it, for that he would give it him; upon this the Son reſted ſatisfied for about fourteen or fifteen Years, and he and his Father carried on a Joint-Trade together, and then became Bankrupts; and upon a Commiſſion taken out againſt the Son, this Legacy among other Things, was aſſigned for the Benefit of his Creditors, and the Plaintiff, the Aſſignee of the Commiſſion, brought his Bill againſt the Executor, to have an Account and Payment of the Legacy; and for the Defendant it was inſiſted, that this would be an extreme Hardſhip on him, if he ſhould be obliged to pay it over again; that he had already fairly and honeſtly paid it to the Father whilſt he was in good Circumſtances, and if Application had been made ſooner, he might have had his Recompence over againſt the Father; that the Father was by Nature Guardian to his Children, and

and ſuch Payments to him have formerly been allowed good, though now indeed this Court has thought fit to extend its Care farther for ſuch Children, and diſallowed ſuch Payments; but the Circumſtances of this Caſe were ſuch, that the Defendant, it was hoped, would not be anſwerable again for it. My Lord Chancellor ſaid, that if the Father had not made his Son ſuch Promiſe of Recompence, and the Son had acquieſced all that Time, the Caſe might have been more doubtful; but this Promiſe of his Father drew him to forbear applying to the Executor ſooner, and ſince his Father had not, nor could now make good his Promiſe, being a Bankrupt likewiſe, the Reaſon of the Son's Forbearance was at an End; and he thought the Rule of this Court, in not ſuffering Parents to receive their Childrens Legacies, was founded on very good Reaſon; and therefore leſt this Caſe might hereafter be cited as a Precedent, when the Circumſtances attending it were forgotten, and to diſcountenance and deter others from paying ſuch Legacies to the Parents, (though he did not deny the Hardſhips of this particular Caſe) he decreed againſt the Executor, which was affirmed on a Rehearing.

If a Legacy be given to a Feme Covert, it muſt be paid to the Huſband; alſo where a Legacy was given to a Feme Covert who lived ſeparate from her Huſband, and the Executor paid it to the Wife, and took her Receipt for it, yet on a Bill brought by the Huſband, he was decreed to pay it over with Intereſt. 2 Vern. 261.

Alſo it hath been adjudged, that if Huſband and Wife are divorced *a menſa & thoro*, and a Legacy is left to her, the Huſband alone may releaſe it. Rol. Abr. 343. 2 Rol. Abr. 301.

Moor 665. Cro. Eliz. 508. Noy 45. Rol. Rep. 426. 3 Bulſ. 264. Moor 683. Salk. 115. pl. 4. Ld. Raym. 73. 12 Mod. 891. 5 Mod. 69. But a Perſon may by Deed or Will give any Thing in Truſt for the ſeparate Uſe of a Feme Covert, and this ſhall be out of the Power of her Huſband. 2 Vern. 659.

A Legacy of 1000*l* was given to one, after the Death of her Mother, when ſhe ſhould attain the Age of twenty-one Years; and the Defendant was appointed Truſtee for the Raiſing and Payment thereof out of certain Lands; the Legatee was drawn into an improvident Match with one who ſoon after became a Bankrupt, and the Commiſſioners aſſigned all his Effects, and gave him a Certificate of his Conformity; and the Aſſignees brought a Bill againſt the Truſtee for this 1000*l*. who inſiſted that the Aſſignees could be in no better Condition than the Huſband, and that if he were Plaintiff he could not prevail without making a ſuitable Proviſion on his Wife; and that this Legacy being liable to a double Contingency, *viz.* the Death of the Mother, and the Legatee's arriving at the Age of twenty-one Years, at the Time of the Bankruptcy, was not ſuch an Intereſt as could be aſſigned. The Court held, that though * both Contingencies have ſince happened, yet thoſe being ſince the Aſſignment of the Bankrupt's Eſtate, and ſince a Certificate of his having conformed himſelf in every Thing to the Acts, he was now diſcharged as a Bankrupt; and this Legacy could not paſs without a new Aſſignment, which the Commiſſioners could not make, their Commiſſion being determined. Abr. Eq. 54. *Jacobſon* ver. *Peter Williams*. *Page 486

2. At what Time a Legacy is to be paid.

By the Civil Law, Executors have a Year's Time, from the Death of the Teſtator, to pay Legacies: And in Conformity to the Civil Law, the ſame Rule hath been taken up, and is now followed, in the Court of Chancery. Godolph. Orph. Leg. 272. 2 Salk. 415. pl. 2.

If

2 Vern. 31, 199, 283. If a Legacy is given to a Child, payable at twenty-one Years, and the Child dies before, though his Adminiſtrator ſhall have the Legacy, yet he muſt wait for it till ſuch Time as the Child, if he had lived, would have come to the Age of twenty-one.

Abr. Eq. 299, 300. *Laundy* and *Williams.* But where *A.* by Will, gave a Legacy to *B.* at twenty-one, and if he died before twenty one, then to the Plaintiff; *B.* died before twenty-one; and the only Queſtion was, whether the Plaintiff was intitled to the Legacy preſently, or muſt wait till *B.* if he had lived, would have been twenty-one. And on Time taken to conſider of it, my Lord Chancellor was of Opinion, the Plaintiff was intitled to the Legacy preſently; (*a*) but that where a Legacy is given to one to be paid at twenty-one, ſo as to be an Intereſt veſted in him preſently, though not payable till twenty-one, if the Party dies before that Age, his Executors or Adminiſtrators ſhall not have it till the Legatee, if he had lived, would be twenty-one Years of Age.

(*a*) For this *vide* Leon. 277-8. And. 33. 2 Rol. Rep. 134.

2 Vern. 431. *Nevil* and *Nevil.* A Legacy of 500*l.* was given to the eldeſt Son of *A.* to be begotten, to place him out Apprentice; *A.* had a Son born after the Death of the Teſtator, and on a Bill brought by him for the Legacy, it was decreed to be paid, though before ſuch Time as he was fit to be placed out Apprentice.

2 Vern. 620. *Moor* and *Godfry.* If Legacies are given to *A. B.* and *C.* being the Teſtator's three Coheireſſes, to be paid at their reſpective Marriages, and if any of them die, her Legacy to go to the Survivors; and one of them dies unmarried, the Survivors ſhall not receive her Legacy before their reſpective Marriages, for the Condition, though not again repeated, ſhall go to the Whole, as well to what accrued by Survivorſhip as to the original Deviſe.

3. Where the Legatee ſhall have Intereſt, and Maintenance till the Legacy is paid.

2 Salk. 415. pl. 2. *& vide* Vern. 251, 262. If a Legacy be deviſed generally, it is regularly to carry Intereſt from the Expiration of the firſt Year after the Death of the Teſtator; but if the Legatee, being of full Age, neglects to (*b*) demand it at that Time, he cannot have Intereſt but from the Time of the Demand.

(*b*) That a Legacy differs from a Debt, and muſt be demanded, otherwiſe the Legatee not intitled to Intereſt. Poph. 104. —So though a Bond was given for Performance of the Will. 1 Leon. 17.

2 Salk. 415. pl. 2. But it is ſaid, that if a Legacy be deviſed generally, and no Time aſcertained for the Payment, and the Legatee be an Infant, he ſhall be paid Intereſt from the Expirations of the firſt Year after the Teſtator's Death, though no Demand be made, becauſe no Laches ſhall be imputed to him.

*Page 487 Salk. 415. pl. 2. *per Ld. Cowper.* * After it is ſaid in *Salk.* that a Legacy left payable at a (*c*) certain Day, muſt (as it ſeems without Demand) be paid with Intereſt from that Day, and that the Intereſt allowed is 5*l. per Cent.*

(*c*) But in Preced. Chan. 161. it is held that though a Legacy be deviſed to be paid at a certain Time, yet it ſhall not carry Intereſt but from a Demand made; otherwiſe of a Debt.

Preced. Chan. 11. *Knap* and *Powell.* The Plaintiff had a Legacy deviſed to him, payable within a Year after the Death of the Teſtator, who was his Half-Brother; the Plaintiff knew nothing of the Legacy, nor of the Teſtator's Death, till the Executor publiſhed it in the *Gazette*, and then he demanded his Legacy of the Defendant the Executor; and the only Conteſt was, whether the Plaintiff ſhould have Intereſt from the Time the Legacy ſhould have been paid.

And

And the Court would not give any Intereſt, not ſo much as from the Time of the Bill exhibited, nor would they give Coſts even out of the Aſſets, but the bare Legacy.

If a Father deviſe Legacies or Portions to his Daughters, or younger Children, to be paid or payable at their reſpective Ages of Twenty-one Years, or any other Time certain, without making any Proviſion for their Maintenance in the mean Time, and die, in this Caſe they ſhall have Intereſt for their Portions, from his Death, till paid, becauſe the Father was obliged to have provided for them, if he had lived; but if ſuch Portions had been deviſed to them by a Stranger, to be paid or payable at ſuch an Age, their Legacies ſhould not carry Intereſt in the mean Time, becauſe he, being a Stranger, was under no ſuch Obligation to provide for them. Abr.Eq.301. *Attorney General* ver. *Thompſon*, that the Court of Chancery hath a diſcretionary Power of awarding Maintenance to Children. Chan.Ca.60.

So where a Father, by his Will, gave 2000*l.* a-piece to his two Daughters, payable at Twenty-one, and charged on Land and Perſonal Eſtate, and the Perſonal Eſtate being exhauſted in Debts, my Lord Chancellor held they ſhould have a reaſonable Maintenance out of the Real Eſtate until their Legacies became payable, and allowed them 80*l.* *per Ann.* each. Abr.Eq.301. *Conway* and *Longville*.

(L) Of the Executor's Aſſent to a Legacy.

ALthough the Teſtator diſpoſes of Goods and Chattels, and Sums of Money, to Legatees, yet they all paſs to the Executor, and he has them in nature of a Truſtee, and he alone has a (*b*) Title in Law to them, and nothing paſſes to the Legatee, nor can any Legatee take any Thing to him deviſed without the Executor's Aſſent; for were it otherwiſe, it might be in the Power of a Legatee to ſubject an Executor to a *Devaſtavit*, which would diſcourage all Perſons from taking upon them the Office of an Executor. Godolph. Orph. Leg. 148. Off.Ex. 27.

(*b*) And therefore if a Legatee takes Poſſeſſion of the Thing deviſed, without the Aſſent of the Executor, he may have an Action of Treſpaſs againſt him. Dyer 254. Keilw. 128.

But this Matter of Aſſent is only (*c*) a perfecting Act for the Security of the Executor, for it is the Will of the Teſtator which gives the Intereſt to the Legatee, and therefore the Law does not require any exact Form in which it is to be made. Hence any Expreſſion or Act done by the Executor, which ſhews his Concurrence or Agreement to the Thing deviſed, will amount to an Aſſent. Off. Ex. 29. Godolph. 148. Plow. 525.

(*c*) And is like an Attornment of a Tenant to the Grant of a Reverſion. March 137.—And therefore a ſmall Matter will amount to an Aſſent. Vern. 90, 460. 2 Vent. 358.—And which the Legatee may compel the Executor to do in the Spiritual Court, March 127.

* As if the Executor ſays to the Legatee, *I wiſh you Joy of the Thing deviſed to you*, or *I am content that you have it according to the Will*; or if one offers the Executor Money, or ſeems willing to purchaſe a Horſe, &c. deviſed to *J. S.* and the Executor directs him to the Legatee; or if the Executor himſelf offers the Legatee Money for the Horſe, &c. theſe and the like Acts amount to an Aſſent. * Page 488 Plow. 53. 5 Co. 29. 4 Co. 18. March 138.

Hence it hath been held, that if a Specific Legacy be deviſed, as three Gowns, &c. and the Legatee takes Money in Satisfaction of them, that this amounts, firſt to a Conſent of the Executor to the Legacy, or Deviſe of them, and then it is a Sale of them by the Legatee or Deviſee to the Executor for the Money *eo inſtanti*. Hill. 5 Ann. *Beckett* and *Ball*.

And

March 136. Cro. Jac. 614, 615. 2 Vent. 360.

And as an Aſſent is but a perfecting Act, the Executor cannot, after he has once given it, revoke the ſame; neither can it be given on (*a*) Condition, or on any Limitation or Reſtriction whatſoever.

(*a*) If the Executor deliver to the Legatee the Goods bequeathed to him, to re-deliver them to him again at ſuch a Day, this is a good Aſſent, and the Words of Re-delivery are void. Leon. 130, 131.

March 136. 8 Co. 96.

If *A.* deviſe a Term to *B.* for Life, Remainder to *C.* and the Executor aſſents to the Deviſe to *B.* this will amount to an Aſſent to the Deviſe over to *C.* and veſt the Intereſt in him accordingly.

10 Co. 47. Plow. 520. Dyer 367. Cro. Eliz. 223. 2 Co. 37.

If one is himſelf both Executor and Deviſee, and he enters generally, without Claim or Demonſtration of Election, he ſhall have the Thing deviſed as Executor, which is the firſt and general Authority, unleſs he elects to take it as Deviſee.

Lev. 25. *Garret* and *Liſter.*

As where a Man, poſſeſſed of a long Term for Years, deviſed it to his Wife for Life, Remainder to Truſtees for his Son's Life, *&c.* and made his Wife Executrix; and it was held, that the Wife took the Term wholly as Executrix, in the firſt place, till ſhe agreed to the Deviſe; but it being proved that ſhe ſaid, *ſhe would take the Term according to the Will*, it was held by the Court to be a ſufficient Aſſent.

Lev. 25.

So in a like Caſe, where the Wife ſaid, *that the Son was to have the Eſtate after her*, and this was reſolved to be a ſufficient Aſſent.

5 Co. 29. Cro. Eliz. 602. March 136. *&c. & vide* Tit. *Executors* and *Adminiſtrators.*

An Executor may aſſent before Probate of the Will, and if there be two or more Executors, the Aſſent of any one of them will be ſufficient; alſo it is ſaid, that an Infant Executor may aſſent, eſpecially if he be above the Age of ſeventeen Years.

Comb. 437-8. *Eſtwart* ver. *Warry*, adjudged on a ſpecial Verdict.

If a Man deviſe a Term to a Child *in ventre ſa mere*, provided it be a Son, and if not a Son, to *J. S.* and the Child happens to be a Daughter, though the Executor aſſents, yet the Daughter cannot take, becauſe here is a Condition precedent that never happened, and the Executor's Aſſent is not material where there is no Deviſe.

(M) Legacies in what Court, and how properly recoverable.

Vide Tit. *Juriſdiction of the Courts Eccleſiaſtical*, and Tit. *Executors and Adminiſtrators.*

IT is clearly agreed, that the Eccleſiaſtical Court having Juriſdiction over all Teſtamentary Matters, that, as incident thereto, they have Conuzance of Legacies, and that it is the only proper Court where Legacies are to be ſued for and recovered, except in thoſe Caſes where the Courts of Equity claim a concurrent Juriſdiction with them.

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* But this Juriſdiction is confined to Gifts of Goods and Chattels; and therefore if a Man, by Will, gives Lands to be ſold for Payment of Debts or Legacies, theſe Legacies cannot be ſued for in the Eccleſiaſtical Courts, but only in a Court of Equity; becauſe it is not a Legacy merely of Goods and Chattels, but ariſes originally out of Lands and Tenements.

Dyer 151. Palm. 120. Cro. Jac. 279, 364. Cro. Car. 16. 2 Rol. Abr. 285. 2 Show. 50. pl. 36.

Cro. Jac. 279. Brown. 34. Bulſ. 153. Sid. 279. Lev. 179. 2 Keb. 8.

But if a Rent be deviſed out of a Term for Years, the Eccleſiaſtical Courts may hold Plea thereof; for the Term for Years being only a Chattel, is Teſtamentary, and conſequently the Rent deviſed thereout.

If

If the Legatee takes a Bond from the Executor for Payment of the Legacy, and afterwards ſues him in the Spiritual Court for the Legacy, a Prohibition will be granted; for, by the taking the Obligation, the Nature of the Demand is changed, and it becomes a Debt or (*a*) Duty recoverable in the Temporal Courts. Yelv. 38. *Goddwyn* and *Goodwyn*, and a Prohibition granted accordingly.

(*a*) That by giving a Bond for Payment of a Legacy at a certain Day, it thereby becomes a Duty, and is not to be conſidered as a Legacy. 2 Vern 31.——But by Juſtice *Dodderidge*, an Obligation given for Payment of a Legacy does not totally deſtroy the Nature thereof, but the Legatee has it ſtill in his Election either to ſue for it in the Temporal or Eccleſiaſtical Court. 2 Rol. Rep. 160.

Alſo though the Temporal Courts do not directly take Conuzance of Legacies, ſo as to allow of an Action for the Recovery of them, yet may the Executor make himſelf liable to an Action at Common Law, as by his Promiſe of Payment; in which Caſe an *Aſſumpſit* will lie ‡. Sid. 45. Raym. 23. ‡By 29 Car. 2. c. 3. ſ. 4.

No Action ſhall be brought to charge an Executor or Adminiſtrator, on any Special Promiſe, to anſwer Damages out of his own Eſtate, unleſs the Agreement or ſome *Memorandum* or Note thereof be in Writing, and ſigned by the Party, or by ſome Perſon by him authorized. But as to the Caſe in the Text, *qu.* if Forbearance to ſue, is not a legal Conſideration, and does not therefore take it out of the Statute?

As where in *Aſſumpſit* the Plaintiff declared that *J. S.* deviſed a Legacy to him, and made the Defendant Executor, and the Plaintiff intending to ſue him for the Legacy, the Defendant, in conſideration of Forbearance, promiſed to pay him; the Defendant pleaded divers Bonds and Judgments, and *Nul aſſets ultra*; upon which the Plaintiff demurred, and had Judgment without Argument; for it is not material whether he had Aſſets or no, for he is charged upon his own Promiſe, in conſideration of Forbearance, and a Forbearance of Suit for a Legacy is a ſufficient Conſideration. 2 Lev. 3. Vent. 120. S. C. *Davis* and *Reyner*. Sel. Cas. Evid. 59. 11 Mod. 91. pl. 15. See 2 *Burn's* Eccleſ. Law. 690.

And although the Spiritual Court, having Juriſdiction of Wills and Teſtaments, have, as incident thereto, Juriſdiction of Legacies, yet if a Temporal Matter be pleaded in Bar of an Eccleſiaſtical Demand, they muſt proceed in the Eccleſiaſtical Court according to the Common Law, otherwiſe they will be prohibited. Rol. Abr. 298, 299. Hob. 12. 12 Co. 65. Hetley 87. 2 Inſt. 608. Sid. 161.

Therefore, if Payment be pleaded in Bar of a Legacy, and there is but one Witneſs, which the Eccleſiaſtical Court will not admit, becauſe their Law requires two Witneſſes, there the Temporal Courts will prohibit them, becauſe it is a Matter Temporal that bars the Eccleſiaſtical Demand. Cro. Eliz. 88, 666. Show. 158, 173. Vent. 291. *Richardſon* and *Deſborrow*, adjudged. 3 Mod. 283. Ld. Raym. 220, 346. 2 Ld. Raym. 1161, 1172, 1211. 2 Salk. 547. pl. 1. *Shotter* and *Friend*, adjudged. Carth. 142. S. C. adjudged.——But it is not ſufficient Ground for a Prohibition to ſuggeſt that the Spiritual Court objected to the Credibility of a Witneſs, nor to ſuggeſt that the Plaintiff had only one Witneſs to prove the Fact, unleſs he alledge that he offered ſuch Proof, and it was refuſed for Inſufficiency. Carth. 143, 144.

It is holden by my Lord Chief Juſtice *Holt*, that a Deviſee may maintain an Action at Common Law againſt a Ter-tenant for a Legacy deviſed out of Land; for where a Statute, as the Statute of Wills, gives a Right, the Party, by conſequence, ſhall have an Action at Law to recover it. 2 Salk. 415. pl. 1. 6 Mod. 26. S. P. *per Holt*, and 279. S. P. *per Twiſden* Juſtice. 2 Ld. Raym. 937.

*LIBEL.

Hawk. P.C. 193. 5 Mod. 165. 12 Mod. 221. Ld. Raym. 418. 4 Read. Stat. 149, 155.

A Libel is (*a*) defined a malicious Defamation, expreſſed either in Printing or Writing, or by Signs, Pictures, &c. tending either to blacken the Memory of one who is dead, or the Reputation of one who is alive, and thereby expoſing him to public Hatred, Contempt and Ridicule.

(*a*) It is termed *Libellus Famoſus ſeu infamatoria ſcriptura*, and from its pernicious Tendency has been held a publick Offence at the Common Law; for Men not being able to bear the having their Errors expoſed to publick View, were found by Experience to revenge themſelves on thoſe who made Sport with their Reputations; from whence aroſe Duels and Breaches of the Peace; and hence written Scandal has been held in the greateſt Deteſtation, and has received the utmoſt Diſcouragement in the Courts of Juſtice. Lamb. Sax. Law 64. Bract. lib. 3. c. 36. 3 Inſt. 174. 5 Co. 125. 2 Stra. 791.

But for the better Underſtanding the Nature of this Offence, I ſhall conſider,

(A) What ſhall be ſaid a Libel. 490.

And herein,

1. How far it is neceſſary that it ſhould be in Writing. 490.
2. What Degree of Defamation will amount to a Libel. 491.
3. What Certainty in the Matter and Application will make it a Libel. 493.
4. Whether any Proceedings in a Court of Juſtice will amount to a Libel. 494.
5. Whether any Thing of this Kind can be juſtified. 495.

(B) Who ſhall be ſaid a Libeller. 496.

And herein,

1. Who ſhall be ſaid the Author or Compoſer of a Libel. 496.
2. Who the Publiſher. 497.

(G) The Offenders how puniſhed. 498.

(A) What ſhall be ſaid a Libel. And herein,

1. How far it is neceſſary that it ſhould be in Writing.

5 Co. 125. Ld. Raym. 416. 12 Mod. 2193.

THIS Species of Defamation is uſually termed *written Scandal*, and thereby receives an Aggravation, in that it is preſumed to have been entered upon with Coolneſs and Deliberation, and to continue longer, and propagate wider and farther than any other Scandal.

But

* But it is clearly agreed, that not only written or printed Scandal comes within the Notion of a Libel, but alſo may be applied to any Defamation whatſoever, expreſſed either by Signs or Pictures; as by fixing up a Gallows at a Man's Door, or elſewhere, or by painting him in a ſhameful and ignominious Manner, as by expoſing a Man and his Wife by a Skimmington or Riding, though a ſpecial Cuſtom is alledged for ſuch Practice. *Page 491 5 Co. 125. Skin. 123. pl. 2. Raym. 431. 3 Keb. 378.

And ſince the chief Cauſe for which the Law ſo ſeverely puniſhes all Offences of this Nature, is a direct Tendency of them to a Breach of public Peace, by provoking the Parties injured, and their Friends and Families, to Acts of Revenge, which it would be impoſſible to reſtrain by the ſevereſt Laws, were there no Redreſs from public Juſtice for Injuries of this Kind, which, of all others, are moſt ſenſibly felt; and ſince the plain Meaning of ſuch Scandal, as is expreſſed by Signs or Pictures, is as obvious to common Senſe, and as eaſily underſtood by every common Capacity, and altogether as provoking as that which is expreſſed by Writing or Printing, why ſhould it not be equally criminal? Hawk. P. C. 193.

2. What Degree of Defamation will amount to a Libel.

As every Perſon deſires to appear agreeable in Life, and muſt be highly provoked by ſuch ridiculous Repreſentations of him, as tend to leſſen him in the Eſteem of the World, and take away his Reputation, which, to ſome Men, is more dear than Life itſelf: Hence it hath been held, that not only Charges of a flagrant Nature, and which reflect a moral Turpitude on the Party, are libellous, but alſo ſuch as ſet him in a ſcurrilous, ignominious Light; for theſe equally create ill Blood, and provoke the Parties to Acts of Revenge, and Breaches of the Peace. 5 Co. 125. Keb. 293. Moor 627. Rol. Abr. 37.

Hence it hath been held, that Words, though not ſcandalous in themſelves, yet if publiſhed in Writing, and tending in any Degree to the Diſcredit of a Man, are libellous, whether ſuch Words defame private Perſons only, or Perſons employed in a public Capacity, in which latter Caſe they are ſaid to receive an Aggravation, as they tend to ſcandalize the Government, by reflecting on thoſe who are intruſted with the Adminiſtration of public Affairs, which doth not only endanger the public Peace, as all other Libels do, by ſtirring up the Parties immediately concerned in it to Acts of Revenge, but alſo have a direct Tendency to breed in the People a Diſlike of their Governors, and incline them to Faction and Sedition. Hard. 470. Skin. 123. pl. 2. 5 Co. 125. 2 Rol. Rep. 86. Hawk. P. C. 194.

As where a Perſon delivered a Ticket up to the Miniſter after Sermon, wherein he deſired him to take Notice, that Offences paſſed now without Controul from the Civil Magiſtrate, and to quicken the Civil Magiſtrate to do his Duty, &c. and this was held to be a Libel, though no Magiſtrates in particular were mentioned, and though it was not averred that the Magiſtrates ſuffered thoſe Vices knowingly. Sid. 219. pl. 4. Keb. 773. pl. 8. *The King* ver. *Py.*

A. a Gunſmith, publiſhed an Advertiſement in a common News-Paper, that he had invented a ſhort Kind of Gun, that ſhot as far as others of a longer Size, and that he was made Gunſmith to the Prince of *Wales*; and *B.* another Gunſmith, counter-advertiſed, *That whereas*, &c. reciting the former Paragraph, *he deſired all Gentlemen to be cautious, for that the ſaid* A. *durſt not engage with any Artiſt in Town, nor ever did make ſuch an Experiment, except out of a Leather Gun, as any Gentleman might be ſatisfied at the* Croſs-Guns *in* Long-Acre, *the ſaid* B.*'s Houſe.* And the Court held, that though *B.* or any other of the Trade, might counter-advertiſe what was publiſhed of *A.* yet that that ſhould have been done without any general Reflections on him in the Way of his Buſineſs; that the Advice to *all Gentlemen to be cautious*, was a Reflection on his Paſch. 4 Geo. 2. in *B. R. Harman* ver. *Delaney.* Barnard K. B. 289. Fitzgib. 121. 2 Stra. 898. S. C.

•Page 492* Honeſty, as if he would deceive the World by a fictitious Advertiſement, and the Allegation that he would not engage with an Artiſt, was ſetting him below the reſt of his Trade, and calling him a Bungler in general Terms, and not relative to the precedent Matter; and that the Words *except out of a Leather Gun*, was charging him with a Lie, the Word *Gun* being vulgarly uſed for a Lie, and *Gunner* for a Liar; and that therefore theſe Words were libellous, and gave Judgment accordingly; and herein the Court held, that Words, though not ſcandalous in themſelves, yet being publiſhed in Writing, and tending any way to the Party's Diſcredit, were actionable, and that all Words were to be conſtrued *ſecundum Subjectam Materiam*, and to be underſtood by the Court in the ſame Senſe that others do †.

† Any Thing that tends to make a Man ridiculous, or to hinder Men from aſſociating with him, is a Libel; as that he ſtinks of Brimſtone, and is *an old ſtinking, old naſty, old itchy, old Toad.* 2 Wilſ. 403. 2 Bur. 980.

But though every Species and Degree of Calumny and Detraction of this Kind are deemed odious in the Eye of the Law, and puniſhable either by civil Action or criminal Proſecution, in moſt Caſes, at the Election of the Party injured; yet the Court of King's Bench, whoſe Juriſdiction herein is founded upon the Neceſſity of preventing Quarrels and ill Blood, and which deals with this Offence as of dangerous Conſequence to, and deſtructive of, the Peace of the Nation, always exerciſes a diſcretionary Power in granting an Information for an Offence of this Nature, and will, in many Caſes, leave the Party to his ordinary Remedy; as where the Application is made (*a*) after a great Length of Time; ſo (*b*) where the Matter complained of as a Libel happens to be true ‡; ſo (*c*) where the granting the Information would be a Diſcouragement to learned Inquiries; or (*d*) where the Matter complained of was intended for Reformation, not Defamation.

(*a*) As in the Caſe of *The King* verſus *Knight*, Trin. 9 Geo. 2. in *B. R.* where the Party, after two Terms, three Seſſions, and one Aſſizes, applied, the Court refuſed to grant an Information; though it was agreed, had the Application been recent, an Information would have been granted. (*b*) As in the Caſe of an Apothecary, who perſonated Dr. *Crow*, wrote in his Name, and took a Fee, which being publiſhed in a publick Advertiſement, a Motion was made for an Information againſt the Publiſher; but the Truth of what was advertiſed being made out, the Court left the Proſecutor to his ordinary Remedy; Hill. 8 Geo. 1. *The King* verſus *Bickerſton.* Stra. 498. Andr. 299. Barnard *K. B.* 13. (*c*) As for publiſhing in a News-Paper, that *Ward*'s Pill and Drop had done great Miſchief in twelve different Caſes, and that they were a Compound of Poiſon and Antimony, &c. 8 Geo. 2. *The King* verſus *Roberts.* (*d*) As where a Perſon in a private Letter to the Party expoſtulates with him about ſome Vices, of which he apprehends him guilty, and deſires him to refrain from them; or where a Perſon ſends ſuch Letter to a Father, in relation to ſome Faults of his Children; which are ſaid to be not at all libellous, being Acts of Friendſhip, not deſigned for Defamation, but Reformation. 2 Brownl. 151, 152. 2 *Burn*'s Eccleſ. Law 779. But ſuch Matters publiſhed in a News-Paper, though the Pretence be Reformation, is, it ſeems, libellous, as was agreed 9 Geo. 2. *The King* verſus *Knight.*

‡ Or where the Libel contains pointed Charges, which, if falſe, may be denied by the Party complaining, and the Court ſuſpects they may be true, an Information will not be granted, unleſs the Party complaining denies ſuch pointed Charges on Oath.

The King ver. *Enes.* 5 Geo. 2. in *B. R.* Andr. 229. So where a Man advertiſed in a public News-paper, that his Wife had eloped from him, and cautioned all Perſons from truſting her; and an Information for a Libel being moved for, it was denied, becauſe it was the only way the Huſband could take to ſecure himſelf.

The King ver. *Jennaur.* Paſch. 8 Geo. 2. in *B. R.* So where it was advertiſed in one of the Daily Papers, that Lady *Mordington* kept an Aſſembly in *Moorfields*, and it being counter-advertiſed, by my Lord's Order, that the Perſon calling herſelf Lady *Mordington* was an Impoſtrix, and that there was no ſuch Perſon, except his Wife, who always lived with him; the Court refuſed to grant an Information; for tho' ſhe be called an Impoſtrix, yet that relates to her as aſſuming the Title of Lady *Mordington*, and which ſhe is alledged not to have any Right to; and therefore, in this Reſpect, may well be called an Impoſtrix.

A Writ-

A Writing was directed to General *Wills*, and the four principal Officers of the Guards, to be preſented to his Majeſty for Redreſs; the Paper contained the Defendant's Caſe, that he furniſhed the Guard at *Whitehall* with Fire and Candle, for which the Government owed him 350*l.* that he obtained a Warrant for his Money, and Captain *Carr* (the Proſecutor) told him, that if he would aſſign the Warrant, he would procure him the Money; the Warrant was aſſigned, and the Money paid * to *Carr*, who refuſed paying it to the Defendant; and the Queſtion was, if an Information ſhould be granted. And the Court held it no Libel, but a Repreſentation of an Injury, drawn up in a proper Way for Redreſs, without any Intention to aſperſe the Proſecutor; and though there be a Suggeſtion of a Fraud, yet that is no more than what is in every Bill in Chancery, which was never held libellous, if relative to the Subject Matter. *The King* ver. *Bayley*, Hill. 8 Geo. 2. in *B. R.* Andr. 229. * Page 493

Here it may be proper to inſert the remarkable Caſe of Parſon *Prick*, who in a Sermon recited a Story out of *Fox's Martyrology*, that one *Greenwood*, being a perjured Perſon, and a great Perſecutor, had great Plagues inflicted on him, and was killed by the Hand of God; whereas in Truth he was never ſo plagued, and was himſelf preſent at that Sermon; and he thereupon brought his Action upon the Caſe, for calling him a perjured Perſon; and the Defendant pleaded not guilty. And this Matter being diſcloſed upon the Evidence, *Wray* Chief Juſtice delivered the Law to the Jury, that it being delivered but as a Story, and not with any Malice or Intention to ſlander any Perſon, he was not guilty of the Words maliciouſly, and ſo was found not guilty †. Cro. Jac. 91.

† *Qu.* If the Story was not in the Book?

3. What Certainty in the Matter and Application will make it a Libel.

It ſeems to be now agreed, that not only Scandal expreſſed in an open and direct Manner, but alſo ſuch as is expreſſed in Allegory and (*a*) Irony amounts to a Libel; and that the Judges are to underſtand it in the ſame Manner as others do, without any ſtrained Endeavours to find out Loop-holes, or to palliate the Offence, which in ſome meaſure would be to encourage Scandal; as where a Writing in a taunting Manner, reckoning up ſeveral Acts of public Charity done by one, ſays, *You will not play the* Jew, *nor the Hypocrite*, and ſo goes on, in a Strain of Ridicule, to inſinuate, that what he did was owing to his Vain-glory; or where a Writing pretending to recommend to one the Characters of ſeveral great Men for his Imitation, inſtead of taking notice of what they are generally eſteemed famous for, pitched on ſuch Qualities as their Enemies charge them with the want of; as by propoſing ſuch a one to be imitated for his Courage, who is known to be a great Stateſman, but no Soldier; and another to be imitated for his Learning, who is known to be a great General, but no Scholar, *&c.* which Kind of Writing is as well underſtood to mean only to upbraid the Parties with the Want of theſe Qualities; as if it had directly and expreſly done ſo. (*a*) 11 Mod. 86. pl. 5. See 4 Read. Stat. Law 151. Barnard *K. B.* 305. 2 Sef. Caſ. 30. 5 Co. 125. That a Libel may be as well by Deſcriptions and Circumlocutions as in expreſs Terms: Poph. 252. Hob. 215. Hawk. P.C. 193-4.

And from the ſame Foundation it hath alſo been reſolved, that a defamatory Writing expreſſing only one or two Letters of a Name in ſuch a Manner that from what goes before, and follows after, it muſt needs be underſtood ‡ to ſignify ſuch a Perſon in the plain, obvious, and natural Conſtruction of the Whole, and would be perfect Nonſenſe if ſtrained to any other Meaning, is as properly a Libel as if it had expreſſed the whole Hawk. P.C. 194. *Hurt's* Caſe.

‡ And on Application for an Information, ſome Friend to the Party complaining, ſhould, by Affidavit, ſtate the having read the Libel, and underſtanding, and believing it to mean the Party.

whole Name at large; for it brings the utmoſt Contempt upon the Law, to ſuffer its Juſtice to be eluded by ſuch trifling Evaſions; and it is a ridiculous Abſurdity to ſay, that a Writing which is underſtood by every the meaneſt Capacity, cannot poſſibly be underſtood by a Judge and Jury.

Hawk. P.C. 195. But it is ſaid, that no Writing whatſoever is to be eſteemed a Libel, unleſs it reflect upon ſome particular Perſon; and that a Writing full of obſcene Ribaldry, without any kind of Reflection on any one, is not puniſhable at all by any Proſecution at Common Law; but the Author may be bound to his good Behaviour, as a ſcandalous Perſon of evil Fame.

*Page 494 Poph. 252, 254. * But a Scandal publiſhed of three or four; or any one or two of them, is puniſhable, at the Complaint of one or more, or all of them.

3 Mod. 68. *The King* ver. *Baxter.* 12 Mod. 139. Ld. Raym. 879. The Defendant was charged in an Information with writing a Libel againſt the Proteſtant Religion and Biſhops, *Innuendo* the Biſhops of *England*; he was found guilty; and in Arreſt of Judgment it was offered, that the Biſhops libelled were not *Engliſh* Biſhops, nor could the *Innuendo* ſupport ſuch Conſtruction; but the Court took upon them to underſtand the Libel in that Senſe, and over-ruled the Exception.

The King ver. *Oſborne*, Trin. 5 Geo. 2. in *B. R.* Seſ. Caſ. 260. 2 Barnard *K. B.* 138, 166. Kel. 230. pl. 183. (*a*) 3 Salk. 224. pl. 5. Lord Raym. 486. 4 Read Stat. Law 151. Ferteſc Rep. 98. 2 Stra. 789. Libel ſpelt badly yet held well. 2 Seſ. Caſ. 29. pl. 33. An Information was prayed for publiſhing a Paper containing an Account of a Murder on a *Jewiſh* Woman and her Child, by certain *Jews* lately arrived from *Portugal*, and living near *Broadſtreet*, becauſe the Child was begotten by a Chriſtian; and the Affidavit ſet forth, that ſeveral Perſons mentioned therein, who were recently arrived from *Portugal*, and lived in *Broadſtreet*, were attacked by Multitudes in ſeveral Parts of the City, barbarouſly treated, and threatened with Death, in caſe they were found abroad any more; and it was objected, that no Information could be granted in this Caſe, becauſe it did not appear who in particular the Perſons reflected on were; and for this was cited *The King* verſus (*a*) *Orme*, *Trin.* 11. *W.* 3. where an Indictment was exhibited for a Libel called *The Ladies Invention*, and alledged to be to the Scandal of ſeveral Ladies unknown; and after Verdict for the King Judgment was arreſted, becauſe it did not appear who the Perſons reflected on were. *Sed per Cur.* admitting that an Information for a Libel may be improper, yet the Publication of this Paper is deſervedly puniſhable in an Information for a Miſdemeanor, and that of the higheſt Kind; ſuch Sort of Advertiſements neceſſarily tending to raiſe Tumults and Diſorders among the People, and inflame them with an univerſal Spirit of Barbarity againſt a whole Body of Men, as if guilty of Crimes ſcarce practicable, and wholly incredible; and in this Caſe was cited the Caſe of *The King* and *Franklin*, where though only the Words *Miniſters* were uſed in the Libel, yet by ſuitable Averments in the Information, and Proof made of them to the Jury, they found thoſe Miniſters to be Miniſters of State to his preſent Majeſty, and the Defendant guilty.

4. Whether any Proceedings in a Court of Juſtice will amount to a Libel.

Dyer 285. 2 Inſt. 228. Yelv. 117. 2 Bulſ. 269. Godb. 340. Palm. 145, 188. Vent. 23. Hawk. P.C. 194. It ſeems to be clearly agreed, that no Proceeding in a regular Courſe of Juſtice will make the Complaint amount to a Libel; for it would be a great Diſcouragement to Suitors to ſubject them to public Proſecutions, in reſpect of their Applications to a Court of Juſtice; and the chief Intention of the Law in prohibiting Perſons to revenge themſelves by Libels, or any other private Manner, is to reſtrain them from endeavouring to make themſelves their own Judges, and to oblige them to refer the Deciſion of their Grievances to thoſe whom the Law has appointed to determine them.

Therefore

Therefore it hath been reſolved, that no falſe or ſcandalous Matter contained in (*a*) a Petition to a Committee of Parliament, or in (*b*) Articles of the Peace exhibited to Juſtices of Peace, are libellous. (*a*) 1 Lev. 240. Sid. 414. 2 Keb. 832. (*b*) 4 Co. 14. 1 Hawk. P. C. 194.

Alſo it is held, that no Preſentment of a Grand Jury can be a Libel, not only becauſe Perſons who are ſuppoſed to be returned without their own ſeeking, and are ſworn to act impartially, ſhall be preſumed to have proper Evidence for what they do, but alſo becauſe it would be of the utmoſt ill Conſequence any way to diſcourage them from making their * Inquiries with that Freedom and Readineſs which the public Good requires. Moor 627. Hawk. P.C. 195. *Page 495

Alſo it is holden by ſome, that no Want of Juriſdiction in the Court to which ſuch a Complaint ſhall be exhibited will make it a Libel; becauſe the Miſtake of the Court is not imputable to the Party, but his Council; but herein it is ſaid by *Hawkins*, that if it ſhall manifeſtly appear from the whole Circumſtances of the Caſe, that a Proſecution is intirely falſe, malicious, and groundleſs, and commenced not with a Deſign to go through with it, but only to expoſe the Defendant's Character, under the Shew of a legal Proceeding, there can be no Reaſon why ſuch Mockery of public Juſtice ſhould not rather aggravate the Offence than make it ceaſe to be one, and make ſuch Scandal a good Ground of an Indictment at the Suit of the King, as it makes the Malice of their Proceeding a good Foundation of an Action on the Caſe at the Suit of the Party, whether the Court had a Juriſdiction of the Cauſe or not †. 2 Keb. 832. 4 Co. 14. Hawk. P.C. 194. † See Com. Dig. 4 V. 152, 3.

5. Whether any Thing of this Kind can be juſtified.

It ſeems to be clearly agreed, that in an Indictment or criminal Proſecution for a Libel the Party cannot juſtify that the Contents thereof are true, or that the Perſon upon whom it is made had a bad Reputation; ſince the greater Appearance there is of Truth in any malicious Invective, ſo much the more provoking it is; for, as my Lord *Coke* obſerves, in a ſettled State of Government the Party grieved ought to complain for every Injury done him, in the ordinary Courſe of Law, and not by any Means to revenge himſelf by the odious Courſe of Libelling or otherwiſe. 5 Co. 125. Hob. 253. Moor 627. Hawk. P.C. 194.

Alſo it ſeems now ſettled, that no Scandal in Writing is any more juſtifiable in a Civil Action brought by the Party to vindicate the Injury done him, than in an Indictment or Information at the Suit of the Crown; for though in Actions for Words, the Law, through Compaſſion, admits the Truth of the Charge to be pleaded as a Juſtification, yet this Tenderneſs of the Law is not to be extended to written Scandal, in which the Author acts with more Coolneſs; and Deliberation gives the Scandal a more durable Stamp, and propagates it wider and farther; whereas in Words Men often in a Heat and Paſſion ſay Things which they are afterwards aſhamed of, and though they ſeem to act with Deliberation, yet the Scandal ſooner dies away, and is forgotten; and therefore from the greater Degree of Miſchief and Malice attending the one than the other, tho' the Law allows the Party to juſtify in an Action for Words, yet it doth not for written Scandal; from whence it follows, that the only Favour Truth affords in ſuch a Caſe is, that it may be ſhewn in Mitigation of Damages in an Action, and of the Fine upon an Indictment or an Information. *The King* ver. *Roberts*, Mich. 8 Geo. 2, in *B. R.* agreed *per Cur.* in a Caſe for publiſhing a Libel on Mr. *Branley*, Recorder of *Warwick*. Str. 498. S. P. Vide 4 Vol. 516.

Page 496 (B) **Who ſhall be ſaid a Libeller: And herein,**

1. Who ſhall be ſaid the Author or Compoſer of a Libel.

IT has been already obſerved, that a Libel may be expreſſed not only by Printing or Writing, but alſo by Signs or Pictures; but it ſeems that ſome of thoſe Ways are eſſentially neceſſary; and it is laid down in *Lamb*'s Caſe, that every Perſon convicted of a Libel muſt be the Contriver, Procurer, or Publiſher thereof.

9 Co. 59. Moor 813. *Lamb*'s Caſe

It hath been ſtrongly urged, that he who writes a Libel, dictated by another, is not guilty of the Compoſing and Making thereof, becauſe it appears that another is the Author or Contriver; but herein the Court held, that the Writing being the eſſential Part of a Libel, the Reducing it into Writing, in the firſt Inſtance, was a Making, and differed from a Tranſcribing; and, according to the Report of this Caſe, in 5 *Mod.* it was held, that if (*a*) one dictates, and another writes, both are guilty of making it, for he ſhews his Approbation of what he writes. So if one repeats, another writes a Libel, and a third approves what is written, they are all Makers of it, as all who concur and aſſent to the doing of an unlawful Act are guilty; and murdering a Man's Reputation by a Libel, may be compared to murdering a Man's Perſon, in which all who are preſent and encourage the Act are guilty, though the Wound was given by one only.

Carth. 405. 5 Mod. 163 to 167. Ld. Raym. 729. Salk. 281. pl. 8. Comb. 359. *The King* ver. *Paine*.

(*a*) But in Carth. 406. is ſaid that he who dictated cannot be indicted for this Libel, becauſe he did not write it, and that therefore if the Writer could not, the Crime would go unpuniſhed †.

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† Why not indictable for contriving it?—And if he dictates, is he not *quaſi*, a Publiſher?

Alſo it hath been held, that Tranſcribing and Collecting libellous Matter is highly Criminal, though it be not found that the Party compoſed or publiſhed it; for his having it in Readineſs for that Purpoſe when Occaſion ſerved, or its falling into ſuch Hands after his Death as may publiſh it, might be injurious to the Government ‡.

Carth. 407. 2 Salk. 417, 646. pl. 13. Ld. Raym. 414. 12 Mod. 218. *The King* ver. *Bear*.

‡ It will not be a Publication of a Libel, if he takes a Copy of it, if he never publiſhes it. Com. Dig. 4 V. 152. (B. 2.) Though he takes a Copy, or reads it by Command of his Father or Maſter. R. Mo. 813. So, if a Man delivers by Miſtake a Paper out of his Study, it is not a Publication, though it be a Libel. R. 5 Mod. 167.

It is ſaid by *Holt* Chief Juſtice, that when a Libel appears under a Man's Hand-writing, and no other Author is known, he is taken in the Manner, and it turns the Proof upon him; and if he cannot produce the Compoſer, it is hard to find that he is not the very Man.

2 Salk. 419. Ld. Raym. 417. 12 Mod. 220, 221.

And it is ſaid to have been reſolved by the Court, that in Libels *Making* is the *Genus*, Compoſing or Contriving is one *Species*, Writing a ſecond *Species*, and Procuring to be written a third *Species*; and finding a Man guilty of Writing only, is finding him guilty of one *Species* of making.

2 Salk. 419. Ld. Raym. 418 12 Mod. 220.

But yet in ſome Caſes the Writing of a Libel may be a lawful or innocent Act, as by the Clerk that draws the Indictment, or by a Student who takes Notes of it, becauſe it is not done *ad infamiam* of the Party; but, abſtractly conſidered, the Writing a Copy of a Libel is writing a Libel, becauſe ſuch Copy contains all Things neceſſary to the Conſtitution of a Libel, *viz.* the ſcandalous Matter, and the Writing;

2 Salk. 418. Ld. Raym. 416, 417. 12 Mod. 220. Comb. 359.

Writing; and it has the ſame pernicious Conſequence, for it perpetuates the Memory of the Thing, and ſome Time or other comes to be publiſhed.

* 2. Who the Publiſher. *Page 497

It ſeems to be agreed, that not only he who publiſhes a Libel himſelf, but alſo he who procures another to do it, is guilty of the Publication; and it is held not to be material, whether he who diſperſes a Libel knew any Thing of the Contents or Effects of it or not, for that nothing would be more eaſy than to publiſh the moſt virulent Papers with the greateſt Security, if the concealing the Purport of them from an illiterate Publiſher would make them ſafe in diſperſing them. 9 Co. 59. Moor 627. Hawk. P. C. 195. Fitzgib. 47.

And on this Foundation it hath been conſtantly ruled of late, that the buying of a Book or Paper, containing libellous Matter, in a Bookſeller's Shop, is ſufficient Evidence to charge the Maſter with the Publication, although it does not appear that he knew of any ſuch Books being there, or what the Contents thereof was; and it will not be preſumed that it was brought and ſold there by a Stranger; but the Maſter muſt, if he ſuggeſts any Thing of this Kind in his Excuſe, prove it. 12 Vin. Abr. 229. pl. 5. *The King* ver. *Nutt*, Hill. 2 Geo. 2. ſo ruled on Evidence at *Guildhall*, *per* Raymond.

C. J. Fitzgib. 47. Barnard *K. B.* 306, 2 Sef. Caſ. 33. pl. 38.

The Reading of a Libel in the Preſence of another, without knowing it before to be a Libel, or the Laughing at a Libel read by another, or the ſaying that ſuch a Libel is made of *J. S.* whether ſpoken with or without Malice, amounts not to a Publication of it. 9 Co. 59. Moor 813. Hawk. P. C. 196.

Alſo it is held, that he who repeats Part of a Libel in Merriment, without any Malice or Purpoſe of Defamation, is no way puniſhable: But of this *Hawkins* makes a Doubt, for that Jeſts of this Kind are not to be endured, and the Injury to the Reputation of the Party grieved is no way leſſened by the Merriment of him who makes ſo light of it. Moor 627. Hawk. P. C. 196.

But it ſeems to be agreed, if he who hath either read a Libel himſelf, or hath heard it read by another, do afterwards maliciouſly read or repeat any Part of it in the Preſence of others, or lend or ſhew it to another, he is guilty of an unlawful Publication of it. Moor 813. 9 Co. 59. Hawk. P. C. 195.

It is ſaid by my Lord *Coke*, in the Caſe *de Libellis Famoſis*, to have been reſolved, that if one finds a Libel, (and would keep himſelf out of Danger) if it be compoſed againſt a private Man, the Finder may either burn it, or preſently (*a*) deliver it to a Magiſtrate: But if it concern a Magiſtrate, or other publick Perſon, the Finder ought preſently to deliver it to a Magiſtrate, to the Intent that by Examination and Induſtry the Author may be found out and puniſhed. 5 Co. 125. 15 Vin. Abr. 88. pl. 3.

(*a*) But it has been ſince ſaid that the not delivering it to a Magiſtrate was only puniſhable in the Star-Chamber, and that the bare having a Libel in one's Cuſtody was no Offence. 1 Vent. 31.——But *vide* 2 Salk. 418. Carth. 409, 410. 12 Mod. 220. Ld. Raym. 417. where it is ſaid to be Evidence of his being the Author or Publiſher.

It ſeems to be a Matter of Doubt, whether the Sending an abuſive Letter, filled with provoking Language, to another, will bear an Action as for a Libel, becauſe here is no Publication. But it ſeems to be clearly agreed, that the ſending ſuch Letter, without other Publication, is an Offence of a public Nature, and puniſhable as ſuch, in as much as it tends to create ill Blood, and cauſes a Diſturbance of the public Peace; and if the bare Making of a Libel be an Offence, whether it be publiſhed or not, as 4 Inſt. 180. 3 Inſt. 174. Hob. 62, 215. 12 Co. 34. Poph. 136. Raym 201. Mod. 58. Sid. 444. Lev. 139, 240. Keb. 931.

2 Keb. 261, 462, 496. See Godb. 405. 4 Co. 14. b. Fitzgib. 47, 57, 65, 122, 253. 11 Mod. 99. pl. 7. Ld. Raym. 341, 417, 486. Skin. 123. pl. 2. 12 Mod. 218.

as it ſeemeth to be holden, ſurely the Sending of it to the Party reflected on muſt be a much greater Crime.

The King ver. *Pillborough*, Mich. 5. Geo. 2. in *B. R.* *Page 498 2 Bernard. *K. B.* 102. 2 Kel. 58. pl. 2.

And on this Foundation the Court of King's Bench granted an Information againſt a Perſon for ſending an abuſive Letter to Mr. *Bernardiſton*, therein calling him Raſcal and Fool; although he ſwore that he wrote this * to the Party himſelf, and never made it public, being only a Piece of private Reſentment. But the Court held, that this Method provoked Perſons to Duelling; that the Writing and Sending was a good Publication, and that the Intent of the Party ſhall not be explained by himſelf.

Sand. 133. Lev. 240. Sid. 414. Keb. 832.

If one deliver a Paper full of Reflections on any Perſon, in Nature of a Petition to a Committee of Parliament, to any other Perſons except the Members of Parliament, he may be puniſhed as the Publiſher of a Libel, in reſpect of ſuch diſperſing thereof among thoſe who have nothing to do with it.

Hawk. P.C. 196. and the Authorities *ſupra*. *Vide* Hardr. 470.

But it hath been held, that the bare Printing of a Petition to a Committee of Parliament, (which would be a Libel againſt the Party complained of, if it were made for any other Purpoſe than as a Complaint in a Court of Juſtice,) and delivering Copies thereof to the Members of the Committee, ſhall not be looked upon as the Publication of a Libel, in as much as it is juſtified by the Order and Courſe of Proceedings in Parliament, whereof the King's Courts will take judicial Notice.

(C) The Offenders how puniſhed.

Cro. Car. 175.

THERE can be no Doubt but that a Perſon who writes or publiſhes a Libel is ſubject to the Action † of the Party injured, in which Damages ſhall be recovered; and that being convicted on an Indictment or Information, ſhall pay ſuch Fine, and alſo ſuffer ſuch corporal Puniſhment, as to the Court in Diſcretion ſhall ſeem proper, according to the Heinouſneſs of the Crime and the Circumſtances of the Offender ‡.

† In an Action for a Libel, it muſt be laid to be of and concerning the Plaintiff.

Lowfield verſus *Bancroft*, P. 5 Geo. 2. Stra. 934. —— ‡ A Libeller may be fined and bound to his good Behaviour, on his Confeſſion in Court. *Rex* v. *Middleton*, 9 Geo. Fort. 201. —— At Common Law, on Conviction upon Indictment, he may be fined and impriſoned, according to the Nature of the Offence. 5 Co. 125. 3 Inſt. 174. Cro. Car. 175, 504.—Or may be put in the Pillory. 5 Co. 125 b.

[See alſo the Statutes W. 1. 34. & 2 R. 25. alſo 12 R. 2. 11 ——As to *Scandalum Magnatum*, &c. for further Particulars of which ſee vol. 4. fo. 404, *&c.*——*Vide* alſo 2 Inſt. 226, 7, *&c.* on thoſe Statutes, and 12 Co. 133. *&c.*]

* Limitation of Actions.

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(A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8. c. 2. 500.
(B) Of the Limitation of Real Actions pursuant to 32 H. 8. c. 2. and 21 Jac. 1. c. 16. 501.
(C) Of the Limitation of Time in regard to Actions on Penal Statutes. 504.
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And herein,

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6. Where no Juriſdiction to ſue on, or where hindered by ſome Authority. 515.
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(F) Of the Manner of Pleading and taking Advantage of the Statute of Limitations. 518.

Page 500 (A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8. cap. 2.

(a) Bract. lib. 2. fol. 228.

IT ſeems that by the Common Law there was no ſtated or fixed Time as to the bringing of Actions; for though it be ſaid by (a) *Bracton*, that *omnes Actiones in mundo infra certa tempora Limitationem habent*; (b) 2 Inſt. 95. Co. Lit. 115. 4 Co. 10, 11. yet my Lord *Coke*, (b) ſays that the Limitation of Actions was by Force of divers Acts of Parliament; alſo, ſays he, this general Poſition of *Bracton*'s admitted of ſeveral Exceptions.

Spelm. Gloſſ. 32.

But we find that by the antient Law there was a ſtated Time for the Heir of the Tenant to claim after the Death of his Anceſtor, or elſe he loſt his Land, according to the feudal Text, *Præterea ſi quis infeudatus major quatuordecim annis, ſua incuria, vel negligentia, per ann. & diem ſteterit, quod feudi inveſtituram a proprio Domino non petierit, tranſacto hoc ſpatio, feudam amittat & ad Dominum redeat.*

Spelm. Gloſſ. *Annus & Dies* 32, 33.

The fixing upon this Period of a Year and a Day, upon ſeveral other Occaſions, ſeems to have been deduced from this antient Rule, and on this Occaſion was pitched upon, becauſe the Services appointed ſeem to be annually computed; and therefore the Feud was ordered to be taken up within ſuch Time as ſuch annual Services became due, or elſe it was loſt and returned to the Lord; and the ſame Time that was appointed to the Tenant to claim from the Lord, was alſo appointed to make his Claim upon any Diſſeiſor; and if no ſuch Claim was made, the Diſſeiſor, dying ſeiſed, caſt the Right of Poſſeſſion upon the Heir; and this was to keep the ſame Uniformity in point of Time through the Law; as alſo that the Lord might be at a Certainty who he might take for his Tenant, and admit upon every Deſcent; and ſince the Heir of the Tenant antiently loſt the whole Land, in caſe he did not take it up within Time, it was fit the Tenant ſhould loſe the Right of Poſſeſſion in caſe he did not claim within the ſame Time upon the Diſſeiſor, that the Heir of ſuch Diſſeiſor might be in Peace, in caſe the Perſon that had Right did not make his Claim upon him, and that from thenceforth the Lord might receive him into his Feud; and as upon the antient Plan of feudal Conſtitution, if the Heir did not take up the Feud within a Year and a Day, a Deſertion and Dereliction was preſumed; ſo alſo if the Diſſeiſee did not claim within the ſame Time, the Right of Poſſeſſion was relinquiſhed.

But for the ancient Limitations, *vide* Co. Lit. 14. b. 15. a. 2 Inſt. 94, 95. 2 Rol. Abr. 111.

Before the 32 *H.* 8. *cap.* 2. certain remarkable Periods were fixed upon, within which the Titles upon which Men deſigned to be relieved muſt have accrued: Thus in the Time of *H.* 3. by the Statute of *Merton*, *cap.* 8. at which Time the Limitation in a Writ of Right was from the Time of King *Henry* 1. by that Statute it is reduced to the Time of King *Henry* 2. and for Aſſiſes of *Mordaunceſtor*, they were thereby reduced from the laſt

Return

Return of King *John* out of *Ireland*, which was 12 *Johannis*; and for Aſſiſes of *Novel Diſſeiſin, a prima transfretatione Regis in Normaniam*, which was 5 *Henry* 3. and which before that had been *poſt ultimum reditum Henric'* 3. *de Britannia*; and this Limitation was alſo afterwards by the Statutes *Weſtm.* 1. *cap.* 39. and *Weſt.* 2. *cap.* 46. reduced to a narrower Compaſs, the Writ of Right being limited to the firſt Coronation of *Rich.* 1. *Hale's* Hiſt. of the Law. 122. 2 Keb. 45.

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* (B) Of the Limitation of Real Actions purſuant to the 32 H. 8. cap. 2. and 21 Jac. 1. cap. 16.

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THE Limitations above-mentioned being, as hath been remarked, ſet Periods, in Proceſs of Time, of Neceſſity grew too large; whereby, as my Lord *Coke* obſerves, many Suits, Troubles and Inconveniencies did ariſe; and therefore a more direct and commodious Courſe was taken, which was to endure for ever, and calculated ſo to impoſe Diligence on, and Vigilancy in him that was to bring his Action, ſo that by one conſtant Law certain Limitations might ſerve both for the Time preſent and for all Times to come. 2 Inſt. 95.

And this was effected by 32 *H.* 8. *cap.* 2. by which it is enacted, "That no Perſon ſhall from henceforth ſue, have or maintain any Writ of "Right, or make any *Preſcription*, *Title* or *Claim* to or for any Manors, "Lands, Tenements, Rents, Annuities, Commons, Penſions, Portions, "Corodies, or other Hereditaments of the Poſſeſſion of his or their An- "ceſtor or Predeceſſor, and declare and alledge any further Seiſin or Poſ- "ſeſſion of his or their Anceſtor or Predeceſſor, but only of the Seiſin or "Poſſeſſion of his Anceſtor or Predeceſſor, which hath been, or now is, "or ſhall be ſeiſed of the ſaid Manors, Lands, Tenements, Rents, An- "nuities, Commons, Penſions, Portions, Corodies, or other Hereditaments, "within *threeſcore* Years next before the *Teſte* of the ſame Writ, or next "before the ſaid Preſcription, Title or Claim, ſo hereafter to be ſued, "commenced, brought, made or had."

And it is further enacted by the ſaid Statute, *par.* 2. "That no manner "of Perſon ſhall ſue, have or maintain any *Aſſiſe* of *Mortdaunceſtor*, Coſen- "age, Ayle, Writ of Entry upon Diſſeiſin done to any of his Anceſtors "or Predeceſſors, or any other *Action Poſſeſſory* upon the Poſſeſſion of "any of his Anceſtors or Predeceſſors, for any Manors, Lands, Tene- "ments or other Hereditaments, of any further Seiſin or Poſſeſſion of his "or their Anceſtor or Predeceſſor, but only of the Seiſin or Poſſeſſion of "his or their Anceſtor or Predeceſſor, which was or hereafter ſhall be "ſeiſed of the ſame Manors, Lands, Tenements, or other Hereditaments, "within *fifty* Years next before the *Teſte* of the Original of the ſame Writ "hereafter to be brought."

And it is further enacted, by *par.* 3. of the ſaid Statute "That no Per- "ſon ſhall ſue, have or maintain any *Action* for any Manors, Lands, "Tenements, or other Hereditaments, of or upon his or their *own Seiſin* "*or Poſſeſſion* therein, above *thirty* Years next before the *Teſte* of the "Original of the ſame Writ hereafter to be brought."

And further, by *par.* 4. "That no Perſon ſhall hereafter make any "*Avowry* or *Cognizance* for any Rent, Suit or Service, and alledge any "Seiſin of any Rent, Suit or Service, in the ſame Avowry or Cognizance "in the Poſſeſſion of any other, whoſe Eſtate he ſhall pretend or claim to "have, above *fifty* Years next before the making of the ſaid Avowry or "Cognizance."

And

And it is further enacted by the ſaid Statue, *par.* 5. "That all *Formedons* in *Reverter*, *Formedons* in *Remainder*, and *Scire facias* upon "*Fines* of any Manors, Lands, Tenements, or other Hereditaments, at "any Time hereafter to be ſued, ſhall be ſued and taken within *fifty* † "Years next after the Title and Cauſe of Action fallen, and at no Time "after the fifty Years paſſed."

† *Vide infra* 502. n.

Alſo by the ſaid Statute, *par.* 6. it is enacted, "That if any Perſon do "ſue any of the ſaid Actions or Writs for any Manors, Lands, Tene-"ments or other Hereditaments, or make any Avowry, Cognizance, "Preſcription, Title or Claim, of or for any Rent, Suit, Service, or "* other Hereditaments, and cannot prove that he or they, or his or their "Anceſtors or Predeceſſors, were in actual Poſſeſſion or Seiſin of and in "the ſame Manors, Lands, Tenements, Rents, Suits, Services, Annuities, "Commons, Penſions, Portions, Corodies, or other Hereditaments, at "any Time or Times (*a*) within the Years before limited and appointed "in this preſent Act, and in Manner and Form as is aforeſaid, if the ſame "be traverſed or denied by the Party, Plaintiff, Demandant or Avowant, "or by the Party, Tenant or Defendant; that then, and after ſuch Trial "therein had, all and every ſuch Perſon and Perſons, and their Heirs, "ſhall from thenceforth be utterly barred for ever of all and every the ſaid "Writs, Actions, Avowries, Cognizance, Preſcription, Title or Claim "hereafter to be ſued, had or made, of and for the ſame Manors, Lands, "Tenements, Hereditaments, or other the Premiſſes, or any Part of the "ſame, for the which the ſame Action, Writ, Avowry, Cognizance, "Preſcription, Title or Claim, hereafter ſhall be at any Time had, ſued "or made."

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(*a*) In 8 Co. 65. the Statute is recited thus: That no Perſon or Perſons ſhall hereafter make any Avowry or Conuzance for any Rent, Suit or Service in the ſame Avowry or Conuzance, in the Poſſeſſion of his or their Anceſtor or Predeceſſor, *&c.* above *forty* Years next before the making of the ſaid Avowry or Conuzance.——[It's *forty*, in Com. Dig. 5 V. 502.]

Note; This Statute hath the uſual Savings for Infants, Feme Coverts, Perſons in Priſon and beyond Sea.

In the Conſtruction of this Statute it hath been holden,

That in a (*b*) Formedon in Reverter or Remainder, or on a *Scire facias* on a Fine of ſuch Nature, the Demandant need not mention the Statute in order to make out his Title, but the Tenant, if he would take advantage of it, muſt plead it.

Dyer 315. b. pl. 101.

(*b*) So in Avowry for Rent.

Moor 31. pl. 102. Rol. Rep. 50.

It hath been held, that this Statute, being in Reſtraint of the Common Law, ought to be conſtrued ſtrictly; and that therefore it does not extend to a *Formedon in Deſcender*, ‡ (*c*) *Ceſſavit* nor *Reſcous*.

4 Co. 8. And. 16. Lit. Rep. 342.

(*c*) Not to a *Ceſſavit* for two Reaſons. 1. Becauſe this Writ is not compriſed within the Statute. 2. Becauſe the Seiſin of Services is not material nor traverſable in this Writ. Moor 44. pl. 135.——Whether it extends to a Penſion in the Spiritual Court, *vide* 3 Keb. 366, 392. Vent. 265 ——‡ See *infra* 503. the Statute of 21 Jac. 1. c. 16.

If *A.* by Deed indented, made a Feoffment in Fee to *B.* and his Heirs, rendering 10*s. per Ann.* to *A.* and his Heirs, of which Rent *A.* or his Heirs, have not been ſeiſed within forty Years, yet the Heirs of *A.* may diſtrain, *&c.* for the Statute muſt be intended in ſuch Caſes (*d*) only where before the Statute the Avowant was obliged to alledge a Seiſin; and that was where the Seiſin was ſo material, and of ſuch Force, that though it was by Incroachment, yet it could not be avoided in an Avowry.

8 Co. 64. b. *Copper* and *Foſter* adjudged. Brownl. 169. S. C.

(*d*) So this Statute extends not to a new Rent created by Act of Parliament. Cro. Car. 80, 81, 214. Lit. Rep. 42. Hetl. 28, 36. Jon. 233.

To

To a Bill in Chancery, to be relieved touching a Rent charged upon Lands by a Will, the Defendant pleaded the Statute of Limitations, and that there had been no Demand or Payment in forty Years; and it was held that this Statute concerns only cuſtomary Rents between Lord and Tenant, and not any Rent that commences by Grant, or whereof the Commencement may be ſhewn. 2 Vern. 255. *Collins* and *Goodall.*

The Statute does not extend to the Services of *(a)* Eſcuage, Homage and Fealty for a Man may live above the Time limited by the Act; neither doth it extend to any other Service which by common Poſſibility may not happen or become due within ſixty Years, as to cover the Hall of the Lord, or to attend the Lord in the War, *&c.* Co. Lit. 115. a. 2 Inſt. 95. *Page 503 4 Co. 10. *Bevil's* Caſe.

8 Co. 65. 9 Co. 36. 4 Lev. 21. *(a)* But although Homage, Fealty, and Eſcuage, be out of the Statute 32 H. 8. c. 2. yet are they within the antient Statute. 2 Inſt. 96.

And where the Tenure is by Homage, Fealty and Eſcuage incertain, and by Suit of Court or Rent, or any other annual Service, the Seiſin of the Suit or Rent, or any other annual Service, is a *(b)* good Seiſin of the Homage, Fealty or Eſcuage, or other accidental Services, as Wardſhip, Heriot Service, or the like. 2 Inſt. 96. 4 Co. 8. b. Winch. 32. Hutt. 52. 2 Rol. Rep. 392.

(b) That Seiſin of a ſuperior Service is a Seiſin of all inferior Services which are incident thereto. 4 Co. 8. b.—— So Seiſin of Fealty is a ſufficient Seiſin of Homage and Eſcuage; for when the Tenant does Fealty, he ſwears to do all other Services. 4 Co. 8. a.——So Seiſin of Homage is a Seiſin of all other Services, as well inferior as ſuperior, becauſe in the Doing thereof the Tenant takes upon himſelf to do all Services. 4 Co. 8.—But Seiſin of one annual Service is no Seiſin of another annual Service; for in that Caſe it is the Folly of the Lord, if he hath not an actual Seiſin of the other Service itſelf, when it becomes due yearly. 4 Co. 9. a.

By the 1 *Mar. cap.* 5. it is enacted, " That the 32 *H.* 8. *cap.* 2. ſhall " not extend to any Writ of Right of Advowſon, *Quare Impedit*, or Aſſiſe " of *Darrein Preſentment*, nor *Jure Patronatus*, nor to any Writ of Right " of Ward, Writ of Raviſhment of Ward for the Wardſhip of the Body, " or for the Wardſhip of any Caſtles, Honours, Manors, Lands, Tene- " ments or Hereditaments holden by Knights-Service, but that ſuch Suits " may be brought as before the making the ſaid Act."

By the 21 *Jac.* 1. *cap.* 16. for quieting Mens Eſtates, and avoiding of Suits, it is enacted, " That all Writs of *Formedon in Deſcender*, *Formedon* " *in Remainder*, and *Formedon in Reverter*, at any Time hereafter to be " ſued or brought of or for any Manors, Lands, Tenements or Hereditа- " ments, whereunto any Perſon or Perſons now hath or have any Title, or " cauſe to have or purſue any ſuch Writ, ſhall be ſued and taken within " twenty Years next after the End of this preſent Seſſion of Parliament; " and after the ſaid twenty Years expired, no Perſon or Perſons, or any of " their Heirs, ſhall have or maintain any ſuch Writ of or for any of the " ſaid Manors, Lands, Tenements or Hereditaments; and that all Writs " of *Formedon in Deſcender*, *Formedon in Remainder*, *Formedon in Rever-* " *ter*, of any Manors, Lands, Tenements, or other Hereditaments whatſo- " ever, at any Time hereafter to be ſued or brought by Occaſion or Means " of any Title, or Cauſe hereafter happening, ſhall be ſued and taken within " *twenty* Years next after the Title and Cauſe of Action firſt deſcended or " fallen, and at no Time after the ſaid twenty Years; and that no Perſon " or Perſons that now hath any *Right or Title of Entry* into any Manors, " Lands, Tenements or Hereditaments, now held from him or them, ſhall " thereinto enter, but within *twenty* Years next after the End of this pre- " ſent Seſſion of Parliament, or within *twenty* Years next after any other " Title of Entry accrued; and that no Perſon or Perſons ſhall at any " Time hereafter make any Entry into any Lands, Tenements or Heredi- " taments, but within *twenty* Years next after his or their Right or Title,

" which

" which ſhall hereafter firſt deſcend or accrue to the ſame; and in Default " thereof, ſuch Perſons ſo not entering, and their Heirs, ſhall be utterly " excluded and diſabled from ſuch Entry after to be made; any former " Law, &c.

" Provided, That if any Perſon or Perſons that is or ſhall be intitled to " ſuch Writ or Writs, or that hath or ſhall have ſuch Right or Title of " Entry, be or ſhall be, at the Time of the ſaid Right or Title firſt de- " ſcended, accrued, come or fallen, within the Age of one and twenty " Years, Feme Covert, *Non compos mentis*, impriſoned, or beyond the " Seas; that then ſuch Perſon and Perſons, and his and their Heir and " Heirs, ſhall or may, notwithſtanding the ſaid twenty Years be expired, " bring his Action, or make his Entry, as he might have done before this " Act, ſo as ſuch Perſon and Perſons, or his or their Heir and Heirs, " ſhall within *ten* Years next after his and their full Age, Diſcoverture, *Page 504 " Coming * of ſound Mind, Enlargement out of Priſon, or coming into " this Realm, or Death, take Benefit of and ſue forth the ſame, and at no " Time after the ſaid ten Years.

In the Conſtruction of this Statute it hath been holden,

Salk. 285. pl. 19. That the Poſſeſſion of one Joint-tenant is the Poſſeſſion of the other, ſo far as to prevent this Statute.

Salk. 285. pl. 19. That a (*a*) Claim or Entry to prevent the Statute of Limitations muſt be upon the Land, unleſs there be ſome ſpecial Reaſon to the contrary.

(*a*) And by 4 & 5 Ann. c. 16. upon ſuch Claim or Entry, an Action muſt be commenced within one Year next after the making of ſuch Entry and Claim, and proſecuted with Effect, otherwiſe of no Force to avoid the Statute.

Lutw. 781. *Hunt* and *Bourn*. Salk. 339. pl. 5. 2 Salk. 422. pl. 7. S. C. That if a Perſon be barred of his *Formedon*, he is not thereby hindred to purſue his Right of Entry which afterwards accrues to him, no more than a Perſon, who has ſeveral Remedies, and diſcharges one of them, is excluded thereby from purſuing the others.

2 Salk. 421. pl. 5. ſaid to have been twice ſo ruled by *Holt*. If *A.* has had Poſſeſſion of Lands for twenty Years without Interruption, and then *B.* gets Poſſeſſion, upon which *A.* is put to his Ejectment; though *A.* is Plaintiff, yet the Poſſeſſion of twenty Years ſhall be a good Title in him, as if he had ſtill been in Poſſeſſion; becauſe a Poſſeſſion for twenty Years is like a Deſcent which tolls Entry, and gives a Right of Poſſeſſion, which is ſufficient to maintain an Ejectment.

Salk. 423. pl. 10. That if one Tenant in Common receives the whole Profits for twenty Years, or more, yet this does not bar his Companion; for the Statute of Limitations never runs againſt a Man but where he is actually ouſted or diſſeiſed.

Moor 410. It has been ruled that Copyholds are within the Statute of Limitations, becauſe an Act made for the Preſervation of the public Quiet, and no Ways tending to the Prejudice of the Lord or Tenant.

Comp. Incumb. 429. But Eccleſiaſtical Perſons are not bound by any of the Statutes of Limitations, becauſe it would be a Side-Wind to evade the Statutes made to prohibit their Alienations.

(C) Of the Limitation of Time in regard to Actions on Penal Statutes.

BY the 31 *Eliz. cap.* 5. *par.* 5. it is enacted, "That all Actions, Suits, "Bills, Indictments or Informations, which ſhall be brought for any "Forfeiture upon any Statute Penal, made or to be made, whereby the "Forfeiture is or ſhall be limited to the *Queen*, her Heirs and Succeſſors "*only*, ſhall be brought within *two* Years after the Offence committed, and "not after two Years; and that all Actions, Suits, Bills or Informations, "which ſhall be brought for any Forfeiture upon any Penal Statute, made "or to be made, except the Statute of Tillage, the Benefit and Suit "whereof is or ſhall be by the ſaid Statute limited to the *Queen*, her Heirs "or Succeſſors, and *to any other that ſhall proſecute* in that Behalf, ſhall be "brought by any Perſon that may lawfully ſue for the ſame within *one* "Year next after the Offence committed; and in Default of ſuch Purſuit, "that then the ſame ſhall be brought for the Queen's Majeſty, her Heirs "or Succeſſors, any Time within the *two* Years *after that Year ended*; "and if any Action, Suit, Bill, Indictment or Information, ſhall be brought "after the Time ſo limited, the ſame ſhall be void: And it is provided, "that where a ſhorter Time is limited by any Penal Statute, the Proſecu-"tion muſt be within that Time."

All popular Actions were limited to a certain Time by 7 H. 8. c. 3. which is repealed by this Statute.

By the 18 *Eliz. cap.* 5. *par.* 1. it is enacted, "That upon every Infor-"mation that ſhall be exhibited on any penal Statute, a ſpecial Note "ſhall be made of the very Day, Month, and Year of the exhibiting "thereof into any Office, or to any Officer which lawfully may receive "the ſame, without any Antedate thereof to be made; and that the "ſame Information be accounted and taken to be of Record from that "Day forward, and not before; and that no Proceſs be ſued out upon "ſuch Information, until the Information be exhibited in Form aforeſaid "*&c.* and that every Clerk, making out Proceſs contrary to this Act, "ſhall forfeit 40*s.*"

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Alſo it is further enacted by 21 *Jac.* 1. *cap.* 4. "That no Officer ſhall "receive, file or enter of Record, any Information, Bill, Plaint, Count "or Declaration, grounded on any penal Statute, (being within the Pro-"viſion of the ſaid Statute of 21 *Jac.*) until the Informer or Relator hath "firſt taken a (*a*) Corporal Oath before ſome of the Judges of the Court, "that he believes, in his Conſcience, the Offence was committed within a "Year before the Information or Suit within the County where the ſaid "Information or Suit was commenced, *&c.*"

(*a*) It hath been adjudged, that if an Officer receive an Information without ſuch previous Oath, that yet the Proceedings on it are not erroneous. Cro. Car. 316. & *vide* 2 Inſt. 192. 4 Inſt. 272.——But *Quære*, whether the Court on Motion will not ſet aſide ſuch Proceſs as having iſſued contrary to the Directions of the Statute. Salk. 376. pl. 19.——[In Actions the Oath is not now uſed; and *quære*, if in criminal Proſecutions?]

In the Conſtruction of theſe Statutes it hath been holden, That the 21 *Jac.* 1. *cap.* 4. does not extend to any Offence created ſince that Statute; ſo that Proſecutions on ſubſequent penal Statutes are not reſtrained thereby, but that Statute is to them as it were repealed *pro tanto*. Salk. 372. pl. 13. 5 Mod. 425.

That if an Offence prohibited by any penal Statute be alſo an Offence at Common Law, the Proſecution of it, as of an Offence at Common Law is no way reſtrained by any of theſe Statutes. Hob. 270. 4 Mod. 144.

That if an Information *tam quam* be brought after the Year on a penal Statute, which gives one Moiety to the Informer, and the other to the King, it is naught only as to the Informer, but good for the King. Cro. Car. 331. Cro. Jac. 366. & *vide* Daliſ. 60.

That

That if a Suit on a penal Statute be brought after the Time limited, the Defendant need not plead the Statute, but may take advantage of it on the general Iſſue †.

Show. Rep. 353.

† For the Statute ſays the ſame ſhall be void, conſequently the Party does not owe the Penalty demanded, the Informer in ſuch Caſe, not having a Right to demand the Penalty.

That the Party grieved is not within the Reſtraint of theſe Statutes, but may ſue in the ſame Manner as before.

Cro. Eliz. 645. Noy 71. 3 Leon. 237. Show. Rep. 354. and Carth. 233. S. P. That where the Penalty is given to the Party alone, this is out of the Statute 31 Eliz. c. 5. but *per Holt*, if given to the King and Party ſeparately, it ſeems within the Statute; but hereof the other Judges doubted.

Show. 353, 354. It ſeems doubtful, whether a Suit by a common Informer on a penal Statute, which firſt gives an Action to the Party grieved, and in his Default, after a certain Time, to any one who will ſue, be within the Reſtraint of theſe Statutes.

Carth. 232. *Culliford* ver. *Blandford.* Show. Rep. 353. S. C. ‡This is now ſettled Law. See *infra* 506. n. It has been held by three Judges, that the Suing out a *Latitat* within the Year was a ſufficient Commencement of the Suit to ſave the Limitation of Time on a penal Statute ‡, becauſe the *Latitat* is the Original of *B. R.* and may be continued on Record as an Original. But *Holt* held otherwiſe, for the Action being for a Penalty given by a Statute, the Plaintiff might have brought an Action of Debt by Original in *B. R.* becauſe the Statute gives the Action; and he held, that there was a Difference between a Civil Action and an Action given by Statute; for in the firſt Caſe the ſuing out a *Latitat* within the Time, and continuing it afterwards, will be ſufficient; but in the other Caſe, if the Party proceeds by Bill, he ought to file his Bill within Time, that it may appear ſo to be upon the Record itſelf.

*Page 506 Trin. 3 Car. 2. in *C. B. Greenwood* ver. *Scott.* * In Debt *qui tam* on the Statute 1 *H.* 5. *cap.* 4. for practiſing as an Attorney during the Time he was Under-Sheriff, and the Point was on the 31 *Eliz. cap.* 5. which limits Informers and Plaintiffs in Popular Actions to a Year; the Defendant in this Caſe was taken upon a *Teſtatum Cap.* that bore *Teſte* 13 *January*, when his Office expired in *November* was Twelve-Month before, and ſo a Year and two Months after his Offence; but by antedating the Original, and making it of *Mich.* Term before, it was brought within the Year; and *North* and *Wyndham* ſaid it was well warranted by the Practice of the Court, and therefore they would make no Rule to ſtop the Filing of the Original; but *Atkins* was againſt it, and ſaid it was nothing but a Practice to evade the Statute of 31 *Eliz. cap.* 5. §

§ The ſettled Practice now is, that the Writ, whether Original, Bill of *Middleſex*, or Latitat, muſt be actually ſued out, within the Time limited by the Statute, that the antedating of the Teſte, will not do, and the real Day of ſuing out the Writ, may be ſhewn in the Pleadings, ſo ſettled in *Combe* and *Pitt*, 3 Bur. 1423, &c.

2 Hawk. P. C. 272. Serjeant *Hawkins* makes it a Queſtion, whether the Clauſe in 31 *Eliz. cap.* 5. *par.* 4. by which it is enacted, *That nothing in the ſaid Act contained ſhall extend to Champerty, King's Cuſtoms, or Foreſtalling*, &c. *but that every ſuch Offence may be laid in any County; any Thing in the ſaid Act to the contrary notwithſtanding*, doth except the ſaid Offences out of the above recited Clauſe, relating to the Time within which Suits on Penal Statutes muſt be brought; for the Words above-mentioned, *viz. but that every ſuch Offence may be laid in any County*, ſeem to reſtrain the Generality of the precedent, which ſay, that nothing in the Act contained ſhall extend to ſuch Offences.

(D) Of the Limitation of Time in regard to Perſonal Actions, purſuant to the 21 Jac. 1. cap. 16. And herein,

1. Of Actions of Aſſault and Battery.

BY the 21 *Jac.* 1. *cap.* 16. "All Actions of Treſpaſs of Aſſault, Bat-
" tery, Wounding, Impriſonment, or any of them, ſhall be com-
" menced and ſued within *four* Years next after the Cauſe of ſuch Acti-
" ons, or Suits, and not after."

It ſeems, that if a Man brings Treſpaſs for beating his Servant, *per quod ſervitium amiſit*, this is not ſuch an Action as is within this Branch of the Statute, being founded on the ſpecial Damage. Salk. 206. pl. 5. 5 Mod. 74. Ld. Raym. 831.

If to an Action of Aſſault, Battery and Impriſonment, the Defendant pleads, as to the Aſſault and Impriſonment, the Statute of Limitations, without anſwering particularly to the Battery, otherwiſe than by uſing the Words *Tranſgreſſio prædicta*, it is ſufficient, for theſe Words are an Anſwer to the Whole ‡. Lev. 31.

‡ But the general Form and beſt Mode of pleading is, to ſay, Not guilty of the *Treſpaſs* aforeſaid, *&c.*

In Treſpaſs for Aſſault and Battery, the Defendant pleaded *Non culp. infra ſex Annos* by Miſtake, and not according to the Statute, which is but four Years; and upon Demurrer it was adjudged an ill Plea, for if it be conſidered as at Common Law, there was no ſuch Plea; if on the Statute, the Act is not purſued; and the Defendant could not take Iſſue on it, for *Quod eſt culp. infra ſex annos* is an Iſſue immaterial, becauſe it may be the Jury might find him Not guilty *infra quatuor annos*, but guilty *infra ſex annos*. 2 Salk, 423. pl. 11. *Blackmore* ver. *Tidderl.* 6 Mod. 240. S. S. 2 Ld. Raym. 1099. S. C. See Ld. Raym. 435.

* 2 Of Actions of Slander.

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By the 21 *Jac.* 1. *cap.* 16. *par* 3. it is enacted, "That all Actions on
" the Caſe for Words ſhall be commenced and ſued within *two* Years
" next after the Words ſpoken, and not after."

In the Conſtruction of this Branch of the Statute it hath been holden,

That an Action of *Scandalum Magnatum* is not within the Statute. Lit. Rep. 342.

That it extends not to Actions for Slander of Title, for that is not properly Slander, but a Cauſe of Damage, and the Slander intended by the Statute is to the Perſon. 3 Keb. 645. CroCar. 141. *Law* and *Harwood*, adjudged. Ley 82. Palm. 530. Jon. 196. S. C. adjudged.

That if the Words are of themſelves actionable, without the Neceſſity of alledging ſpecial Damage, although a Loſs enſues, yet in this Caſe the Statute of Limitations is a good Bar; but if the Words at the Time of the ſpeaking of them are not actionable, but a ſubſequent Loſs enſues, which intitles the Plaintiff to his Action, in ſuch Caſe the Statute is no Bar. Sid. 95. *Saunders* ver. *Edwards*. Raym. 61. S. C. & *vide* 3 Mod. 111. S. C. cited.

Sid. 95. Salk. 206. pl. 5. S. P. And that it was incumbent upon the Plaintiff to prove the ſpecial Damage; otherwiſe the Action would not have laid for the Words.

As for calling a Woman Whore, by which ſhe loſt her Marriage ſeven Years afterwards, the Statute is no Bar; for it is not the Words, but the ſpecial Damage, which is the Cauſe of Action in this Caſe.

CroCar. 163. *Topſal* and *Edwards*, adjudged on the Branch of this Statute that ſays, that for ſlanderous Words the Plaintiff ſhall have no more Coſts than Damages, &c.

Alſo for calling a Man Thief, and procuring him to be indicted and impriſoned for Felony, and the Defendant is found guilty of the Whole; the Statute in this Caſe ſeems no Bar, for the Action is not for Words barely, but is an Action upon the Caſe in nature of a Conſpiracy.

Sid. 95.

That if an Action for Words be founded upon an Indictment, or other Matter of Record, it is not within the Statute, but ſuch Action may be brought at any Time.

Keb. 820, 918. *Lidiate* and *Butrle.*

In an Action for Words, the Defendant pleaded *non locutus eſt verba prædicta infra duos annos*; and upon a ſpecial Demurrer it was objected, that it ought to have been *Non culp. infra duos annos*; for as it is it may be, the Defendant ſpoke the ſubſtantial Words of the Slander, and yet did not ſpeak all the Words; and yet the Plaintiff could not have a Verdict upon this Iſſue; as in an Action of Debt for 10*l.* if the Defendant ſays *Non Debet* the 10*l.* without adding *nec aliquem inde denarium*, it would be naught; but the Court held the Caſes not alike; for in an Action of Debt, every Penny that ſtands in Demand is of equal Weight; but here the Action is founded upon the ſubſtantial Words only, and the *verba prædicta* ſhall refer only to them; and it was held well enough.

3. Of Actions ariſing upon Contract and founded *in Maleficio*: And herein,

1. *Of what Nature or Degree the Action muſt be ſo as to be barred by the Statute.*

By the 21 *Jac.* 1. *cap.* 16. *par.* 3. it is enacted, "That all Actions of "Treſpaſs *Quare Clauſum fregit*, all Actions of Treſpaſs, Detinue, Action "*ſur* Trover, and Replevin for taking away of Goods and Cattle, all "Actions of Account, and upon the Caſe, other than ſuch Accounts as "concern the Trade of Merchandize between Merchant and Merchant, "their Factors or Servants, all Actions of Debt grounded upon any "Lending or Contract without Specialty, all Actions of Debt for Ar-"rearages of Rent, and all Actions of Aſſault, Menace, Battery, Wound-"ing and Impriſonment, or any of them, which ſhall be ſued or brought "at any Time after the End of the then Seſſion of Parliament, ſhall be "commenced and ſued within the Time of Limitation herein after ex-"preſſed, and not after; that is to ſay, the ſaid Actions upon the Caſe, "(other than for Slander) and the ſaid Actions of Account, and the ſaid "Actions for Treſpaſs, Debt, Detinue and Replevin for Goods or "Cattle, and the ſaid Action of Treſpaſs *Quare clauſum fregit*, within "three Years next after the End of the then Seſſion of Parliament, or "within *ſix* Years next after the Cauſe of ſuch Actions or Suit, and not "after; and the ſaid Actions of Treſpaſs of Aſſault, Battery, Wounding, "Impriſonment, or any of them, within one Year next after the End "of the then Seſſion of Parliament, or within *four* Years next after the "Cauſe of ſuch Actions or Suit, and not after; and the ſaid Action upon "the

" the Caſe for Words, within one Year after the End of the then Seſſion " of Parliament, or within *two* Years next after the Words ſpoken, and " not after.

" Nevertheleſs, that if in any the ſaid Actions or Suits Judgment be " given for the Plaintiff, and the ſame be reverſed by Error, or a Verdict " paſs for the Plaintiff, and upon Matter alledged in Arreſt of Judgment, " the Judgment be given againſt the Plaintiff, that he take nothing by his " Plaint, Writ, or Bill; or if any the ſaid Actions ſhall be brought by " Original, and the Defendant therein be outlawed, and ſhall after (*a*) " reverſe the Outlawry, that in all ſuch Caſes, the Party Plaintiff, his " Heirs, Executors or Adminiſtrators, as the Caſe ſhall require, may " commence a new Action or Suit from Time to Time, within a Year " after ſuch Judgment reverſed, or ſuch Judgment given againſt the " Plaintiff, or Outlawry reverſed, and not after.

(*a*) Whether reverſed by Plea or Writ of Error, not material, Cro. Car. 294-5.

Provided, That if any Perſon or Perſons, that is or ſhall be intitled " to any ſuch Action of Treſpaſs, Detinue, Action *ſur* Trover, Replevin, " Actions of Accounts, Actions of Debt, Actions of Treſpaſs for Aſſault, " Menace, Battery, Wounding or Impriſonment, Actions upon the Caſe " for Words, be or ſhall be, at the Time of any ſuch Cauſe of Action, " given or accrued, fallen or come, within the Age of Twenty-one Years, " Feme Covert, *Non compos*, impriſoned, or beyond the Seas; that then " ſuch Perſon or Perſons ſhall be at Liberty to bring the ſame Actions, ſo " as they take the ſame within ſuch Times as are before limited, after " their coming to or being of full Age, diſcovert, of *ſane* Memory, at " large, and returned from beyond the Seas, as other Perſons having no " ſuch Impediment ſhould have done."

Winch. 82. Jon. 312.

Here we ſhall conſider and ſet down ſuch Caſes, about which there hath been any Conteſt, as to the Actions being grounded on a Contract * or Lending, as the Statute ſpeaks; thoſe by (*b*) Specialty, as all others of a ſuperior Nature, being plainly excepted out of the Statute.

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(*b*) But tho' a Bond or Specialty be out of the Statute, yet it ſeems to be the Practice at this Day, where an Action is brought on a Bond of twenty Years ſtanding, and on which no Intereſt has been paid for that Time, to admit the Defendant on a Plea of *ſolvit ad diem*, to give this Matter in Evidence, which, from the Length of Time, will be Preſumptive Proof of Payment.—So in Chancery, an Obligee on a Bond of twenty Years ſtanding was refuſed any Relief. Chan. Rep. 78, 88, 106.

And to this Purpoſe it hath been adjudged, that an Action of Debt on the 2 & 3 *E.* 6. *cap.* 13. for not ſetting out Tithes, is not within the Statute, the Action being grounded on an Act of Parliament, which is the higheſt Record.

Cro. Car. 513. *Talory* and *Jackſon*. Sand. 38.

2 Sand. 66. Sid. 305, 415. Keb. 95. 2 Keb. 462.

So it hath been adjudged, that an Action of Debt for the Arrearages of Rent reſerved on a Leaſe by Indenture is out of the Statute, the Leaſe by Indenture being equal to a Specialty.

Hutt. 109. *Freeman* and *Stacy*. Sand. 38. S. C. cited.

2 Sand. 66. S. C. cited, and S. P. admitted; and there ſaid, that the Statute extends to Rent reſerved on Parol Leaſes only.

Alſo it hath been adjudged, that an Action of Debt for an Eſcape is not within the Statute, not only becauſe it is founded *in Maleficio*, and ariſes on a Contract in Law, which is different from thoſe Actions of Debt on a Lending or Contract mentioned in the Statute, but alſo becauſe it is grounded on the 1 *R.* 2. *cap.* 12. which firſt gave an Action of Debt for

Sand. 37. *Jones* ver. *Pope*. Lev. 191. S. C. adjudged. 2 Keb. 93.

S. C. and Sid. 305. S. C. where it is ſaid, that an Action on the Caſe, For an Eſcape is within the Statute; and by *Wyndham*, Debt upon a Tally is not within the Statute.

an

an Eſcape, (*a*) there being no Remedy for Creditors before but by Action on the Caſe.

(*a*) For this *vide* 2 Inſt. 383. and Title *Eſcape.*

Mod. 245. *Cockram* ver. *Welby* 212. and 2 Show. Rep. 79. S.C. 2 Mod. 212.

So it hath been adjudged, that this Statute cannot be pleaded to an Action of Debt brought againſt a Sheriff for Money by him levied on a *Fieri Facias*, becauſe the Action is founded *in Maleficio*, as alſo upon the Judgment on which the *Fieri Facias* iſſued, which is a Matter of Record.

See 8 Mod. 171. Will. Rep. 742. pl. 214. 2 Will. Rep. 144. pl. 31. 2 Ld. Raym. 852, 935, 1204. Salk. 351. pl. 11. Carth. 153. 5 Mod. 308.

2 Sand. 64. Sid. 415. Lev. 273. 2 Keb. 462, 497, 533. S. C.

It hath been adjudged, that an Action of Debt on an Award under the Hand and Seal of the Arbitrator, though the Submiſſion was by Parol, is not within the Statute; for though in Strictneſs the Award cannot be ſaid to be equal to a Specialty, yet by being under Hand and Seal it becomes Matter of that Notoriety, that it cannot be liable to any of the Inconveniencies the Statute was made to prevent; ſuch as Perjury in Witneſſes, and the Oppreſſion of Defendants when their Witneſſes are dead, or Vouchers loſt; alſo it was never intended that the Statute ſhould extend to all Kinds of Actions of Debt, but only to thoſe which aroſe on a *Contract* or *Lending.*

Hutt. 109. *Sherwin* and *Cartwright.* Lit Rep. 341. S.C. adjudged. Sand. 37. 2 Sand. 64. S. C. cited, and admitted to be Law.

It hath been adjudged, that the Statute does not extend to the Writ *De rationabili parte bonorum*, founded on the Cuſtom of *Nottingham*, altho' it conclude in the *Detinet*; for this is an original Writ in the Regiſter; and though it conclude in the *Detinet*, is yet a different Action to the common Action of Detinue mentioned in the Statute, which being frequent in Practice, is the Detinue plainly intended by the Statute, and not this, which being founded on a Cuſtom ſeldom happens; and as the Statute is in Derogation of the Common Law, it ought to be conſtrued ſtrictly.

2 Keb. 536. Lev. 273.

An Action of Debt for a Fine of a Copyholder is not within the Statute.

2 Vern. 540. *per Curiam.*

If a Man recovers a Judgment or Sentence in *France* for Money due to him, the Debt muſt be conſidered here only as a Debt by ſimple Contract, and the Statute of Limitations will run upon it.

*Page 510 2 Lev, 166. 3 Keb. 645. Comb. 70.

* It ſeems, that to an *Aſſumpſit* brought by the Aſſignees of a Bankrupt for a Debt due to the Bankrupt, this Statute is a good Bar; for though the Aſſignment is by Force of an Act of Parliament, yet the Aſſignees ſtand only in the Place of the Bankrupt, and can have no other Right nor Remedy than he had.

3 Lev. 367. Ld. Raym. *Oliver* and *Thomas.*

It hath been adjudged, that this Statute is a good Plea in Bar to an *Aſſumpſit* brought by an Attorney for his Fees; for though the Attorney be of Record, yet his Fees are not.

Carth. 3. *Renew* ver. *Axton.* (*b*) Carth. 226. adjudged.

It hath been adjudged, that this Statute is a good Bar to an Action brought againſt the Drawer of a Bill of Exchange; and that ſuch Bill is not of as high a Nature as a Specialty, (*b*) neither is it within the Exception in the Statute relating to Merchants Accounts.

2. *Whether a Truſt or Equitable Demand be within the Statute.*

March 129. 2 Salk. 224. pl. 12. Chan. Ca. 20. Sir *Edward Heath* ver *Henley* & *al'.*

It ſeems clearly agreed, that though the Statutes of Limitations bind the Courts of Equity, that yet a Truſt is not within theſe Statutes.

And therefore where the Plaintiff, who was the Son and Executor of Ch. Juſt. *Heath*, who was made Ch. Juſt. at *Oxon* during the Difference between the King and Parliament, but never ſat at *Weſtminſter-Hall*, exhibited a Bill againſt the Defendants, Prothonotaries of the *K. B.* at that Time,

Time, to have an Account of the Money, &c. received by them during that Time by an implied Truſt *Virtute officii*; to which the Defendants pleaded the Statute of Limitations; but upon Argument the Plea was over-ruled. 2 Ld. Raym. 1204.

So where the Plaintiff exhibited a Bill to have an Account of Money received by the Defendant from his Father, (whoſe Executor he was) who gave it to him to compound for his Eſtate, ſequeſtered for Delinquency at *Goldſmith's Hall*; and it was ordered accordingly, the Court declaring it a Truſt, and therefore not within the Statute of Limitations. 2 Chan. Ca. 26. *Sheldon* ver. *Weldman.*

So where my Lady *Hollis* lent 100*l.* and in the Note which was given for it Mention was made, that it ſhould be diſpoſed of as my Lady ſhould direct; and a Bill being exhibited for it, the Court held it a *Depoſitum* or Truſt, and decreed Payment of it; though otherwiſe it had been barred by the Statute of Limitations. 2 Vent. 345.

A Charity is not barred by Length of Time, nor within the Statute of Limitations. 2 Vern. 399

So it hath been held, that a Legacy is not within the Statute of Limitations. Vern. 256.

It ſeems to be the Doctrine of Courts of Equity, that Mortgages are not within the Statute of Limitations, yet where a Man comes in at an old Hand, it hath been ſometimes decreed, that the Poſſeſſor ſhould account no farther than for the Profits made in his own Time, to diſcourage the ſtirring in ſuch dormant Titles; alſo the Courts have allowed Length of Time to be pleaded in Bar, where the mortgaged Eſtate hath deſcended as a Fee without Entry or Claim from the Mortgagor, and where the Poſſeſſor would be intangled in a long Account; and in theſe Caſes the Statute of Limitations hath been mentioned as a proper Direction to go by †. Chan. Ca. 102. but now by the 7 Geo. 2. c. 20. the Redemption of Mortgages is expreſly limited to 20 Years, which *vide* Title *Mortgages.*

* 3. *At what Time the Right of Action ſhall be ſaid to have accrued, before which the Statute can be no Bar.*

† *Vide poſt* 654-6. n.

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This Statute cannot be a Bar, unleſs the ſix Years are expired after there hath been compleat Cauſe of Action; as if a Man promiſe to pay 10*l.* to *J. S.* when he comes from *Rome*, or when he marries, and ten Years after *J. S.* marries, or comes from *Rome*, the Right of Action accrues from the happening of the Contingency, from which Time the Statute ſhall be a Bar, and not from the Time of the Promiſe. Godb. 437.

So in an Action on the Caſe, wherein the Plaintiff declared, that in Conſideration that he would forbear to ſue the Defendant for ſome Sheep, killed by his the Defendant's Dog, the Defendant promiſed to make him Satisfaction upon Requeſt, and that ſuch a Time he requeſted, &c. and it was held, that the Right of Action accrued from the Requeſt, and not from the Time of killing the Sheep; and that therefore the Defendant could not plead the Statute of Limitations, the Requeſt being within ſix Years, though the killing the Sheep, and Promiſe of Satisfaction, was long before. Godb. 437. *Shutford* ver. *Buroughs*, adjudged.

So in *Aſſumpſit*, in conſideration that the Plaintiff would deliver to the Defendant ſuch a Deed, the Defendant promiſed, that he would redeliver it to him on Requeſt, and alſo in conſideration that he had, upon Requeſt, delivered to him another Deed; the Defendant promiſed to pay him 40*l.* and alledges, that he had delivered to him the firſt Deed, and although at ſuch a Day afterwards he made Requeſt, yet he had not re-delivered the firſt Deed, nor paid the 40*l.* the Defendant pleads the Statute of Limitations, and that he did not promiſe within ſix Years before Lev. 48. *Webb* and *Martin.* Sid. 66. Keb. 177. S. C.

fore the Action brought; whereupon the Plaintiff demurs; for the Cauſe of Action, as to the firſt Deed, did not ariſe upon the Promiſe, but upon the Refuſal after Requeſt; and the Requeſt was within ſix Years; and ſo held the Court.

2 Salk. 422. pl. 9. 2 Ld. Raym. 838. *Gould* and *Johnſon*. So in *Aſſumpſit*, in Conſideration that the Plaintiff, at the Defendant's Requeſt, would receive *A.* and *B.* into his Houſe *ut Hoſpites*, and diet them, the Defendant promiſed, *&c.* *Non aſſumpſit infra ſex annos* was pleaded; the Plaintiff demurred, and held no Plea; for the Defendant cannot in ſuch Caſe plead *Non aſſumpſit infra ſex annos*; (*a*) but *Actio non accrevit infra ſex annos*; for it is not material when the Promiſe was made, if the Cauſe of Action be within ſix Years, and the Dieting might be long afterwards.

(*a*) For this *vide* 1 Vent. 191. 3 Keb. 613. 7 Mod. 99. *Wortley Mountague* ver. Lord *Sandwich*. Ld. Raym. 283, 838, 1099, 1101. Vern. 456. Fitzgib. 171, 172, 289. Will. Rep. 742. pl. 214. An Executor, ſeveral Years before the Action brought, left ſome Houſhold-Stuff in the Houſe, by the Conſent of the Heir, who uſed them after; and within ſix Years of the Action brought, the Executor demands the Goods, and the Heir refuſed to let him have them; whereupon Trover was brought, and the Statute of Limitations pleaded. And *per Cur.* the Uſer before the Demand was no Converſion, nor Evidence of it, for it was the Conſent of the Executor till then, and the Demand being within ſix Years, the Refuſal which enſued it, and is the only Evidence of a Converſion in the Caſe, was within the ſix Years; and (*b*) if a Trover before ſix Years, and a Converſion after, the Statute cannot be pleaded.

2 Ld. Raym. 851. Salk. 351. pl. 11. Stra. 556. 2 Stra. 736, 907. Fitzgib. 170. Barnard. *K. B.* 335. (*b*) But for this *vide* Cro. Car. 245-6, 333. Jon. 252. 3 Mod. 111.

Allen 62. *Harvey* and *Thorne* adjudged, no Body appearing for the Defendant. In an Action upon the Caſe againſt an Executor, the Plaintiff declares, that upon a Marriage Treaty it was agreed between the Plaintiff and Teſtator, that he ſhould pay to the Plaintiff 100*l.* and whilſt that ſhould be unpaid he ſhould pay the Plaintiff 10*l.* *per Ann.* which Agreement was made *Anno* 1618, and the Action was brought for all the Arrears by the Space of Twenty-eight Years. The Defendant pleaded

*Page 512 * the Statute of Limitations; and on Demurrer it was held, that all could not be barred by the Statute; and therefore the Plaintiff had Judgment.

2 Salk. 420. pl. 3. *Coventry* ver *Apſley*, *& vide* 3 Mod. 110. Comb. 26. Treſpaſs for impriſoning him, and detaining him in Priſon from 32 *Car.* 2. till the 3d of *April* 4 *Jac.* 2. The Defendant pleaded as to all till 32 *Car.* 2. ſuch a Day, *Non culp. infra quatuor annos*, and as to the Reſt, a Plaint, and *Capias* iſſued; the Plaintiff demurred. *Et per Curiam*, though the Impriſonment be complained of as one continual Impriſonment, yet the Defendant may divide the Time, and plead the Statute as to Part; and the Plaintiff may reply the Continuance; therefore as to this, Judgment was given againſt the Plaintiff upon his Demurrer, but for him as to the Reſt, becauſe the *Capias* was awarded by the Court *ex officio*, and it did not appear that the Defendant meddled in it.

6 Mod. 26. In Caſe of Seamen, the Duty does not ariſe from the Contract, but from the Service done; and therefore though the Contract were above ſix Years, and any Part of the Service within that Time, it is out of the Statute.

4. *In what Court the Demand muſt be made, or what Courts are bound by the Statute.*

March 129. 2 Salk. 424. pl. 13. It is clearly agreed, that the Statute of Limitations is a good Plea in a Court of Equity; but it ſeems the ſafeſt Way for him who pleads it, in his Anſwer, alſo to ſay, that he has paid the Money, becauſe otherwiſe the

the Court ſuppoſes a Truſt between the Plaintiff and Defendant, and that the Money is a *Depoſitum* in the Hands of the Defendant for the Benefit of the Plaintiff; and the Statute of Limitations, as has been obſerved, does not reach Truſts.

But it ſeems to be agreed, that the Statute of Limitations is no Plea in the Court of Admiralty, or Spiritual Court, where they proceed according to their Law, and in a Matter in which they have Conuzance. 6 Mod. 25, 26, 76. 2 Salk. 424. pl. 12. 3 Keb. 366, 392. Vent. 146, 343. Raym. 3. Salk. 34. 2 Rol. Abr. 350. pl. 10. 3 Mod. 244. Carth. 166, 518. Ld. Raym. 152, 398, 632, 576, 639, 650, 739. 2 Ld. Raym. 838. 8 Mod. 379. 10 Mod. 263. 11 Mod. 43. pl. 4. Ld. Raym. 1264. Vern. 73, 256, 456. 2 Vern. 141, 235, 540, 694. 12 Mod. 406. Comb. 135.

Therefore it hath been agreed, that for a Suit upon a Contract *ſuper altum mare*, no Prohibition ſhould go upon their Refuſal of a Plea of the Statute of Limitations. 6 Mod. 26.

So it has been held not to be pleadable to a Proceeding in the Spiritual Court, *pro violenta manuum injectione ſuper Clericum*, becauſe the Proceeding is *pro reformatione morum*, and not for Damages. 2 Salk. 424. pl. 12.

It has been doubted, whether, to a Suit in the Admiralty for Mariners Wages, this Statute is a good Plea; becauſe it is ſaid, that this is a Matter properly determinable at Common Law; and the allowing the Admiralty Juriſdiction therein, only a Matter of Indulgence. 2 Salk. 424. pl. 12. 6 Mod. 25.

But this is now ſettled by the 4 & 5 *Ann. cap.* 16. by which it is enacted, "That all Suits and Actions in the Court of Admiralty for Sea-"mens Wages, ſhall be commenced and ſued within ſix Years next after "the Cauſe of ſuch Suits or Actions ſhall accrue, and not after."

(E) Of the Exceptions in the Statute 21 Jac. 1. c. 16. and what will ſave a Bar thereof: And herein, *Page 513

1. What Actions are within the Exceptions of the Statutes.

AS to this it hath been adjudged, that the laſt Proviſo in the Statute not only extends to thoſe Actions therein enumerated, but alſo to an *Aſſumpſit*, though not mentioned, and to all other Actions on the Caſe, being of equal Miſchief, and plainly within the Intention of the Legiſlature. Cro. Car. 245, 333. 2 Sand. 120. 2 Mod. 71. Sid 453. See Fitzgib. 81, 170, 289, 290. Ld. Raym. 2, 153. Stra. 556. 2 Stra. 719. 2 Ld. Raym. 1427. Barnard *K. B.* 2 Stra. 550. Sid. 53, 60. Style 126. 2 Ld. Raym. 1441. 2 Stra. 737, 907. Barnard *K. B.* 335. Fitzgib. 170. 2 Stra. 1271. 10 Mod. 206, 313. 12 Mod. 444, 486, 568, 579. Ld. Raym. 432. Debt upon Eſcape is out of the Statute; Saund. 37. but an Action on the Caſe for an Eſcape is not. Sid. 305. So is Debt for not ſetting out of Tithes; for theſe are not grounded upon any Contract. Cro. Car. 515. Hutt. 109.

2. Of the Exception in relation to Infants, &c.

As to this it hath been holden, that the Statute being general, Infants had been included, had they not been particularly excepted. Lev. 31.

It hath been holden, that if an Infant, during his Infancy, by his Guardian brings an Action, the Defendant cannot plead the Statute of Limitations; although the Cauſe of Action accrued ſix Years before, and the Words of the Statute are, *That after his coming of Age*, &c. 2 Sand. 121.

It

Abr.Eq.304. *Lockey* verſus *Lockey.* It hath been held in Chancery, that if one receives the Profits of an Infant's Eſtate, and ſix Years after his coming of Age he brings a Bill for an Account, the Statute of Limitations is as much a Bar to ſuch a Suit, as if he had brought an Action of Account at Common Law; for this Receipt of the Profits of an Infant's Eſtate is not ſuch a Truſt as, being a Creature of the Court of Equity, the Statute ſhall be no Bar to; for he might have had his Action of Account againſt him at Law, and therefore no Neceſſity to come into this Court for the Account, for the Reaſon why Bills for an Account are brought here, is from the Nature of the Demand, and that they may have a Diſcovery of Books, Papers, and the Party's Oath, for the more eaſy taking of the Account, which cannot be ſo well done at Law; but if the Infant lies by for ſix Years after he comes of Age, as he is barred of his Action of Account at Law, ſo ſhall he be of his Remedy in this Court.

3. Of the Exception in relation to Merchants Accounts.

Jon. 401. 2 Sand. 124, 125. Lev. 287. 2 Keb. 622. Lev. 298. Vent. 90. Mod. 270. 2 Mod. 312. 2 Vern. 456. As to the Exception relating to Merchants, it hath been a Matter of much Controverſy, whether it extends to all Actions and Accounts relating to Merchants and Merchandize, or to Actions of Account open and current only, the Words of the Statute being, *That all Actions of Treſpaſs*, &c. *all Actions of Account and upon the Caſe, other than ſuch Accounts as concern the Trade of Merchants*; ſo that by the Words, *other than ſuch Actions*, not being ſaid Actions of Account, it has been inſiſted that all Actions concerning Merchants are excepted.

Vide the Authorities *ſupra.* But it is now ſettled, that Accounts open and current are only within the Statute; and that therefore, if an Account be ſtated and ſettled between Merchant and Merchant, and a Sum certain agreed to be due to one of them, if in ſuch Caſe, he to whom the Money is due, does not bring his Action within the Time limited, he is barred by the Statute.

*Page 514 Carth. 226. * So it hath been adjudged, that by the Exception in the Statute concerning Merchants Accounts, no other Actions are excepted but Actions of Account.

Carth. 226. Alſo it hath been adjudged, that Bills of Exchange for Value received, are not ſuch Matters of Account as are intended by the Exception in the Statute of Limitations.

4. Of the Exception in relation to Perſons beyond Sea.

Cro. Car. 245, 333. Jon. 252. Lev. 143. 3 Mod. 311. 2 Lutw. 950. 2 Salk. 420. pl. 1. Show. 98. Carth. 136. It ſeems to have been agreed, that the Exceptions as to Perſons being beyond Sea, extends only where the Creditors or Plaintiffs are ſo abſent, and not to Debtors or Defendants, becauſe the firſt are only mentioned in the Statute; and this Conſtruction hath the rather prevailed, becauſe it was reputed the Creditor's Folly, that he did not file an Original, and outlaw the Debtor, which would have prevented the Bar of the Statute.

But now 4 & 5 Ann. c. 16. Sect. 19. alters the Law in this Caſe of the Defendants being beyond Sea, for it does avoid the Statutes. 4 Vin. Abr. 236. pl. 5. But as the Creditors being beyond Sea is ſaved by the 21 *Jac.* 1. *cap.* 16. ſo now by the 4 & 5 *Ann. cap.* 16. it is enacted, "That if any Perſon or "Perſons, againſt whom there is or ſhall be any Cauſe of Suit or Action "for Seamens Wages, or againſt whom there ſhall be any Cauſe of Action "of Treſpaſs, Detinue, Action *ſur* Trover or Replevin, for taking away "Goods or Chattels, or of Action of Account, or upon the Caſe, or of "Debt grounded upon any Lending or Contract without Specialty, of "Debt, for Arrearages of Rent, of Aſſault, Menace, Battery, Wounding

" and Impriſonment, or any of them, be, or ſhall be, at the Time of any " ſuch Cauſe of Suit or Action given or accrued, fallen or come, beyond " the Seas, that then ſuch Perſon or Perſons, who is or ſhall be intitled " to any ſuch Suit or Action, ſhall be at Liberty to bring the ſaid Actions " againſt ſuch Perſon and Perſons after their Return from beyond the " Seas, within ſuch Times as are limited for the bringing of the ſaid Ac- " tions by the 21 *Jac.* 1. *cap.* 16."

5. Where no Executor or Adminiſtrator to ſue or be ſued.

If *A.* receives Money belonging to a Perſon who afterwards died Inteſtate, and to whom *B.* takes out Adminiſtration, and brings an Action againſt *A.* to which he pleads the Statute of Limitations, and the Plaintiff replies, and ſhews that Adminiſtration was committed to him ſuch a Year, which was *infra ſex Annos*; though ſix Years are expired ſince the Receipt of the Money, yet not being ſo ſince the Adminiſtration committed, the Action is not barred by the Statute.

Salk. 421. pl. 4. *Curry* verſ. *Stephenſon.* Skin. 555. pl. 3. 4 Mod. 376. Latch 335. S. C. In which laſt Book it is ſaid, that *Holt* was of Opinion, that the Adminiſtrator ſhould have ſix Years from the Time of granting Adminiſtration, according to *Sanford*'s Caſe cited in *Saffin*'s Caſe, Cro. Jac. 60, 61. but in the principal Caſe there was Judgment againſt the Plaintiff on another Point. Ld. Raym. 838, 1510. Fitzgib. 130. 10 Mod. 104, 205, 294, 330. 2 Stra. 871, 1220.

It is ſaid in general, that where one brings an Action before the Expiration of ſix Years, and dies before Judgment, the ſix Years being then expired, this ſhall not prevent his Executor †.

2 Salk. 424. pl. 13. † See Stra. 907. the next Caſe.

But if an Executor ſues upon a Promiſſory Note to the Teſtator, and dies before Judgment, and ſix Years from the original Cauſe of Action are actually expired, and the Executor of the Executor brings a new Action in four Years after the firſt Executor's Death, the Statute of Limitations ſhall be a Bar to ſuch Action; for though the Debt does not become irrecoverable, by an Abatement of the Action after the ſix Years elapſed by the Plaintiff's Death, yet the Executor ſhould make a recent Proſecution, to which the Clauſe in the Statute, that provides a Year after the Reverſal of a Judgment, *&c.* may be a good Direction; or ſhew that he came as early as he could, becauſe there was a Conteſt about the Will, or Right of Adminiſtration; * for the Statute was made for the (*a*) Benefit of Defendants, to free them from Actions when their Witneſſes were dead, or their Vouchers loſt.

Trin. 5 Geo. 2. *Wilcox* and *Huggins.* Barnard. *K. B.* 335. Fitzgib. 170. 2 Stra. 907.

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(*a*) That the Statute of Limitations was one of the beſt of Statutes, and the Pleading thereof no Diſparagement to any Body: *Per Holt* C. J. 7 Mod. 12.

If there is no Executor againſt whom the Plaintiff may bring his Action he ſhall not be prejudiced by the Statute of Limitations, nor ſhall any Laches in ſuch Caſe be imputed to him.

2 Vern. 695.

6. Where no Juriſdiction to ſue in, or where hindered by ſome Authority.

It ſeems agreed, that there being no Courts, or the Courts of Juſtice being ſhut, is no Plea to avoid the Bar of the Statute of Limitations; as where after the Civil War an *Aſſumpſit* was brought, and the Defendant pleaded the Statute of Limitations; to which the Plaintiff replied, that a Civil War had broke out, and that the Government was uſurped by certain Traitors

Keb. 157. Lev. 31, 111. Carth. 137. 2 Salk. 420. pl. 1.

Traitors and Rebels, which hindred the Courſe of Juſtice, and by which the Courts were *(b)* ſhut up, and that within ſix Years after the War ended he commenced his Action; and this Replication was held ill; (*c*) for the Statute being general, muſt work upon all Caſes which are not exempted by the Exception.

(*b*) In Plow. 9. b. that Things happening by an invincible Neceſſity, tho' they be againſt the Common Law, or an Act of Parliament, ſhall not be prejudicial.—Therefore to ſay the Courts were ſhut, is a good Excuſe, on Voucher of Record. *Bro.* Tit. *Failer of Record.*—So in the Times of Domeſtic War, when the Courts of Juſtice are ſhut, a Deſcent ſhall not take away an Entry, though the Diſſeiſin was in Times of Peace; for then the Diſſeiſee would be without all Remedy, there being no Courts open to bring his Action in. Co. Lit. 249. (*c*) In ſome Books it is ſaid, that the Defendant rejoined, and ſet forth the Act of Oblivion, and that for Confirmation of Judicial Proceedings; and for this Reaſon alſo the Replication was held ill. Keb. 157. Lev. 111.

3 Lev. 283. And in Confirmation of this Doctrine we find, that an Act of Parliament was made 1 *W. & M.* whereby it is enacted, that from the 10th of *December* (which was the Day that King *James* departed, till the 12th of *March* 1688, when King *William* aſſumed the Government) ſhall not be accounted any Part of the Time within which any Perſon by Virtue of the Statute of Limitations might bring his Action; but that he ſhall have ſo much Allowance of Time as is from the 10th of *December* to the 12th of *March* for bringing his Action.

Lev. 31, 111. Carth. 136, 137. It is clearly agreed, that the Defendant's being a Member of Parliament, and intitled to Privilege, will not ſave a Bar of the Statute; becauſe the Plaintiff might have filed an Original without being guilty of any Breach of Privilege.

Vern. 73, 74. But it ſeems that there muſt be ſome equitable Circumſtances attending his Caſe; and therefore in 2 Chan. Ca. 217. it is ſaid, that unleſs the Plaintiff was ſtayed by ſome Act of the Court, as Injunction, &c. the Court will not interpoſe. It is ſaid, that if a Man ſues in Chancery, and, pending the Suit there, the Statute of Limitation attaches on his Demand, and his Bill is afterwards diſmiſſed, the Matter being properly determinable at Common Law; in ſuch Caſe the Court will preſerve the Plaintiff's Right, and will not ſuffer the Statute to be pleaded in Bar to his Demand.

Sid. 228. 3 Keb. 263. *Beven* and *Chapman.* If the Statute of Limitations be pleaded to an Action, the Plaintiff to ſave his Action may reply, that he had commenced (*c*) the Suit in an inferior Court within the Time of Limitation, and that it was removed to *Weſtminſter* by *Habeas Corpus*; and this ſhall be allowed by a favourable Conſtruction of the Statute of Limitations; although in Strictneſs the Suit is commenced in the Court above, when it is removed by *Habeas Corpus.*

*Page 516 Lev. 143. S. C. but ſame Point does not appear. (*c*) The Plaintiff muſt aver, that the Cauſe of Action in the Court below, and that removed, is the ſame. Cro. Car. 294.—But a Difference in Value is not material. Vent. 252.

2 Salk. 424. pl 13. *Matthews* v. *Phillips.* So in a like Caſe, where Debt was brought in the Palace-Court, and after ſome Proceedings there, the ſix Years expired, the Defendant ſued a *Habeas Corpus*, and removed the Cauſe into *B. R.* where the Plaintiff declared *de novo*; and the Defendant pleaded, that the Cauſe of Action did not accrue within ſix Years before the *Teſte* of the *Habeas Corpus*; and this was held to be a good Plea; but that the Plaintiff might reply the Suit below, and ſhew that to have been within the ſix Years; not that this Suit was a Continuance of the Suit below, but that the Plaintiff had rightfully and legally purſued his Right; and it ſhould not be in the Power of the Defendant to defeat or hinder him of a Remedy without any Default †.

†So a Plaint in the Sheriff of *London*'s Court. Stra. 719. Ld. Raym. 1427.

7. Where

7. Where the Suing out a Writ will ſave the Bar of the Statute.

It is clearly agreed, that the Suing out an Original will ſave a Bar of the Statute of Limitations, and that thereupon the Defendant may be outlawed; and that if beyond Sea at the Time of the Outlawry, though it ſhall be reverſed after his Return, yet the Plaintiff may bring another Original by (a) *Journies Accounts*, and thereby take Advantage of his firſt Writ. Carth. 136. Salk. 420. pl. 1. 3 Mod. 311. (a) For this *vide* Lutw. 260.

Alſo it is agreed, that the Suing out a *Latitat* ‡ is a ſufficient Commencement of a Suit, to ſave the Limitation of Time, becauſe the *Latitat* is the § Original of *B. R.* and may be continued on Record as an Original Writ. Sid. 53, 60. Carth. 233. Salk. 421. ‡ So of a Bill of *Middleſex*. § Stra. 550, 734. Ld. Raym. 1441.

Alſo it hath been ruled, that to a Plea of the Statute of Limitations the Plaintiff may reply, that he ſued out a *Latitat*, and continued it down by a *Vicecomes non miſit breve*, without concluding *prout patet per Recordum*; for the *Latitat* Roll is only for the private Uſe of the Court, and no Record. 2 Keb. 46. *Bottle* and *Wood*.

So it ſeems the Plaintiff may reply, that he ſued out a *Latitat* of ſuch a Term, without ſetting forth the Day of the *Teſte*; and that in ſuch Caſe it ſhall have Relation to the firſt Day of the Term †. Style 178. 2 Keb. 369. S. C. cited. † The actual Day of ſuing forth the Writ may be ſhewn in the Pleadings, and if it was not actually ſued out within ſix Years after the Cauſe of Action accrued, it will not ſave the Statute.—That the actual Day of ſuing forth the Writ may be ſhewn in Pleadings. See *Combe* and *Pitt*, 3 Burr. 1423, &c.

But though the Suing out an Original, or *Latitat*, will be a ſufficient Commencement of a Suit, yet the Plaintiff, in order to make it effectual, muſt ſhew that he hath *(b)* continued the Writ to the Time of the Action brought. Carth. 144. 2 Salk. 420. pl. 2. Lutw. 101, 254. 3 Mod. 35.

(b) That the Attorney's writing the Continuances on the Writ in his Chambers, is ſufficient. Sid. 53. Keb. 140.

As in *Aſſumpſit* for Fees due to an Attorney, the Defendant pleaded, *Non Aſſumpſit infra ſex annos*; the Plaintiff replied, that on ſuch a Day two Years before he had ſued out an Attachment of Privilege againſt the Defendant; upon which Writ *taliter proceſſum fuit*; that the Defendant (on ſuch a Day) in *Hilary* Term *anno* 2 *Will.* &c. appeared, and the Plaintiff declared againſt him *modo & forma*, &c. And upon Demurrer to this Replication it was held ill; becauſe the Plaintiff did not ſet forth any Continuance of this Writ of Attachment, (*per Vic' non miſit Breve*,) which was ſued out two Years before; for it is impoſſible that the Defendant ſhould appear in *Hilary* Term *anno* 2 *Will.* to a Writ returnable two Years before, and no other Writ is ſet forth by the Plaintiff; but if the Plaintiff, after the *taliter proceſſum fuit*, had ſhewn the laſt Attachment, and the Return thereof, upon which, in Truth, the Defendant did appear, it had been well enough without ſhewing any of the Continuances. Carth. 144. *Rudd* v. *Berkenhead*. 2 Salk. 420. pl. 2. S. C.

*An *Indebitatus Aſſumpſit* laid ſeveral Ways; the Defendant pleaded, *Actio non, quia dicit quod billa prædict' exhibit' fuit* 20 *die Junii, & non antea & quod ipſe ad aliquod tempus infra ſex annos ante exhibitionem billæ prædict' non aſſumpſit*, &c. The Plaintiff replied a Bill of *Middleſex* teſted *die lunæ prox' poſt tres ſeptimanas*, &c. returnable the ſame Day; whereupon was returned *Non eſt inventus*, and continued down by *Vic' non miſit breve & præcept' ſicut alias*. To this it was demurred, and Judgment given for Defendant; for there cannot be ſuch a Bill of *Middleſex* as this, which is return- *Page 517 Salk 421. *Green* ver. *Rivett*.

returnable the very Day of the *Teſte*; and the Statute of Limitations, on which the Security of all Men depends, is to be favoured.

8. Where a Debt barred by the Statute ſhall be ſaid to be revived.

Salk. 28. pl. 16, 29, 19. Carth. 470. 5 Mod. 425, 426. 2 Show. 126. pl. 104. 2 Vent. 151.

It is clearly agreed, that if after the ſix Years the Debtor acknowledges the Debt, and promiſes Payment thereof, that this revives it, and brings it out of the Statute; as if a Debtor by Promiſſory Note, or Simple Contract, promiſes within ſix Years of the Action brought that he will pay the Debt; though this was barred by the Statute, yet it is revived by the Promiſe; for as the Note itſelf was at firſt but an Evidence of the Debt, ſo that being barred, the Acknowledgement and Promiſe is a new Evidence of the Debt, and being proved, will maintain an *Aſſumpſit* for Recovery of it.

Carth. 470. *Heylin* v. *Haſtings*. Salk. 29. pl. 19. S. C. 5 Mod. 425. S. C. cited,

Alſo it hath been adjudged, that a conditional Promiſe will revive a Debt barred by the Statute of Limitation; as where to an *Aſſumpſit* by an Executor for Goods ſold and delivered by the Teſtator, the Defendant pleaded the Statute; and upon Evidence it appeared, that the Defendant within ſix Years, being applied to by the Executor for the Debt, ſaid, *If you prove that I had the Goods, I will pay you*; which being fully proved at the Trial, it was held that this conditional Promiſe revived the Debt; and that though made to the Executor, after the Death of the Teſtator, was ſufficient to maintain the Iſſue; (*a*) becauſe the Promiſe did not give any new Cauſe of Action, but only revived the old Cauſe, and was of no other Uſe but to prevent the Bar by the Statute of Limitations.

(*a*) Where the Plaintiff declared as Executor, on a Promiſe to the Teſtator, and the Defendant pleaded *Non aſſumpſit infra ſex annos*; and upon the Trial of the Iſſue it appeared, that there was a new Promiſe made within ſix Years, but it was a Promiſe made to the Plaintiff himſelf, and not to the Teſtator; and it was held *per Cur'*, that he ſhould have declared accordingly. Salk. 28. *Dean* v. *Crane*. 6 Mod. 309. S. C. ſaid to be ſo held on a Conference with all the Judges. See Ld. Raym. 389, 422, 838, 1101. L'Nay. 1101. to ſame Purport as to ſhewing Promiſe to Executor.—But there ſix Years elapſed before the new Promiſe. 10 Mod. 314. 12 Mod. 223, 444. 2 Will. Rep. 373. pl. 111. 3 Will. Rep. 84, 89, 143. pl. 33.

Carth. 470. 2 Bur. Rep. 1099. S. P. ſaid to be ſo held by all the Judges in *Serjeants-Inn*.

So it hath been held, that a bare (*b*) Acknowledgement of the Debt within ſix Years of the Action, is ſufficient to (*c*) revive it, and prevent the Statute, though no new Promiſe was made.

(*b*) So ſtating an Account of the Goods ſold, March 105-6. (*c*) In 5 Mod. 426. it is ſaid to be Evidence of a Promiſe.——But in 2 Show. 126. pl. 104. 2 Vent. 151-2. it is ſaid, that an Acknowledgment is not ſufficient without a Promiſe. [But *vide* 2 Burr. 1099. cited above.]

2 Vent. 151. *Bland* v. *Haſelrig*, adjudged by three Judges againſt *Ventris* who inclined to the contrary;

But if an *Indebitatus Aſſumpſit* for Goods ſold be brought againſt four Perſons who plead the Statute of Limitations, and it be found that one of them promiſed within ſix Years, there can be no Judgment againſt him, for the Contract being intire, it muſt be found that they all promiſed.

becauſe the Plea of *Non aſſumpſit infra ſex annos* implies a Promiſe at firſt; and if one ſhould renew his Promiſe within ſix Years, it is reaſonable it ſhould bind him; and the Plaintiff muſt ſue them all, or elſe he will vary from the original Contract.

*Page 518 Salk. 154. pl. 3. 2 Vern 141.

* It ſeems to be the Doctrine of the Courts of Equity, that if a Man by Will or Deed ſubject his Lands to the Payment of his Debts, Debts barred by the Statute of Limitations ſhall be paid, for they are Debts in Equity, and the Duty remains; and the Statute hath not extinguiſhed that, though it hath taken away the Remedy.

Abr. Eq. 305. *Andrews* ver. *Brown*.

Alſo it hath been ruled in Equity, that if a Man has a Debt due to him by Note, or a Book-Debt, and has made no Demand of it for ſix Years,

ſo

ſo that he is barred by the Statute of Limitations; yet if the Debtor, or his Executor, after the ſix Years, put out an Advertiſement in the *Gazette*, or any other News-Paper, that all Perſons who have any Debts owing to them, may apply to ſuch a Place, and that they ſhall be paid; this (though general, and therefore might be intended of legal ſubſiſting Debts only,) yet amounts to ſuch an Acknowledgement of that Debt which was barred, as will revive the Right, and bring it out of the Statute again.

(F) Of the Manner of pleading and taking advantage of the Statute of Limitations.

IT ſeems to be admitted, that the Statute of Limitations muſt be pleaded (*a*) poſitively by him that would take (*b*) advantage thereof; (*c*) and that the ſame cannot be given in Evidence, eſpecially in an *Aſſumpſit*, becauſe the Statute ſpeaks of a Time paſt, and relates to the Time of making the Promiſe. Lev. 111. Sid. 253, & *vide* Cro. Jac. 115.

(*a*) And therefore if the Defendant pleads, that if any ſuch Promiſe was made, it was not within ſix Years, and ſo within the Statute of Limitations; ſuch conditional Plea is not good; *vide* Head of *Pleadings*.——But purſuant to the Statute 4 & 5 *Annæ*, c. 16. for Amendment of the Law, the Defendant, by way of double Plea, may plead *Non aſſumpſit*, and *Non aſſumpſit infra ſex annos*; though it may ſeem inconſiſtent, the Plea of *Non aſſumpſit infra ſex annos* implying a Promiſe. (*b*) If a Man deviſe all the Reſt and Reſidue of his Perſonal Eſtate, after Debts and Legacies paid, to *J. S.* and ſeveral of the Creditors are barred by the Statute of Limitations, who notwithſtanding bring Actions againſt the Executor, and he refuſes to plead the Statute of Limitations; yet Equity will not, in favour of *J. S.* to whom the Surplus is deviſed, compel the Executor to plead the Statute. Abr. Eq. 305. *Caſtleton* v. *Lord Fanſhaw*. (*c*) That though it appears upon the Face of the Declaration that the Cauſe of Action did not ariſe within ſix Years, yet the Defendant ſhall not take advantage of that without Pleading, becauſe there might be an Original ſued out, which the Plaintiff cannot otherwiſe ſhew, than by way of Replication, upon the Defendant's putting him upon it. 2 Salk. 422-3.

But in Debt for Rent, upon *Nil debet* pleaded, the Statute of Limitations may be given in Evidence; for the Statute has made it no Debt at the Time of the Plea pleaded, the Words being in the preſent Tenſe. Salk. 278. pl. 1. *per Holt.*

In Replevin the Defendant pleaded not guilty *de capt' predict' infra ſex annos jam ultimo elapſos*; and though it was urged that this was the ſame with pleading *Non cepit*, and if he did not take, he could not be guilty of the Detainer; and if this Way of Pleading were not allowed, the Statute would be intirely evaded as to this Action; yet the Plea was held ill, becauſe he ought to have anſwered to the Detainer, as well as to the Taking; for there may be a Detainer without a Taking; alſo a Thing may be lawfully diſtrained, although unlawfully kept; as by being put into a Caſtle, *&c.* by which Means it could not be replevied. Sid. 81. *Arundel* and *Trevil.* Keb. 279. S. C.

In Treſpaſs, for a Treſpaſs done thirteen Years before, the Defendant pleads, that *infra ſex annos, &c. non eſt inde culpabilis.* Plaintiff replies, that he brought his Action ſuch a Term, and that within ſix Years before that Time the Defendant did the Treſpaſs; and upon this the Defendant takes Iſſue, and is found guilty; and it was held, *1ſt.* That the Defendant's Plea was good in Bar, without pleading the Statute. *2dly.* That * the Plaintiff's Replication was no Departure; although it was objected, that he could have replied nothing, but that he was under ſome of the Diſabilities, for which there is a Saving in the Statute; for the Plaintiff is not tied to the Time or Place laid in the Declaration, but may vary from it upon Evidence; and ſo when the Defendant, by his Plea, pleads to a certain Raym. 86. Lev. 110. Keb. 566. S. C. *Lee* v. *Raynes.* *Page 519

tain Time or Place, and thereby makes the Time or Place material, the Plaintiff may follow him without any (a) Departure.

(a) *Note*; This Case seems to differ from *Tyler* and *Wall*, Cro. Car. 229. for there the Plaintiff in his Replication varies as well from the Time laid by the Defendant in his Plea, as the Time laid in the Declaration.

MAIHEM.

(A) What it is. 519.
(B) How punished. 519.

(A) What it is.

Co. Lit. 126, 128. 3 Inst. 62, 118. Hawk. P.C. 111.

MAIHEM is defined to be any Hurt done to a Man's Body whereby he is rendered less able in Fighting, either to defend himself, or annoy his Adversary; such as the Cutting off, Disabling or Weakening a Hand or Finger, striking out an Eye or Fore-Tooth, or Castration, &c. and these are properly said to be Maihems, and to come under the Notion of Felonies; but the cutting off an Ear, or Nose, are said not to be properly Maihems, because they do not weaken a Man, but only disfigure him †.

† But, if a Man wound another, *per quod redditur inutilis ad pugnandum*, it shall be a Mayhem. Co. Lit. 126. b. 288. a.—As, if he cut off his Hand, or Leg. H. P. C. 133. Co. Ent. 52. c. Co. Lit. 288. a.—Or, if he break his Leg. 2 Inst. 313. Hard. 408.—If he cut the Veins and Sinews, whereby the Party loses the Use of his Fingers. 1 Leo. 318. Co. Ent. 52. a.—Or, cut off his Thumb, or any of his Fingers. 1 Leo. 139. Co. Lit. 288. a.—Or, strike off his Arm. Co. Lit. 288. a.—Or, if he does any Thing, whereby he loses the Use of any such Member. Co. Lit. 288. a.—So, if *virilia alterius abscindit, aut castravit.* 3 Inst. 63, 118.—So, if he beat out his Teeth. H P. C. 133. *Dub.* 2 R. 3. 13. b. Co. Lit. 288. a.—If he cut him across the Nose, whereby he loses his Smelling. *Dub.* 2 R. 3. 13. b.—So, if he put out his Eye. Co. Lit. 288. a.—If he break his Skull. Co. Lit. 288. a.—But Cutting off an Ear is no Mayhem. H. 133.—Mayhem is justified in Defence of his Life. 2 Rol. 547. l. 40.—Or, Member. Co. Ent. 52.

(B) How punished.

Bract. 144. 3 Inst. 62.

BY the Old Common Law Castration was punished with Death, and other Maihems with the Loss of Member for Member; but of later Days Maihem was punishable only by Fine and Imprisonment ‡.

‡ Cutting out Tongues, Maiming, &c. made Felony by 5 H. 4. c. 5.—Cutting off the Ears of a Man, or the Tongue of a Beast, punished with treble Damages, and 10*l.* Fine, by 37 H. 8. c. 4. s. 4.

And

And by the Statute (*b*) 22 & 23 *Car.* 2. *cap.* 1. it is enacted, "That if "any Perſon ſhall on purpoſe, and of Malice forethought, and by lying in "wait, unlawfully cut out, or diſable the Tongue, put out an Eye, ſlit the "• Noſe, cut off a Noſe or Lip, or cut off or diſable any Limb or Member *Page 520 "of any Subject of his Majeſty, with Intention in ſo doing to maim or "diſfigure, in any the Manners before-mentioned, ſuch his Majeſty's Sub- "ject, that then, and in every ſuch Caſe, the Perſon or Perſons ſo offend- "ing, their Counſellors, Aiders and Abettors, knowing of and privy to "the Offence as aforeſaid, ſhall be and are by the ſaid Statute declared to "be Felons, and ſhall ſuffer Death as in Caſes of Felony without Benefit "of Clergy.

(*b*) The Occaſion of this Act was an Aſſault that was made on Sir *John Coventry*, a Member of the Houſe of Commons, by ſlitting his Noſe, and thence called *Coventry*'s Act.

"Provided, that no Attainder of ſuch Felony ſhall extend to corrupt "the Blood, or forfeit the Dower of the Wife, or the Lands, Goods or "Chattels of the Offender.

If a Man attack another of Malice forethought, in order to murder him with a Bill, or any other ſuch like Inſtrument, which cannot but endanger the maiming him, and in ſuch Attack happen not to kill, but only to maim him, he may be indicted on this Statute, together with all thoſe who were his Abettors, *&c.* and it ſhall be left to the Jury on the Evidence, whether there was a Deſign to murder by Maiming, and conſequently a malicious Intent to maim, as well as to kill; in which Caſe the Offence is within the Statute, though the primary Intention was Murder.

Stat. Tr. Vol. 6. f. 211. ſo ruled in *Coke*'s Trial who together with *Woodburne* were condemned and executed at *Suffolk* Aſſiſes, 8 Geo. 1. for Slitting the Noſe of Mr. *Criſpe*.

† REMEDY *by Action.*——For a Threat, Aſſault, Battery, or Mayhem, the Party ſhall have a Remedy by Action of Treſpaſs, *quare minas impoſuit ita quod*, &c. Lut. 1428.—*Quare in ipſum inſultum fecit & ipſum verberavit*, &c. F. N. B. 86. I.—And ſuch is the Form, tho' he does not wound him. F. N. B. 86. K.—*Quare in ipſum inſultum fecit, verberavit, vulneravit, & impriſonavit*, &c. F. N. B. 86. K.—*Quare, cepit, impriſonavit, & in Priſona quoſque finem, &c. feciſſet, detinuit.* F. N B 86. K.—As to the Declaration in Treſpaſs, for Battery, *&c.* and the Pleas to it. *Vide* Com. Dig. 5 V. Tit. *Pleader.* (3 M. 3. *&c.* 11. *&c.* 15. *&c.*)

By Indictment.—So Mayhem is the greateſt Offence under Felony. Co. Lit 127. a.—So, for a Mayhem a Man may be indicted, fined, and ranſomed. Co. Lit. 127. a. b. 3 Inſt. 63.—Tho' the Mayhem be done by himſelf. Co. Lit. 127. b.—Tho' the Perſon be his Villein, who cannot maintain an Action for it againſt his Lord. Co. Lit. 127. a.—So an Indictment lies for an Aſſault, Battery, or Impriſonment of a Subject. Com. Dig. 1 V. 526.

When the Damages ſhall be increaſed for a Mayhem.——If the Declaration mention a Mayhem, the Court, upon View of the Mayhem, may increaſe the Damages given by the Jury. 1 Rol. 572. l. 10, 15. R. 1 Leo. 139.—Tho' the particular Part in which the Mayhem was, be not ſpecified. R. Hard. 408.—So, in Battery, where the Manner of the Battery is deſcribed, the Court, upon View, may increaſe the Damages. *Per Hale.* Hard. 408.—So the Court may increaſe Damages, upon View, and Examination of Witneſſes, where the Declaration is general *quod maihemavit*, without making any Deſcription of the Mayhem, if the Judge of Aſſiſe certify the Particulars of the Mayhem, or be in Court, and affirm, that the Particulars, now proved, were given in Evidence at the Trial. 1 Sid. 108.—But where the Declaration does not mention a Mayhem, nor deſcribe the Manner of the Battery, the Court cannot increaſe the Damages upon View. Hard. 408.—So if the Mayhem was not the Act of the Defendant directly, but by an Horſe, after the Plaintiff was thrown down by the Defendant. R 1 Sid. 433.—Or, by a Gun, which the Defendant let off, and which maimed the Plaintiff againſt his Will. R. 1. Sid. 108.—So if the Declaration be general *quod maihemavit*, without deſcribing how, and the Judge does not certify it. 1 Sid. 108.

By Appeal.—So he may proſecute his Appeal of Mayhem. Han. Ent. 270. Co. Ent. 50. c.—And the Writ of Appeal, and Indictment ſhall ſay, *quod felonice mayhemavit.* 3 Inſt. 63, 118.—To an Appeal of Mayhem, the Defendant may plead *Not guilty.* Han. 271.—So, if he did it *Se defendendo*, he may plead in Bar, *Son aſſault demeſne.* Han. 271, 277. Co. Ent. 52.—And he muſt plead it; for he cannot give it in Evidence upon *Not guilty.* 2 Inſt. 316.—So the Defendant may plead a Releaſe of the Mayhem. Com. Dig. 1 V. 597.—Or, of all Actions perſonal; for the Damages only are recovered in ſuch Appeal. Lit. ſ. 502.—So the Defendant may plead 20*l.* or other Sum given in Satisfaction. Han. 274.—A Recovery in Treſpaſs for the ſame Mayhem. Co. Ent. 50. b.

Maintenance, and the Offence of Buying or Selling a pretended Title.

Co.Lit. 368. b. 2 Inſt. 208, 212. Hawk. P. C. 249.

MAINTENANCE in general ſignifies an unlawful Taking in Hand, or Upholding of Quarrels, or Sides, to the Diſturbance or Hindrance of common Right; and is ſaid to be twofold:

Co.Lit. 368. 2 Inſt. 213. 2 Rol. Abr. 115.

1. *Ruralis*, or in the Country; as where one aſſiſts another in his Pretenſions to certain Lands, by taking or holding the Poſſeſſion of them for him by Force or Subtilty; or where one ſtirs up Quarrels and Suits in the Country, in relation to Matters wherein he is no Way concerned; for this Kind of Maintenance is puniſhable at the King's Suit by Fine and Impriſonment, whether the Matter in Diſpute any Way depended in Plea, or not; but it is ſaid not to be actionable.

2 Inſt. 212. 2 Rol. Abr. 115.

2. *Curialis*, or in a Court of Juſtice, where one officiouſly intermeddles in a Suit depending in any ſuch Court, which no Ways belongs to him, by aſſiſting either Party with Money, or otherwiſe, in the Proſecution or Defence of any ſuch Suit.

Of this ſecond Kind of Maintenance there are ſaid to be three Species:

1. Where one maintains one Side to have Part of the Thing in Suit, which is called Champerty; and for which *vide* Tit. *Champerty*.

*Page 521 * 2. Where one laboureth a Jury, which is called Embracery; and for which *vide* Tit. *Embracery*.

3. Where one maintains another without any Contract to have Part of the Thing in Suit, which generally goes under the common Name of Maintenance; and of which in the following Order.

(A) What ſhall be ſaid to amount to an Act of Maintenance. 521.

(B) In what Reſpects ſome ſuch Acts may be juſtified. 522.

And herein,

1. How far they are juſtifiable in reſpect of an Intereſt in the Thing in Variance. 522
2. How far in reſpect of Kindred or Affinity. 523.
3. How far in reſpect of other Relations; as that of Lord and Tenant, Maſter and Servant. 523.

4. How

4. How far in reſpect of Charity. 523.
5. How far in reſpect of the Profeſſion of the Law. 523.

(C) How Maintenance is reſtrained and puniſhed by the Common Law. 524.
(D) How reſtrained and puniſhed by Statute. 524.
(E) Of the Offence of Buying or Selling a pretended Title. 525.

(A) What ſhall be ſaid to amount to an Act of Maintenance.

IT is ſaid, that not only he, who aſſiſts another with Money in his Cauſe, as by retaining Counſel for him, or otherwiſe bearing him out in the Whole, or Part of the Expence, but alſo he who, by his Friendſhip or Intereſt, ſaves him that Expence, which otherwiſe he may be put to, is guilty of Maintenance; as where one perſuades, or but endeavours to perſuade, a Man to be of Counſel for another *gratis* †. Bro. Maint. 7, 14. 2 Rol. Abr. 118. Hawk. P. C. 249.

† But *qu.* If this is any Offence, where there is juſt Cauſe of Suit?

Alſo it ſeems to be an Act of Maintenance to open Evidence to the Jury, or to give Evidence officiouſly without being called upon to do it, or to ſpeak in a Cauſe as one of Counſel with the Party, or to retain an Attorney for him; and ſome have ſaid, that it is Maintenance even barely to go along with him to inquire for a Perſon learned in the Law ‡. Hetl. 78, 79. Cro. Eliz. 735. Rol. Abr. 593. 2 Rol. Abr. 118.

‡ *Sed qu.* as above? And ſee *infra* 522.

It ſeems to be Maintenance for a Man of great Power and Intereſt to ſay publickly, that he will ſpend 20*l.* on one Side, or that he will give 20*l.* to labour the Jury; and it hath been ſaid to be Maintenance for ſuch a Perſon to come to the Bar with one of the Parties, and ſtand by him while his Cauſe is tried, without ſaying any Thing: But a Promiſe to maintain another is not Maintenance, unleſs it be in reſpect of the public Manner in which it is made, or the Power of the Perſon by whom it is made. Hawk. P. C. 250. and ſeveral Authorities there cited.

* It is ſaid to be Maintenance for a Juror to ſolicit a Judge to give Judgment according to the Verdict; but it ſeems to be no Maintenance for a Juror to exhort his Companions to join with him in ſuch a Verdict as he thinks right. *Page 522 Hawk. P. C. 250.

It ſeems to be no Maintenance for a Man to give another friendly Advice what Action is proper for him to bring for ſuch a Debt; or what Method is ſafeſt to free him from ſuch an Arreſt; or what Counſellor or Attorney is likely to do his Buſineſs moſt effectually; for it would be extremely hard to make ſuch neighbourly Acts of Kindneſs, which ſeem rather commendable than blame-worthy, to come under the Notion of Maintenance; which always ſeems to imply a contentious and over-buſy Intermeddling with other Mens Matters, in which Reſpect it is ſo highly criminal; yet it is ſaid, that a Man of great Power, not learned in the Law, may be guilty of Maintenance, by telling another, who aſks his Advice, that he has a good Title. Hawk. P. C. 250.

Hawk. P. C. 250. It is no Maintenance to give a Man Money, who has no Suit then depending, unleſs it plainly appear that it was given with a Deſign to aſſiſt him in a Suit intended, which Suit is afterwards actually brought.

Hawk. P. C. 250. It is as much an Act of Maintenance to ſupport a Man after Judgment given, as to do it pending the Plea.

(B) In what Reſpect ſome ſuch Acts may be juſtified: And herein,

1. How far they are juſtifiable in reſpect of an Intereſt in the Thing in Variance.

2 Rol. Abr. 115, 117. 2 Inſt. 564. Bro. *Maint.* 28, 53. IT ſeems clear, that not only thoſe who have an actual Intereſt in the Thing in Variance, as thoſe who have a Reverſion expectant on an Eſtate-tail, or on a Leaſe for Life, or Years, *&c.* but alſo thoſe who have a bare Contingency of an Intereſt in the Lands in Queſtion, which poſſibly may never come *in eſſe*, and even thoſe who, by the Act of God, have the immediate Poſſibility of ſuch an Intereſt, as Heirs apparent, or the Huſbands of ſuch Heirs, though it be in the Power of others to bar them, may lawfully maintain another in an Action concerning ſuch Lands; and if a Plaintiff, in an Action of Treſpaſs, alien the Lands, the Alienee may produce Evidence to prove that the Inheritance, at the Time of the Action, was in the Plaintiff, becauſe the Title is now become his own.

Bro. *Maint.* 51. Alſo he who is bound to warrant Lands may lawfully maintain the Tenant in the Defence of his Title, becauſe he is bound to render other Lands to the Value of thoſe that ſhall be evicted.

Noy 99, 100. Moor 620. Cro. Eliz. 552. Sid. 217. Alſo he who has an equitable Intereſt in Lands or Goods, or even in a Choſe in Action, as a *Ceſtui que Truſt*, or a Vendee of Lands, *&c.* or an Aſſignee of a Bond for a good Conſideration, may lawfully maintain a Suit concerning the Thing in which he has ſuch an Equity; and from the ſame Ground it ſeems plainly to follow, that the Grantee of a Reverſion for good Conſideration might, without any Attornment, maintain the Tenant of the Land, before the Statute 4 & 5 *Annæ*, *cap.* 16. which makes ſuch Attornment needleſs.

Hawk. P. C. 252. *Page 523 * Wherever any Perſons claim a common Intereſt in the ſame Thing, as in a Way, Church-yard or Common, *&c.* by the ſame Title, they may maintain one another in a Suit concerning ſuch Thing; and a Man's Bail may take care to have his Appearance recorded; but, as ſome ſay, they cannot ſafely intermeddle farther.

2. How far in reſpect of Kindred or Affinity.

2 Inſt. 564. Hawk. P. C. 252. Whoever is of Kin, or Godfather, to either of the Parties, or related by any Kind of Affinity ſtill continuing, may lawfully ſtand by at the Bar and counſel him, and pray another to be of Counſel for him; but cannot lawfully lay out his Money in the Cauſe, unleſs he be either Father, or Son, or Heir apparent to the Party, or Huſband of ſuch an Heireſs.

3. How

3 How far in reſpect of other Relations; as that of Lord and Tenant, Maſter and Servant.

Not only the actual Lord, but alſo the *Ceſtui que Uſe* of a Seigniory, may come with the Tenant to a Trial in an Aſſiſe againſt him, and ſtand by him, and aſſiſt him, and alſo pray the Sheriff to return an indifferent Jury; and it ſeems a plauſible Opinion, that he may alſo juſtify laying out his Money in Defence of his Tenant's Title: Alſo the Lord of a Town may maintain the Inhabitants in an Action, wherein the Right to their common Burying-place is queſtioned, by ſhewing authentick Evidence of it to the Jury. Co. Lit. 65, 101, 384. 2 Rol. Abr. 116, 117.

A Tenant may lawfully come with his Lord, and ſtand with him at a Trial. Hawk. P. C. 253.

A Maſter may go along with his Servant, or with his domeſtic Chaplain, to retain Counſel; alſo he may pray one to be of Counſel for him, and may go with him, and ſtand with him, and aid him at the Trial, but ought not to ſpeak in Court in Favour of his Cauſe; alſo if the Servant be arreſted, the Maſter may aſſiſt him with Money to keep him from Priſon, that he may have the Benefit of his Service; but the Maſter cannot ſafely lay out Money for the Servant in a real Action, unleſs he have ſome of his Wages in his Hands; but thoſe, with the Servant's Conſent, he may ſafely diſburſe. Bro. *Maint.* 44, 52. Hetley 79. Moor 814.

A Perſon retained generally as a Servant, and not for a particular Occaſion only, may lawfully ride about to ſpeed his Maſter's Buſineſs, and may go to Counſel for him, and ſhew his Evidence to the Counſel, or to the Jury, and ſtand by him at a Trial, but cannot lawfully lay out his own Money in the Suit. Hawk. P. C. 253.

4. How far in reſpect of Charity.

Any one may lawfully give Money to a poor Man to enable him to carry on his Suit; alſo any one may lawfully go with a Foreigner, who cannot ſpeak *Engliſh*, to a Counſellor, and inform him of his Caſe. Bro. *Maint.* 14.

5. How far in reſpect to the Profeſſion of the Law.

A Counſellor, having received his Fee, may lawfully ſet forth his Client's Cauſe to the beſt Advantage; but can no more juſtify giving him Money to maintain his Suit, or threaten a Juror, than any other Perſon. 2 Inſt. 564. 2 Rol. Abr. 116.

* Alſo an Attorney ſpecially retained may lawfully proſecute or defend an Action in the Court wherein he is an allowed Attorney, and lay out his own Money in the Suit, and maintain an Action againſt his Client for the Money ſo laid out, by Virtue of the Retainer, without any ſpecial Promiſe; alſo an Attorney ſo retained may in like Manner maintain his Client in a Court wherein he is not an allowed Attorney; but as ſome ſay cannot have an Action for the Money laid out in the Suit, without a ſpecial Promiſe; but an Attorney, who maintains another, is no way juſtified, by a general Retainer, to proſecute for him in all Cauſes; neither can an Attorney lawfully carry on a Cauſe for another at his own Expence, with a Promiſe never to expect a Re-payment; and it is queſtionable, whether Solicitors, *Page 524 Keilw. 50. 2 Inſt. 564. Winch 52. Jon. 208. Cro. Car. 159. 3 Mod. 98.

Solicitors, who are no Attornies, can in any Caſe lawfully lay out their own Money in another's Caſe.

2 Inſt. 215. But Counſellors and Attornies, uſing deceitful Practice in Maintenance of their Clients Cauſes, are puniſhable by the Common Law, as well as by the Statute of *Weſtm.* 1. *cap.* 28. which enacts, "That if any Serjeant "Pleader or other, do any Manner of Diſceit or Colluſion in the King's "Court, or conſent unto it in Diſceit of the Court, or to beguile the "Court or the Party, and thereof be attainted, he ſhall be impriſoned "for a Year and a Day, and from thenceforth ſhall not be heard to plead "in that Court for any Man; and if he be no Pleader, he ſhall be impri-"ſoned in like Manner by the Space of a Year and a Day at the leaſt; "and if the Treſpaſs require greater Puniſhment, it ſhall be at the King's "Pleaſure."

Dyer 249. pl. 84. 2 Inſt. 215. It is an Offence within this Statute for an Attorney to ſue out an *Habere facias ſeiſinam*, falſly reciting a Recovery where there was none, and by Colour thereof to put the ſuppoſed Tenant in the Action out of his Freehold.

2 Inſt. 215. Alſo it is an Offence within the Statute to bring a *Præcipe* againſt a poor Man, having nothing in the Land, on purpoſe to ouſt the true Tenant; or to procure an Attorney to appear for a Man, and confeſs a Judgment without any Warrant; or to plead a falſe Plea, known to be utterly groundleſs, and invented merely to delay Juſtice, and to abuſe the Court †.

† In moſt of theſe Caſes the Court would grant an Attachment againſt the Offender, on Motion.

(C) How Maintenance is reſtrained and puniſhed by the Common Law.

2 Rol. Abr. 114. 2 Inſt. 208. Hetley 79. BY the Common Law, all unlawful Maintainers are not only liable to render Damages in an Action at the Suit of the Party grieved, but may alſo be indicted and fined, and impriſoned, *&c.* and it ſeems that a Court of Record may commit a Man for an Act of Maintenance in the Face of the Court.

(D) How reſtrained and puniſhed by Statute.

BY the 1 *E.* 3. *cap.* 14. and 20 *E.* 3. *cap.* 4. it is enacted, "That none "of the King's Miniſters, nor no great Man of the Realm, by him-"ſelf nor by other, by ſending of Letters nor otherwiſe, nor none other "great nor ſmall, ſhall take upon them to maintain Quarrels, nor Parts in the Country, to the Diſturbance of common Right.

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And by the 1 *R.* 2. *cap.* 4.—it is enacted, "That no Perſon whatſoever "ſhall take or ſuſtain any Quarrel by Maintenance in the Country or elſe-"where, on grievous Pain, that is to ſay, the King's Counſellors and great Officers, on a Pain that ſhall be ordained by the King himſelf, by the Advice of the Lords of this Realm, and other Officers of the King, on "Pain to loſe their Offices and to be impriſoned, and ranſomed, *&c.* and "all other Perſons, on Pain of Impriſonment and Ranſom, *&c.*"

In

In the Conſtruction of theſe Statutes the following Points have been holden:

That *Nul tiel Record* is a good Plea to an Action on theſe Statutes, by which it appears that they extend not to taking out an Original, which is never returned, but they extend as well to Maintenance in a Court-Baron, as to Maintenance in a Court of Record; neither is it material whether the Plaintiff in the Action, wherein there was ſuch Maintenance, were nonſuited or recovered: But it is ſaid, that none of the Statutes of Maintenance extends to the Spiritual Court. Hawk. P.C. 156-7.

He who fears that another will maintain his Adverſary, may, by way of Prevention, have an Original grounded on theſe Statutes, prohibiting him to do it. Hawk. P.C. 156.

By the 32 *H.* 8. *cap.* 9. "No Perſon ſhall unlawfully maintain or cauſe "or procure any unlawful Maintenance in any Suit, in any of the King's "Courts, where any Perſon ſhall have Authority by the King's Commiſ- "ſion, Patent; or Writ to hold Plea of Lands, or to examine, hear or "determine any Title of Lands, *&c.* and no Perſon ſhall unlawfully main- "tain, for Maintenance of any Suit or Plea, any Perſon or Perſons, or "embrace any Freeholders or Jurors, or ſuborn any Witneſs by Letters, "Rewards or Promiſes, or any other ſiniſter Means, to maintain any "Matter or Cauſe, or to the Diſturbance of Juſtices, *&c.* on Pain of 10 *l.* "one Moiety to the King, the other to the Informer."

In an Information thereon, it is not ſufficient to ſay, that the Defendant maintained the Party, without adding, that he did it unlawfully; neither is it ſufficient to ſay, that a Bill was exhibited, without further ſhewing that a Plea was depending †. Hawk. P.C. 258.

† *Vide* alſo the Statutes 3 Ed. 1. c. 25, 28, and 33. 13 Ed. 1. c. 36. and c. 49. 28 Ed. 1. c. 11. 4 Ed. 3. c. 11. 20 Ed. 3. c. 5. 1 R. 2. c. 7. 13 R. 2. ſtat. 3. 20 R. 2. c. 1. 8 H. 6. c. 9. and 7 R. 2. c. 15. & *infra*.

(E) Of the Offence of Buying or Selling a pretended Title.

IT ſeems an high Offence at Common Law, as plainly tending to Oppreſſion, for a Man to buy, at an under Rate, a doubtful Title known to be diſputed, to the Intent that the Buyer may carry on the Suit, which the Seller doth not think it worth his while to do; and it ſeems not to be material whether the Title be good or bad; or whether the Seller were in Poſſeſſion or not, unleſs the Poſſeſſion were lawful and uncontеſted. Moor 751. pl. 1031. Hob. 115. Plow. 80.

Alſo by the 1 *R.* 2. *cap.* 9. reciting, that many Perſons having true Title to Lands, *&c.* were wrongfully delayed, by Means that the Defendants did make Gifts and Feoffments of their Lands in Debate, and of their Goods to great Men, againſt whom the ſaid Purſuants durſt not make their Purſuits; and alſo that many Perſons uſed to diſſeiſe others, and anon to make Feoffments ſometimes to great Men to have Maintenance, and ſometimes to Perſons unknown, to the Intent to delay the ſaid Diſſeiſees, *&c.* and therefore it is enacted, "That no Gift or Feoffment of Tenements or "* Goods be made by ſuch Fraud or Maintenance, and that if any be ſo "made, they ſhall be holden for (*a*) none; and that the ſaid Diſſeiſees

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(*a*) In reſpect of the Diſſeiſees; but they are effectual between the Feoffor and Feoffee. Co. Lit. 369.

" ſhall recover againſt the firſt Diſſeiſor their Lands and Damages, with-
" out having Regard to ſuch Alienations, ſo that they commence their
" Suit within a Year after the Diſſeiſin."

It is further enacted by 32 *H.* 8. *cap.* 9. " That no Perſon ſhall bargain,
" buy, or ſell, or by any Means obtain any pretended Rights or Titles,
" or take, promiſe, grant or covenant to have any Right or Title to any
" (*b*) Hereditaments, unleſs the Seller, *&c.* his Anceſtors, or they from
(*b*) Whether Freehold or Copyhold. 4 Co. 26. a. Co. Lit. 369. b. Moor 655.
" whom he claims, have been in Poſſeſſion of the ſame, or of the Rever-
" ſion or Remainder thereof, or taken the Rents or Profits thereof, for one
" whole Year next before the ſaid Bargain and Sale, *&c.* on Pain that ſuch
" Seller ſhall forfeit the whole (*c*) Value of the Hereditaments ſo ſold;
" and the Buyer or Taker, knowing the ſame, ſhall forfeit the Value of
(*c*) And therefore the Plaintiff in his Action must ſhew the Value at the Time of the Bargain. Co. Car. 233.
" the Hereditaments ſo by him bought or taken; the one Half of the
" ſaid Forfeitures to be to the King, and the other to him who will ſue."

But it is provided, " That it ſhall be lawful for any Perſon, being in
" lawful Poſſeſſion, by taking of the yearly Farm-Rents, or Profits of any
" Hereditaments, to buy or get, by any reaſonable Means, the pretended
" Right or Title of any other Perſon to the ſame.
" Provided, that no one ſhall be charged with theſe Penalties, unleſs he
" be ſued within one Year after the Offence."

In the Conſtruction of this Statute the following Opinions have been holden:

Lit. Rep. 369. Plow. 84. Cro. Car. 233. Dyer 74.
That the Statute being public, there is no need to recite it in an Action brought upon it; but if you take upon you to recite it, a material Miſrecital will be fatal.

Leon. 167. Lit. Rep. 369.
In an Action againſt the Buyer of a pretended Title, it muſt expreſly appear, that the Defendant knew that the Seller had not been a Year in Poſſeſſion; but in ſuch an Action by the Buyer, the contrary muſt expreſly appear; for otherwiſe it may be intended that he was *Particeps criminis.*

Dyer 74. pl. 19, 20. Plow. 80, 87. Cro Car. 233.
It is not ſufficient to ſhew that the Seller had not been in Poſſeſſion a Year before, *&c.* without averring, that he had a pretended Right or Title, for that is the Point of the Action.

Co. Lit. 369. Leon. 166. And. 76.
A Contract for a Leaſe for Years, unleſs fairly made to try a Title in Ejectment, is within the Statute, whether it were made off the Land, or upon the Land, by a Perſon in or out of Poſſeſſion; and in an Action on the Statute for making ſuch a Leaſe, there is no Need to ſhew its Commencement or End, becauſe the Plaintiff is ſuppoſed to be a Stranger to it.

Plow. 88. Co. Lit. 369. Leon. 166. Savil 95.
No Conveyance by one who has the unconteſted Poſſeſſion and abſolute undiſputed Propriety of Lands, as by a Diſſeiſor having obtained a Releaſe from the Diſſeiſee who had the true Right not conteſted by any other Perſon whatſoever, or by a Mortgagor having redeemed his Lands, is within the Meaning of the Statute; becauſe it no way favours of Maintenance, and can be prejudicial to no one; neither is a Leaſe for the uſual Rent, by one who recovers Lands by Virtue of an antient Title, within the Meaning of the Statute, though he had the abſolute Property and Poſſeſſion of the Land; for the Intent of the Statute was to reſtrain all Perſons from transferring any diſputed Right to Strangers.

Co. Lit. 369.
Whoever has a Reverſion or Remainder veſted in him, may lawfully take any Conveyance which will ſtrengthen his Eſtate; but cannot take a Covenant from a Stranger for a Conveyance from him, when he ſhall have recovered the Land.

* MANDAMUS. *Page 527

(A) Of the Nature of the Writ; and herein of the Suggeſtion and Manner of awarding thereof. 527.
(B) Of the Form thereof, and for what Irregularities it may be quaſhed or ſuperſeded. 528.
(C) In what Caſes to be granted. 529.

And herein,

1. Where it lies to reſtore or admit a Perſon to an Office, and what ſhall be ſaid ſuch a public Office for which a *Mandamus* will lie. 529.
2. Where the Party's having another Remedy is a ſufficient Foundation to deny it; and therein of granting *Mandamus's* to reſtore Members of Colleges, *&c.* 533.
3. What Removal or Turning out of an Officer will intitle him to a *Mandamus.* 534.

(D) Where it lies to inferior Courts, and Magiſtrates, to oblige them to do that Juſtice which the Public Good requires, and the Law enjoins. 534.
(E) Of the Authority by which it iſſues; and herein of the diſcretionary Power in the Court of granting or refuſing it. 540.
(F) To whom to be directed. 540.
(G) By whom to be returned. 541.
(H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return. 541.
(I) What ſhall be ſaid a good Return. 542.
(K) Of traverſing the Return, and taking Iſſue thereon. 543.
(L) Of the Party's Remedy for a falſe Return. 543.
(M) Of awarding a peremptory Mandamus. 544.

(A) Of

(A) Of the Nature of the Writ; and herein of the Suggestion and Manner of Awarding thereof.

A *Mandamus* is a Writ commanding the Execution of an Act, where otherwiſe Juſtice would be obſtructed, or the King's Charter neglected, iſſuing regularly only in Caſes relating to the Public and the Government; and is therefore termed (*a*) a Prerogative Writ, being grantable only where the Public Juſtice of the Nation is concerned †.

(*a*) 4 Mod. 281. March 101.

† Where a Right is of a private Nature, as to an Office in which the Publick is not concerned, ſuch as a Deputy Regiſter, &c. it is diſcretionary in the Court to grant or refuſe it. *Law relative to Trials at Niſi Prius.* 195. *cites Wheeler and Trotter. E.* 8. *G.* 2.

* And in this (*b*) Senſe and Uſe of it, it is ſaid by (*c*) ſome to be of modern Date, and to owe its Original to (*d*) *Bagg*'s Caſe; but (*e*) others hold it far more antient, and that there are Inſtances of ſuch a Writ in the Reigns of *Ed.* 1. and *Ed.* 3. and that it is founded on theſe Words in *Magna Charta, cap.* 29. *Nullus Liber Homo Capiatur vel impriſonetur, aut diſſeiſietur de libero tenemento ſuo, vel Libertatibus, vel Liberis conſuetudinibus ſuis, aut utlagetur, aut exuletur, aut aliquo modo deſtruatur; nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per Legale judicium parium ſuorum, vel per Legem terræ; nulli vendemus, nulli negabimus aut differemus juſtitiam vel rectum.* 10. Mod. 53.

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(*b*) There is a Writ called a *Mandamus*, which lay where the King's Tenant, who held of him by Knights Service, died, his Heir within Age, and no Writ of *diem clauſit extremum*, &c. was ſued out within a Year and a Day after his Death; then iſſued a *Mandamus* to the Eſcheator, commanding him to inquire of what Lands holden by Knights Service the Tenant died ſeiſed, &c. but for this *vide* F. N. B. 561. Dyer 209. pl. 19. 248. pl. 18. Lamb. 36. (*c*) Lev. 23. Show. 263, 274. Ca. Law and Eq. 53, 57. (*d*) 11 Co. 94. Rol. Rep. 173. S. C. (*e*) Lev. 23. Palm. 51. Dyer 333. Skin. 293. pl. 3, 310. pl. 4.

4 Mod. 52. Carth. 217.

It is now an eſtabliſhed Remedy, and every Day made uſe of, to oblige inferior Courts and Magiſtrates to do that Juſtice, which, without ſuch Writ, they are in Duty, and by Virtue of their Offices, obliged to do; and is a Writ of Right, which the ſuperior Court is obliged to iſſue in the ordinary Form, without impoſing any Terms on him who demands it; and therefore where a *Mandamus* was granted, to oblige a Corporation to proceed to the Election of a Capital Burgeſs, and being afterwards moved, that a Day ſhould be fixed for the Election, that all Parties might have Notice; for that otherwiſe the Perſon obtaining the *Mandamus* might ſteal an Election by Surpriſe, the Court refuſed to grant the Motion, and held, that their Power was only to command an Election, but not to preſcribe the Manner of it, which was left to the Law, and which muſt make it good or bad accordingly.

Paſch. 6 Geo. 2. in *B. R. The King* v. *Mayor and Burgeſſes of Eveſham.* 2 Barnard. *K. B.* 236, 265.

But though it be a Writ of Right, yet the Court ſeldom grants it, without giving the Party, to whom it is prayed, a Day to ſhew Cauſe againſt it; ‡ alſo ſuch Matter muſt be laid before the Court, by which it may appear, that the Party is intitled to it; and therefore on a Motion for a *Mandamus*,

2 Kel. 243, pl. 195. Mich. 4 Geo. 2. in *B. R.*

‡ Where it is to ſwear, or, to admit, the Court will, in caſe the Right appear plain, grant the Writ upon the firſt Motion: But where it is to reſtore one who has been removed, they will firſt grant a Rule to ſhew Cauſe why ſuch a Writ ſhould not iſſue. *Law Niſi Prius* 195.———Where they grant a Rule to ſhew Cauſe, though upon ſhewing Cauſe it appear doubtful, whether the Party have a Right or not, yet the Court will iſſue the *Mandamus*, in order that the Right may be tried upon the Return. *Niſi Prius* 196. cites *Rex.* ver. *Dr. Bland T.* 1741.

damus, to reſtore the Regiſter of the Blackſmiths Company, the Court refuſed it, becauſe they did not produce their Charter, or a Copy of it, with an *Affidavit*; for this being a private Corporation, they held they could not take Notice thereof, as they will of a Town, *&c.* without ſuch previous Information.

(B) Of the Form thereof, and for what Irregularities it may be quaſhed or ſuperſeded.

A *Mandamus* is a ſignable Writ, and muſt be ſigned by the proper Officer of the Court before it is ſealed; there muſt be fifteen Days between the *Teſte* and the Return of the firſt Writ of *Mandamus*, if the Corporation, to which it is ſent, be above forty Miles from *London*; but if but forty Miles, or under, then eight Days only. 2 Salk 434. pl. 16, 452. pl. 3. Ld. Raym. 1233. 2 Stra. 949. For how many Days between *Teſte* and Return. See Str. 407.

If there be any Irregularity in the Writ, it may be amended at any Time before it is returnable; but it cannot be ſuperſeded after the Return is out; neither can the Party move to quaſh it before a Return made and filed. 6 Mod. 133.

If a *Mandamus* be awarded to reſtore nine Perſons to the Place and Office of Common-Council Men, this is ſuch an Irregularity for which * the Writ will be quaſhed; for ſeveral Perſons cannot join in ſuch Writ, the Amotion of one not being the Amotion of another; beſides their Intereſts are ſeveral †, and they might have been removed for ſeveral different Cauſes, one for one Fault, and one for another; which would make it impracticable for the Court to grant a joint Reſtitution to them. 2 Salk. 436. pl. 19. *Page 529 2 Sel. Caſ. 221. pl. 154. Comb. 307. 5 Mod. 11. 2 Salk. 433. pl. 13. Ld. Raym. 710. S. P. and that ſeveral Perſons cannot join in an Action on the Caſe for a falſe Return.——† A *Mandamus* was granted to a Jury of a Court Baron to do an Act to perfect the Rights of ſeveral. *Niſi Prius* 196. cites *Rex* verſus *Ld. Mountague*, 24 Geo. 2.

If the Writ be directed to a Corporation by a wrong Name, this is ſuch an Irregularity for which it may be quaſhed; as if to the Mayor, Aldermen and Commonalty of *Rippon*, where it ſhould have been, Mayor, Burgeſſes and Commonalty; but in this Caſe, the Parties having made a good Return, the Court refuſed to grant a new Writ; for by the Return, if falſe, they ſubjected themſelves to an Action on the Caſe, and therefore a new Writ would be only Vexatious. 2 Salk. 433. pl. 12. Ld. Raym. 563. *The King* v. *Mayor*, &c. of *Rippon*; *vide* Carth. 500-1.

So where, in a *Mandamus* to the Corporation of *Ipſwich*, the Direction was to the Vill *de Gippo*, inſtead of *de Gipwico*; and it was held that the Direction was wrong, *Gippus* and *Gipwicus* being different Names; but that yet they ſhould have returned the ſpecial Matter accordingly, and relied upon it; but that, after the Return, they admitted themſelves the Corporation to whom the Writ was directed; beſides, a Corporation may have ſeveral Names. 2 Salk. 434. pl. 16. 2 Ld. Raym. 1233. Serjeant *Whitaker*. Caſ.

If a Writ appears on the Face of it to be *Felo de ſe*, the Court *ex officio* may quaſh it‡; as where the Biſhop of *Ely* procured a *Mandamus* to the Vice- Hil. 9 Geo 2. in *B. R. The King* v. *Doctor Walker*. Andr. 178. Poſt. 536. Motion to ſuperſede *Mandamus* granted to Church-Wardens, to deliver up Books and Papers in their Cuſtody, refuſed. Sel. Caſ. 229. pl. 186. 8 Mod. 98. *Mandamus* ſuperſeded, if ill directed or fatally miſtaken. 2 Sel. Caſ. 65. pl. 69. And ſee Sel. Caſ. 423. pl. 333. 2 Sel. Caſ. 292. pl. 177. Str. 578. 2 Str. 880, 1139. Barnard *K. B.* 362, 407. 2 Barnard *K. B.* 132, 447. 2 Kel. 209. pl. 162.——‡ The Time for taking Exception to the Writ, is after the Return made, and before it is moved to be filed. *Niſi Prius* 201. cites 5 M. 314.

maſter

maſter for *Trinity-College Cambridge*, to compel him to execute a Sentence of Deprivation, pronounced by the Biſhop, againſt Doctor *Bentley* Maſter of the ſaid College, and which Sentence the Vice-maſter, by the Statutes of the College, was obliged to execute; and it appearing on the Face of the Writ, that the Biſhop himſelf was General Viſitor, and that therefore it belonged to him to inforce the Execution of his own Sentence, the Court of *B. R.* quaſhed the Writ, being a Matter in which they had no Right to intermeddle, there being a proper Viſitor.

(C) In what Caſes to be granted: And herein,

1. Where it lies to reſtore or admit a Perſon to an Office, and what ſhall be ſaid ſuch a public Office for which a Mandamus will lie.

HErein we muſt obſerve, that the Caſes in the Books on this Head are ſo unſettled and contradictory, that it is hardly poſſible to fix on any general Rule, whereby to determine in what Inſtances the Court of *K. B.* having a Superintendency over all inferior Courts and Magiſtrates, will grant a *Mandamus* or not; for though in general it be laid down as a Rule, (*a*) that where a Man is refuſed to be admitted, or wrongfully turned out of any Office or Franchiſe that concerns the Public, or the Adminiſtration of Juſtice, he may be admitted, or reſtored by *Mandamus*; yet it being ſtill Matter of Controverſy, what ſhall be ſaid a Public Office, or ſuch as relates to the Adminiſtration of Juſtice; and as the Court of late has rather extended than contracted this Remedy, it will be neceſſary, for the better apprehending hereof, to inſert the Caſes themſelves, in which the Court has granted or denied a *Mandamus*.

(*a*) 11 Co. 93. *Bagg*'s Caſe. 2 Sid. 112. ſame Rule laid down by *Glyn* C. J.

11 Co. 93. 4 Inſt. 71. It is clearly agreed, That the Court of King's Bench, having a Superintendency over all Inferior Courts and Magiſtrates, may by the Plenitude of its Power correct, not only Errors in Judicial Proceedings, but alſo extra-judicial Errors and Miſdemeanors, tending to the Breach of the Peace, Oppreſſion of the Subject, to the raiſing of Faction, Controverſy, Debate, or *Page 530 * any Manner of Miſgovernment; ſo that no Tort or Injury, whether Public or Private, can be committed, but what may be reformed and puniſhed according to the due Courſe of Law.

11 Co. 94. *Bagg*'s Caſe. 2 Buſſt. 122. Style 299, 457. Raym. 12, 431, 437. Vent. 302. And on this Foundation it has been adjudged, and admitted in Variety of Caſes, that if a Mayor, Alderman, Burgeſs, (*b*) Common-Council Man, Freeman, or other Perſon, Member of a Corporation, having a Franchiſe and Freehold therein, be refuſed to be admitted, or being admitted be turned out or diſfranchiſed without juſt Cauſe, he may have his Remedy by Writ of *Mandamus*.

(*b*) It is ſaid, that a Cuſtom to elect one to be of the Common Council, and to remove him *ad libitum*, is good; but where a Man is a Freeman, or Alderman, &c. they cannot remove him from his Freedom or Place without Cauſe, and a Cuſtom to the contrary is void, becauſe the Party hath a Freehold therein; but that to be of Council is a Thing collateral to the Corporation. Cro. Jac. 450. *Warren*'s Caſe.

2 Mod. 316. But it muſt appear what the Office is; and therefore a *Mandamus* to ſwear one, who was elected to be one of the eight Men of *Aſhburn-Court*, was denied; becauſe it was not ſpecially inſerted, what the Nature of the Office was, ſo as the Court might be able to determine, whether it were ſuch a Place for which a *Mandamus* will lie, or not.

A *Man-*

A *Mandamus* lies to reſtore a Town-Clerk, being an Office of a Public Nature, and ſuch as relates to the Aminiſtration of Juſtice; but *(b)* if a Corporation have Power by their Charter to have a Town-Clerk, who ſhall continue *durante beneplacito* of the Mayor and Aldermen; by this they have an arbitrary Power of turning him out at Pleaſure, and need not, to the Return of a *Mandamus*, aſſign any reaſonable Cauſe for their Conduct herein.

Noy 78. Style 457. (*b*) Vent. 77. Sid. 461. Lev. 291. *Dighton* v. *Mayor of Stratford upon Avon.*

Raym. 188. S. C. where it is ſaid, that the Court adviſed to repeal the Patent becauſe of this Inconveniency.

So a *Mandamus* lies for a (*c*) Recorder and *(d)* Clerk of the Peace; for theſe are Officers of a Public Nature, and relate to the Adminiſtration of Juſtice.

(*c*) Style 452. Vent. 143, 153. (*d*) 4 Mod. 31. 5 Mod. 386. Show. 282. Ld. Raym. 158, 166. Carth. 426. 12 Mod. 13. 2 Stra. 997. 2 Salk. 467. pl. 4.

It is admitted by all (*e*) the Books which ſpeak of this Matter, that a *Mandamus* lies to reſtore a Steward of a Court-Leet; but (*f*) ſome hold, that a *Mandamus* does not lie to reſtore a Steward of a Court (*g*) Baron, becauſe but a private Office, and ſuch as does not concern the Adminiſtration of Juſtice; but (*h*) others hold that it does; becauſe he is Judge of that Part of the Court which concerns Copyholds, and is therefore an Officer concerned in the Aminiſtration of Juſtice.

(*e*) 2 Sid. 112. Raym. 12. Sid. 40. 2 Lev. 18. Vent. 153. (*f*) Raym. 12. Sid. 40. Comb. 127. (*g*) Fitzgib. 195. (*h*) Vent. 153. 2 Lev. 18. S. P. expreſly by *Hale* C. J.

It hath been adjudged, that a *Mandamus* lies to reſtore one to an Attorney's Place in an Inferior Court; becauſe his is an Office concerning the Public Juſtice, and is compellable to be an Attorney for any Man; and has a Freehold in his Place.

Lev. 75. Sid. 152. Keb. 549. adjudged in *Hurſt*'s Caſe, who was reſtored to an Attorney's Place of the Court of *Canterbury*; and in one *Collin*'s Caſe, who was reſtored to an Attorney's Place of the Liberty of St. *Martin's le Grand.*

So a *Mandamus* was granted to the Mayor of *Reading*, for an Attorney of *B. R.* who was prohibited to practice in an Inferior Court in *Reading*.

Vent. 11. Sid. 410. Mod. 23.

It hath been adjudged, that a *Mandamus* lies to reſtore a Sexton; tho' as to this the Court at firſt doubted; becauſe he was rather a Servant to the Pariſh than an Officer, or one that had a Freehold in his Place; but upon a Certificate ſhewn from the Miniſter, and divers of the Pariſh, that the Cuſtom was to chuſe a Sexton, and that he held it for his Life, and * that he had 2*d.* a Year of every Houſe within the Pariſh; they granted a *Mandamus* directed to the Church-Wardens.

Vent. 143, 153. T. Raym. 211. 2 Lev. 18. 2 Keb. Rep. 802. * Page 531 *Ile*'s Caſe. 7 Mod. 118.

A *Mandamus* lies to reſtore a Church-Warden, being a Temporal Officer, and an Office concerning the Public; and therefore (*i*) where to a *Mandamus* to ſwear a Church-Warden, choſen according to the Cuſtom, the Archdeacon returned, that the Perſon preſented was a poor Dairy-Man who had no Eſtate, was *Perſona minus habilis & idonea* for that Office; the Court granted a peremptory *Mandamus.*

2 Sid. 112. Vent. 143. 3 Mod. 335. 5 Mod. 325. 8 Mod. 325. Style 457. Comb. 417. (*i*) Carth. 393. Salk. 166. pl. 5. *The King* v. *Rees.* 12 Mod. 116. L. Raym. 138.

So a *Mandamus* hath been granted to reſtore a Pariſh-Clerk, choſen according to the Cuſtom, being a Temporal-Officer.

Style 457. 2 Sid. 112. Vent. 143. 3 Mod. 335. Comb. 105. 2 *Burn*'s Eccleſ. Law, Quarto, 136. 6 Mod. 253. Stra. 59.

So

King v. *Doctor Henchman*, Official of the Conſiſtory-Court of the Biſhop of *London*.

So a *Mandamus* was lately granted, to admit one *Robert Trott* to the Office of Pariſh Clerk of *Clerkenwell*, being elected by the Pariſh; it being ſhewn that the Official had uſually admitted to this Office.

(*b*) 2 Stra. 1023. 2 Barnard, *K. B.* 365, 428. 2 Kel. 287. pl. 218. Andr. 367. 2 Sid. 112. Sid. 40. Style 457. Comb. 144. Stra. 58. 2 Stra. 897.

So a *Mandamus* lies for a Schoolmaſter or the (*b*) Uſher of a School, if he be elected for Life, although he be not a ſworn Officer; for this is a Temporal and Public Office, in which the Party hath a Freehold.

2 Rol. Rep. 82. Rol. Abr. 535. Salk. 175. Carth. 169, 170. 3 Lev. 309. 3 Mod. 333. Skin. 290. pl. 1. *Lee's* Caſe. Show. 217, 251, 261. S. C. by the Name of *The King* v. *Oxenden*. 3 Mod. 332. 3 Salk. 230. p. 4. Holt 435. pl. 1.

A *Mandamus* lies to admit, reſtore, or diſcharge a Conſtable; for he is a Public Officer, and one whoſe Office relates to the Adminiſtration of Juſtice.

It hath been adjudged, that no *Mandamus* lies to reſtore a Proctor of *Doctors-Commons*, admitting that no Appeal lay from the Dean of the Arches to the Archbiſhop, as Viſitor; becauſe this is an Eccleſiaſtical Office, and a Matter properly and only cognizable in that Court; and that the Temporal Courts are not to intermeddle, or inquire into their Sentence, or into the Proceedings in any Matters whereof they have a proper Juriſdiction, but are to give Credit thereunto; although it was urged, that if a *Mandamus* did not lie in this Caſe, the Party would be without Remedy, for that no Aſſiſe would lie of this Office; and though an Action on the Caſe might lie, yet it may be defective; becauſe a Jury may not well compute the Damages in Proportion to the Loſs of a Man's Livelihood; beſides it was urged, that a *Mandamus* ought to lie in this Caſe, as well as for an Attorney of an Inferior Court, becauſe this is an (*c*) Officer of a more Public Concern.

(*c*) A Proctor is not an Officer, properly ſpeaking, it is only an Employment in that Court, which acts by different Rules from the King's Bench. 3 Mod. 335. *Per Cur'*.

Carth. 170. 6 Mod. 18. S. P. *per Holt*; but ſaid to be againſt his Conſent. See Fitzgib. 123, 194. 8 Mod. 148. 10 Mod. 214, 221. 12 Mod. 190, 609, 666. Stra. 159, 557. 2 Ld. Raym. 1004, 1334. Forteſc. 202. Stra. 608, 696. 2 Stra. 797. Barnard, *K. B.* 52. See Andr. 101. 2 Stra. 1082. Skin. 45. pl. 17. Lev. 108. Vent. 188. Sir *Wm. Jones* 199.

But it hath been ſince held, that a *Mandamus* lies for a Regiſter in an Eccleſiaſtical Court, (*d*) upon an *Affidavit* that he hath Eccleſiaſtical Juriſdiction.

(*d*) Comb. 133. 3 Salk. 232. pl. 9. Ld. Raym. 337. And. 177.

Mich. 4 Geo. 2. *The King* v. *Doctor Ward*. 2 Stra. 893. Fitzgib. 123. pl. 8. 194. pl. 7. Barnard, *K. B.* 254, 294, 380, 411.

So upon a *Mandamus* to the Commiſſary of *York*, to admit Mr. *Dryden* a Deputy-Regiſter under Doctor *Sharp*; it was objected that the Writ did not lie for an Eccleſiaſtical Officer, becauſe he is under the Enquiry and Cenſure of his proper Judge; nor for a private Officer, becauſe he may have his Action on the Caſe for a Diſturbance, or an Aſſize, in Caſe the Place be a Freehold; and herein was cited the above Caſe of *Lee*, and the expreſs Opinion of my Lord *Holt* therein that a *Mandamus* did not lie for a Deputy-Regiſter. In Anſwer to which were cited the Caſes of *The King* ver. *Doctor Betteſworth*, to admit Mr. *Faulkes* Apparitor General

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* to the Archbiſhop of *Canterbury*; *Hil.* 4 *Geo.* 1. *The King* ver. *The Chapter of Norwich, to admit Doctor* Sherlock *to a* (*e*) *Prebendary*; *Hil.* 9 *Geo.* 1. to the Univerſity of *Cambridge*, to reſtore Doctor (*f*) *Bentley* to his Degrees of Maſter of Arts and Doctor of Divinity; from the Reaſon of which

(*e*) Stra. 519. Andr. 21. Barnard, *K. B.* 40. Andr. 177.

(*f*) Forteſc. Rep. 202. 2 Ld. Raym. 1334. See 2 Str. 1082. Andr. 20, 185. S. P. Stra. 557.

Caſes

Caſes the Court held, that this Writ lay for a Regiſter, an Officer much leſs Spiritual than a Prebendary, or the Degree of Doctor in Divinity; alſo this *Mandamus* is at the Suit of Doctor *Sharp*, and ſets forth his Title to the Office of Regiſter, *exercendum per ſe vel ſufficient' deputatum ſuum*; and that the Commiſſary had refuſed Mr. *Dryden*, whom he appointed his Deputy; and that therefore the *Mandamus* was well awarded, becauſe he had no other Way to get his Deputy admitted.

So where a *Mandamus* was prayed to the Lord Preſident and Council of the *Marches*, to admit *A.* to the Exerciſe of the Office of Deputy-Secretary; and it was objected, *1ſt*, That a Deputy could not pray a *Mandamus*, becauſe his Authority was revocable. *2dly*, That he being an Officer belonging to the Court, they are to judge of his Sufficiency, and ſo have Power to refuſe. As to the firſt Objection, it was adjudged, that the *Mandamus* being at the Suit of the Principal, and ſetting forth that he had the Office of Secretary *exercendum per ſe vel ſufficientem deput' ſuum*, the *Mandamus* was well awarded, becauſe he had no other Remedy to have this Deputy admitted; and as to the ſecond Objection, it was adjudged, that if they refuſed to admit him for Inſufficiency, they ought to have returned that he was inſufficient. Vent. 110. Lev. 306. 2 Keb 738. *The King* v. *Clapham.*

A *Mandamus* is ſaid to have been denied to reſtore a Clerk of a Dean and Chapter; becauſe that he hath nothing to do with the Public, his Office being only to enter Leaſes granted, *&c.* and that therefore he hath no more to do with the Publick than a Bailiff of a Manor. Comb. 135.

It is ſaid, that the Court refuſed to grant a *Mandamus* to reſtore a Surgeon to an Hoſpital, becauſe it was not a Public Office. Comb. 41. 7 Mod. 118. S. P. where, in ſuch a Caſe, the Court made a Rule, to ſhew Cauſe why the *Mandamus* ſhould not be granted.

It hath been adjudged, that a *Mandamus* lies to reſtore the Treaſurer of the New River Company; for though it be a private Corporation, yet it was created by the King's Letters Patent, which being on Record the Judges are obliged to take Notice of them, and ſee that they are duly executed. Lev. 123. Sid. 169. Keb. 625. *Middleton's* Caſe. 3 Mod. 334. S. C. cited; and ſaid to have been granted *de bene eſſe*, to bring the Matter before the Court.

A *Mandamus* was granted to the Mayor of *Briſtol*, to reſtore Mr. *Roe* to the Office of Sword-Bearer. Comb. 145.

It is ſaid, that a *Mandamus* was denied to one, who pretended to be (*a*) Maſter of the Lord Mayor's Water-houſe, becauſe not an Office, but a Service. Vent. 143. (*a*) Refuſed to reſtore the Clerk of the Butchers Company. 6 Mod. 18. 2 Ld. Raym. 959, 1004. So to reſtore the Approver of Guns to the Gunſmiths Company. 6 Mod. 82. 2 Ld. Raym. 989. Comb. 347.—But *qu.* of theſe Caſes; for they ſeem not to be Law. For more Caſes of Refuſal, ſee fol. 540. *Poſt.*

A *Mandamus* was granted, to reſtore one *Smith* to the Office of Clerk of the City-Works; it appearing by his *Affidavit*, that the Office was an antient Office, eſtabliſhed Time out of Mind, to ſurvey the Works and Edifices of the City, and to ſee that all the City-Buildings were well done; and to ſign the Workmens Bills; and that he was admitted into this Office, with the Fees belonging to it, *quamdiu ſe bene geſſerit*; and that there was an Oath of Office taken by him, and the Oaths to the Government; for the Court held, that tho' there was ſomething here that looked like Service, by the Nature of the Employment, yet there being an Oath of Office, and Oaths to the Government to be taken, theſe import a Public Office, for which a *Mandamus* is proper. Hil. 7 Geo. 2. in *B. R. The King* v. *City of London.* 2 Barnard. *K. B.* 398. S. P. & C.

* If there be a Diſpute between the High-Steward of *Weſtminſter* and the Dean and Chapter, about appointing a Bailiff, and the Steward names one, and * Page 533

and the Dean and Chapter appoint and ſwear in another the Appointee of the Steward may have a *Mandamus*, but without Prejudice; for though the Court will not regularly grant a *Mandamus* to try private Titles, yet here the Appointee of the Steward having no Seiſin, ſo as to enable him to maintain an Aſſiſe, and an Action on the Caſe only repairing him in Damages, without putting him in Poſſeſſion of the Office, a *Mandamus* is a proper Remedy †.

4 Mod. 281. Comb. 244. *Knipe* and *Edwin*. Ld. Raym. 159, 163, 338, 561, 958, 989, 1004.

10 Mod. 146. 12 Mod. 609, 666. Fitzgib. 123, 194.——† *Mandamus* grantable to a College of either *Univerſity* for the Admiſſion of the King's Nominee to a Vacancy occaſioned by not taking the Oaths, 1 Geo. 11. ſtat. 2. c. 13. ſ. 12, 13.——Where *Mandamus* may be granted requiring Lords, *&c.* to hold a Court Leet, *vide* 11 Geo. 1. c. 4. ſ. 3.

2. Where the Party's having another Remedy is a ſufficient Foundation to deny it; and therein of granting *Mandamus's* to reſtore Members of Colleges, *&c.*

It ſeems to be now agreed, that no *Mandamus* lies to reſtore or admit a (*a*) Fellow or Member of any (*b*) College, becauſe that theſe being private Eleemoſynary Societies, and governed by particular Laws of the Founders, they who would take the Benefit of them, muſt take it on ſuch Terms as the Founder has thought proper to impoſe; and muſt therefore, in Caſe of any Grievance, apply themſelves by way of Appeal to their (*c*) proper Viſitors.

(*a*) Andr. 184. Skin. 454. 4 Mod. 112, 124. in the Caſe of *Phillips* and *Bury* fully debated and ſettled.

(*b*) That the Law is the ſame in the Caſe of an Hoſpital or College of Phyſick, ſaid to have been adjudged in *Merrick*'s Caſe, who was one of the College of Phyſicians; and in *Ayleffe*'s Caſe. Carth. 92. 3 Mod. 265. Andr. 184. (*c*) That in Lay-Foundations, whether of Hoſpitals or Colleges, the Viſitatorial Power is either in the Founder or his Heirs, or the Viſitors appointed by the Founder, and they have the ſole Power to execute Juſtice within that Foundation; but where the Corporation is Spiritual, there the Biſhop of the Dioceſe is Viſitor. Carth. 93. 10 Co. 31. Show. 74.

And this ſeems to have been the better Opinion of the Judges, not only in thoſe (*d*) Caſes where Application was made for a *Mandamus* before the Party had appealed to the Viſitor, but alſo where after ſuch Application the Sentence had been confirmed by the Viſitor; as in (*e*) *Appleford*'s Caſe, where, to a *Mandamus* to reſtore him to a Fellowſhip of *New College*, the Return was, that by the Founder's Laws they might expel any one who had committed an enormous Crime; and that *Appleford* had committed an enormous Crime, and therefore they expelled him; that he appealed to the Viſitor, who was the Biſhop of *Wincheſter*, who confirmed the Expulſion, and concluded to the Juriſdiction of the Court: And this was held a good Return, though it did not mention what Manner of Crime *Appleford* had committed, ſo that it might appear whether he was lawfully expelled or not; for it was not neceſſary to mention the Crime, becauſe the Court had no Authority to intermeddle with it.

(*d*) As Dr. *Witherington*'s Caſe. Sid. 71. Raym. 31, 68. Lev. 23. Keb. 2, 50. Dr. *Robert*'s Caſe. 2 Keb. 102. Dr. *Patrick*'s Caſe. Raym. 101. Lev. 65. Sid. 346. 2 Keb. 164 199.

(*e*) Mod. 82.

See Lev. 23, 65. Raym. 56, 94, 101. Sid. 94, 152, 346. 8 Mod. 27, 148, 380. 10 Mod. 50. 12 Mod. 2, 113, 190, 600, 666. Fitzgib. 123, 194. 2 Ld. Raym. 1334. Stra. 557. Forteſc. 202. 2 Ld Raym. 1348, 1379, 1405. Will. Rep. 47, 93, 348, 351. 2 Lev 14. 11 Mod. 174. pl. 16. 2 Stra. 895.

A *Mandamus* to reſtore one *Probuſt* to the Place of Chaplain of *All Souls* College in *Oxon*, being turned out by the Warden of that College, was granted upon Suggeſtion, that the Archbiſhop of *Canterbury* was Viſitor of the College, and the See being now vacant by the Deprivation of the Biſhop, by virtue of the Act of Parliament which enjoins the Oath of Allegiance; and for that *Probuſt* had no other Remedy, becauſe the Dean and Chapter of *Canterbury*, who are Guardians of the Spirituality *ſede vacante*,

Carth. 168. *Probuſt*'s Caſe. See 2 Bur. Rep. 1044.

cante, have (*f*) refuſed to meddle with this Viſitatorial Power by way of * Appeal. But at another Day, it being ſhewn in Behalf of the College, that the Dean and Chapter of *Canterbury*, and not the Archbiſhop, are Viſitors of this College, becauſe they were created, and ſtand inſtead of the Prior and Convent of *Canterbury*, who were Viſitors heretofore; and farther, that they were ready to hear the Appeal; the Court diſcharged the firſt Rule, and ordered *Probuſt* to apply himſelf by way of Appeal.

*Page 534 Andr. 177.

(*f*) Whether a *Mandamus* will lie to a Viſitor to compel him to execute his Juriſdiction, was ſaid by my Lord *Hardwicke* in Dr. *Bentley*'s Caſe, Hil. 9 Geo. 2. not to have been determined, though a Rule for that Purpoſe, to ſhew Cauſe, was made, 12 *Ann.* and he ſeemed to think, that if this Power of a Viſitor be a Juriſdiction, yet it is *Forum Domeſticum*, and not any public Juriſdiction; or rather a Deciſion of the Founder, upon his own private Charity, than any Juriſdiction at all. 15 Vin. Abr. 203. pl. 4. See Andr. 185, 187.

A *Mandamus* was prayed to the Mayor and Jurats of *Sandwich*, Governors of the Hoſpital of the Brothers and Siſters of St. *Bartholomew*, to reſtore one who was a Siſter of the ſaid Hoſpital; and it was urged, that a *Mandamus* ought to be granted, becauſe the Party had a Corody and Freehold in the Hoſpital. But *per Cur'*, The King is the Founder, and ſo hath the Viſitation, and therefore Application muſt be made to him.

3 Keb. 360. *Wheeler*'s Caſe. To chooſe Maſter of an Hoſpital. Andr. 184. To reſtore to a Scholarſhip. *id. ib.*

3. What Removal or Turning out an Officer will intitle him to a *Mandamus*.

It ſeems by the better Opinion, that a Member of a Corporation, being only ſuſpended, and not (*g*) totally removed, may have a *Mandamus*; becauſe, were it otherwiſe, they might always ſuſpend, and thereby not only effectually keep him out, but alſo deprive him of all Remedy of Redreſs.

Lev. 162. Keb. 868. Raym. 152. *The King* ver. *Approved Men of Guildford*.

(*g*) A *Mandamus* to reſtore an Alderman expelled from his Priority and Precedency of his Place of Alderman. 1 Lev. 119.

A *Mandamus* was granted to the College of Phyſicians in *London*, to reſtore Dr. *Goddard* to all the Privileges and Pre-eminences that belonged to him. The Preſident of the College returns, that they were incorporate, &c. by virtue of the Statute *H.* 8. and that they made a By-Law, that there ſhould be a ſelect Number of twelve to attend in Committees, and that Dr. *Goddard* was one of the thirty, and that they put him out for certain Reaſons, but that he remains Fellow ſtill. And all the Court, except *Mallet*, held that this was a good Return, for it was in the Fellowſhip he had a Franchiſe; but to be one of the Thirty is no ſuch Thing as a Man may ſue to be reſtored to, for it is only a ſelect Number for the Convenience of ordering their Affairs.

Sid. 29. Lev. 19. Keb. 75, 84. Dr. *Goddard* ver. *College of Phyſicians*.

(D) Where it lies to inferior Courts, and Magiſtrates, to oblige them to do that Juſtice which the Public Good requires, and the Laws enjoin.

THE Court of King's Bench having a Superintendancy over all inferior Courts and Magiſtrates, will oblige them to execute that Juſtice which the Party is intitled to, and which they are enjoined by Law to do; and

Styl. 7, 8. Lev. 186. Sid. 293.

Comb. 158, 450. of this there are Multitudes of Inſtances; (*b*) as where the Ordinary refuſes to grant the Probate of a Will to an Executor, or to grant Adminiſtration to the next of Kin, he may be compelled thereto by *Mandamus*; for theſe being Things enjoined by Statute, the Temporal Courts will take Care that due Obedience is paid to them.

(*b*) And therefore, where to a *Mandamus* to the Judge of the Prerogative Court to grant the Probate of a Will to a Perſon named Executor therein, the Ordinary returned, that he was an abſconding Perſon, and inſolvent; and that he had refuſed to give Caution to pay Legacies bequeathed to ſome of the Teſtator's Infant Relations; and a peremptory *Mandamus* was granted; for the Ordinary has no Authority to interpoſe and demand Caution of the Executor, when the Teſtator himſelf required none. Carth. 457. Salk. 299. pl. 11. *The King* ver. *Sir Richard Raines*. But where Executors may be compelled to give Security in Equity, *vide* Title *Executors and Adminiſtrators*, Letter (A).

*Page 535 Hil. 4 Geo. 2. *Smith*'s Caſe in *B. R.* 2 Stra. 892. Andr. 24, 366. Barnard, *K. B.* 370, 425. * But a *Mandamus* will not lie to oblige the Ordinary to grant Adminiſtration *durante minori Ætate* of an Infant to the next of Kin, this being a Matter out of the Statutes, and therefore diſcretionary in the Ordinary to whom to grant it; and if in ſuch Caſe he grants it to an improper Perſon, or inſiſts upon unreaſonable Security, the Redreſs muſt be by Appeal; or if in the laſt Inſtance there be any Remedy at Common Law, it muſt be by Prohibition.

Mich. 7 Geo. 2. in *B. R.* *The King* ver. *Betteſworth*. 2 Stra. 956. 2 Barnard. *K. B.* 334. So if the Teſtator make *J. S.* his Reſiduary Legatee, who by the Eccleſiaſtical Law is intitled to Adminiſtration upon the Executor's Renunciation; yet if the Spiritual Court refuſe to admit him thereto, they cannot be compelled by *Mandamus*; for this is a Matter purely of Eccleſiaſtical Cognizance, and out of the Statutes; and therefore the Party's Redreſs muſt be by Appeal. 2 Kel. 139. pl. 118.

Lev. 91. Sid. 107. pl. 20. 5 Mod. 402. 6 Mod. 227, 260. If by the Cuſtom of a Corporation, *&c.* a Perſon ſerving an Apprenticeſhip there, is at the End of his Term intitled to his Freedom, and the Mayor, *&c.* refuſe to admit him thereto, they may be compelled by (*c*) *Mandamus*; for this is an Act of Public Juſtice, which the ſuperior Court will ſee executed.

12 Mod. 490. Ld. Raym. 337. 2 Ld. Raym. 1238. 2 Show. Rep. 154. pl. 138. See 6 & 7 *W.* 3. c. 17. ſ. 12. 8 *Ann.* c. 9. ſ. 39. Andr. 1. Com. Rep. 240. pl. 134. *id.* 243. pl. 136. 2 Kel. 280. pl. 213. Carth. 448. (*c*) *Mandamus* to admit a Quaker, having taken his *Affirmation*, but refuſing to take the *Oath*, into the Freedom of the *Turkey* Company, granted peremptorily. 2 Bur. Rep. 1004, 1005.

6 Mod. 310. *Peat*'s Caſe, *& vide*. 2 Salk. 572. 2 Ld. Raym. 1206. Stra. 58. 6 Mod. 229. So it hath been held, that a *Mandamus* lies to the Juſtices of the Peace, to oblige them to admit a Perſon to take the Oath of Allegiance, and to ſubſcribe according to the Act of Toleration, in order to qualify him to teach a Diſſenting Congregation: And herein it is ſaid, that the Party ought to ſuggeſt whatever is neceſſary to intitle him to be admitted; and if that be not done, or if it be done, and the Fact be falſe, that will be a good Matter to return.

Comb. 422, 478. So a *Mandamus* lies to the (*c*) Juſtices of the Peace, Churchwardens and Overſeers of the Poor, to oblige them to make Rates for the Relief of the Poor.

(*c*) To a Juſtice of the Peace to ſign a Poor-Rate. 5 Mod. 275. 6 Mod. 229. Comb. 422, 478. Fol. 36, 37, 368. 2 Seſ. Caſ. 65. pl. 68.

2 Show. 74. pl. 57. Comb. 203. *Vide* 6 Mod. 97-8. So *Mandamus*'s have been granted to oblige Juſtices of the Peace to diſcharge Priſoners, purſuant to Acts of Parliament made for the Relief of Inſolvent Debtors. See Seſ. Caſ. 247. pl. 198. 2 Barnard. *K. B.* 410.

So

So where by the Statutes 19 *Car.* 2. *cap.* 3. *ſect.* 25. & 22 *Car.* 2. *cap.* 11. *ſect.* 61. for erecting *Newgate* Market, Power is given to the Mayor and Aldermen of *London* to impanel a Jury, who ſhall aſſeſs and adjudge what Satisfaction and Recompence ſhall be given to the Owners of the Grounds; and that the Verdict of ſuch Jury, on that Behalf to be taken, and the Judgment of the ſaid Mayor and Court of Aldermen thereupon, and the Payment of the Money ſo awarded or adjudged, &c. ſhall be binding and concluſive to and againſt the Owners, &c. and there being 15000 Foot of the Grounds of *J. S.* taken away for this Purpoſe, for which a Jury being impanelled aſſeſſed and awarded two Shillings a Foot; but the Mayor and Court of Aldermen refuſing to give Sentence or Judgment thereupon, a *Mandamus* was awarded to compel them to it. Vent. 187. Raym. 214. *Amburſt's* Caſe.

And this general Juriſdiction and Superindency of the King's Bench over all inferior Courts to reſtrain them within their Bounds, and to compel them to execute their Juriſdiction, whether ſuch Juriſdiction ariſes from a modern Charter, ſubſiſts by Cuſtom, or is created by (*c*) Act of Parliament, yet being *in Subſidium Juſtitiæ*, has of late been exerciſed in Variety of Inſtances; as (*d*) a *Mandamus* granted to the Quarter-Seſſions to give Judgment for abating a Nuſance. Andr. 183.

(*c*) A *Mandamus* to the Preſident and Fellows of St. *John's* College *Cambridge*, to oblige them to turn out certain Fellows of the College, whoſe Places became void for not taking the Oaths of Supremacy and Allegiance, purſuant to the Statute 1 *W.* & *M.* c. 1 & c. 8. Skin. 359. pl. 1, 368. pl. 15, 393. pl. 30, 546. pl. 9. 4 Mod. 233. S. C. (*d*) Hil. 3 Geo. 1. Andr. 183. 2 Ld. Raym. 1334. Seſ. Caſ. 248. ſo to receive an Appeal. Seſ. Caſ. 248.

* So a *Mandamus* was granted to the Court of *Sandwich*, to give Judgment in an Action of Aſſault and Battery. *Page 536 Mich. 5 Geo. Str. 113. Seſ. Caſ. 248. Andr. 183.

So a *Mandamus* was granted to the Sheriffs Court in *London*, to give final Judgment upon a Writ of Inquiry. Mich. 7 G. 1. 1. *Baily* ver. *Bourn.* Stra. 392. Forteſc. Rep. 198. Seſ. Caſ. 249. Andr. 183, 184.

So a *Mandamus* was granted to the Bailiff of *Andover*, to give Judgment in a Cauſe there depending; but the Court in this Caſe required an Affidavit of their Refuſal, or elſe it ſhould be preſumed that the Court would do right. Trin. 2 Geo. 2. Barnard. *K. B.* 59. Andr. 184. Seſ. Caſ. 248.

So a *Mandamus* was granted to the Corporation of *Liverpool*, to hold an Aſſembly for doing the public Buſineſs, which was making Leaſes. Mich. 8 Geo. 1. Andr. 184. Barnard, *K. B.* 82.

But though theſe Kind of Writs are daily awarded to Judges of Courts to give Judgment, or to proceed in the Execution of their Authority, yet are they never granted to aid a Juriſdiction, but only to enforce the Execution of it; nor are they ever granted where there is another proper Remedy, and therefore will not lie to an Officer of an inferior Court; as to a Serjeant at Mace, an Apparitor, &c. to compel them to execute their Duty; for theſe are Servants to their reſpective Courts, and puniſhable by the Judges of them; and for the ſuperior Court to interpoſe in obliging ſuch inferior Officers, would be to uſurp the Authority of the Court, which has a proper Juriſdiction over its own Officers, and which alone is anſwerable to the ſuperior Court for the Execution of ſuch Authority; and therefore where a *Mandamus* iſſued to the Vice-Maſter of *Trinity* College *Cambridge*, commanding him to execute a Sentence of Deprivation, pronounced by the Biſhop of *Ely*, as Viſitor of the College, againſt Dr. *Bently*, the Maſter of that College; and it appearing on the Face of the Writ, and by the Return, that the Biſhop himſelf or the King were Viſitors, the Court held, that no *Mandamus* would lie; for taking the Biſhop to be general Viſitor, as the Writ ſuppoſes, he is the proper Perſon to carry his own Sentence into Execution, Hil. 9 Geo. 2. in *B. R. The King* ver. *Dr. Walker.* Ante 529.

ecution, having Power *tam in Capite quam in membris*; and if the Vice-Maſter refuſes Obedience to his Mandate, he may pronounce Sentence of Deprivation againſt him, and he will be immediately ouſted by the Judgment; or taking the Crown to be Viſitor, the Vice-Maſter may be puniſhed by Commiſſioners appointed by the Crown; one of which Ways the Court held to be the proper one to compel the Vice-Maſter to do his Duty.

Sid. 31. (*a*) 5 Mod. 314. (*b*) Comb. 102. 2 Stra. 948. 2 Barnard, *K. B.* 235. S.P.

A *Mandamus* lies to deliver up the Enſigns of an Office, or the Papers or Records of a public Nature to a Succeſſor; as (*a*) a *Mandamus* to deliver the Mace, and other Enſigns of Mayoralty, to the ſucceeding Mayor; ſo (*b*) a *Mandamus* to a Town-Clerk, to deliver ſeveral Books which belonged to the Corporation.

Vide Tit. *Corporations.*

A *Mandamus* lies to oblige Corporations to chuſe proper Officers, which if they neglected to do, this by the Common Law was a Forfeiture of their Charter; and though by the Common Law, upon the Death of a Mayor within his Year, which was the Act of God, and an ordinary Contingency, the Court of King's Bench was authorized to grant a *Mandamus* immediately to fill up the Vacancy; yet upon an Omiſſion to elect at the Charter-Day, or upon the Removal of an Officer unduly choſen, there was no Power to compel an Election before the Day came round again to ſupply thoſe Defects.

Mandamus may be granted on this Statute to go to an Election, though there is a Mayor *de facto*. 2 Str. 1003. 1157. Andr. 280. To go to Election of ſeveral annual Officers. 2 Str. 1180. *Page 537 To a Steward to hold a Court Leet, and to charge and ſwear a Jury, to preſent *J. D.* elected Mayor, upon an Affidavit of his Election. Andr. 279. To reſtore a Corporator. 2 Bur. Rep. 731. See *id.* 783. *Mandamus* granted to put in *Execution*, ſtat. 8 Hen. 6. c. 9. Seſ. Caſ. 367. pl. 291. Barnard, *K. B.* 72. To paſs Overſeer's Account. Seſ. Caſ. 368.

By the 11 *Geo.* 1. *cap.* 4. it is enacted in the following Words: "Whereas in many Cities, Boroughs and Towns Corporate, within that Part of *Great Britain* called *England*, *Wales*, and *Berwick upon Tweed*, the Election of the Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, is by Charter, or ancient Uſage, confined to a particular Day or Time, without any Proviſion how to act or proceed in caſe no Election be then made; and it frequently happens that by ſuch Charter, or Uſage, particular Acts are required to be done at certain Times, in order to and for the compleating of ſuch Elections; and by the Contrivance or Default of the Perſon or Perſons, who ought to hold the Court, or preſide in the Aſſembly where ſuch Elections are to be * made, or ſuch Acts to be done, or by Accident, it hath ſometimes happened, and may frequently do ſo, if not timely prevented, that no Courts or Aſſemblies have been held, or Elections made, or ſuch Acts done within the Time fixed for that Purpoſe; in which Caſes, if Elections of ſuch Officers could not afterwards be made, the Corporation ſhould be diſſolved, great Miſchiefs might enſue; for Remedy and Prevention whereof be it enacted, That if in any City, Borough or Town Corporate, within that Part of *Great Britain* called *England*, *Wales*, and *Berwick* upon *Tweed*, no Election ſhall be made of the Mayor, Bailiff or Bailiffs, or other chief Officer or Officers of ſuch City, Borough or Town Corporate, upon the Day, or within the Time appointed by Charter or Uſage for ſuch Election; or ſuch Election being made, ſhall afterwards become void, whether ſuch Omiſſion or Avoidance ſhall happen through the Default of the Officer or Officers, who ought to hold the Court, or preſide where ſuch Election is to be made, or by any Accident, or other Means whatſoever; the Corporation ſhall not thereby be deemed or taken to be diſſolved or diſabled from electing ſuch Officer or Officers for the future; but in any Caſe, where no Election ſhall be made as aforeſaid, it ſhall and may be lawful for the Members or Perſons of ſuch City, Borough or Corporation, who have Right to vote, or be preſent at, or to do any other Act neceſſary to be done, in order to or for the compleating ſuch Election; and they, and ſuch of them, as ſhall be hindred by any reaſonable Impediment or Excuſe, are hereby required reſpectively to meet or aſſemble together in the Town-Hall, or other uſual Place of Meeting, for making ſuch Election within ſuch City, Borough or Town

" Corporate,

" Corporate, upon the Day next after the Expiration of the Time within " which ſuch Election ought to have been made, unleſs ſuch Day ſhall hap- " pen to be *Sunday*, and then upon the *Monday* following, between the " Hours of ten in the Morning and two of the Afternoon of the ſame " Day; and that the Members, or Perſons, having Right to vote at, or to " do any other Act neceſſary to be done in order to ſuch Election, or ſuch of " them as ſhall be ſo aſſembled or met together, ſhall forthwith proceed to " the Election of a Mayor or Bailiffs, or other chief Officer or Officers for " ſuch City, Borough or Corporation, and to do every Act neceſſary to be " done, in order to or for the compleating ſuch Election, in ſuch Manner " as was uſual in, or in order to the Election of ſuch Officer or Officers, " upon the Day, or within the Time appointed by Charter or Uſage for " ſuch Election; and in caſe upon ſuch Day of meeting hereby appoint- " ed for ſuch Election, the Mayor, Bailiff or Bailiffs, or other proper Of- " ficer or Officers, who ought to have held the Court, or preſided at the " Aſſembly for ſuch Election, or doing any other Act neceſſary to be done " in order to ſuch Election, if the ſame had been made or done on the Day " fixed, or within the Time limited by Charter or Uſage for that Purpoſe, " ſhall be abſent; then ſuch other Perſon, having a Right to vote, being " the neareſt then preſent in Place or Office to the Perſon or Perſons ſo ab- " ſenting himſelf, or themſelves, ſhall hold the Court, or preſide in the " Meeting or Aſſembly hereby appointed, and ſhall have the ſame Power " and Authority in all Reſpects therein, as belongs to the Mayor, Bailiff or " Bailiffs, or other chief Officer or Officers of the ſame City, Borough or " Town Corporate, at any Court or Aſſembly, for the Election of Officers " for ſuch Place, or for doing any other Act neceſſary to be done in order " to ſuch Election.

To appoint Overſeers in extraparochial Places. Ventr. 187. Comb. 203, 483. Sel. Caſ. 368. To compel the Treaſurer of the County to allow Conſtable Charges on Expedition to *Scotland*. Str. 42, 93. Sel. Caſ. 367. pl. 291. To reimburſe him on Vagrant Act of 17 Geo. 2. c. 5. ſ. 16, 17. 2 Bur. Rep. 1198. To reimburſe Surveyor of Highways. Str. 211. On ſtat. 6. Geo. 2. c. 21. Str. 530. Sel. Caſ. 248. To take Security upon Articles of the Peace. 2 Sel. Caſ. 68. pl. 72. 2 Str. 835. Barnard, *K. B.* 166.

And by *Sect.* 2. it is further enacted, " That if it ſhall happen that in " any City, Borough or Town Corporate, within that Part of *Great Britain* " called *England*, *Wales*, and *Berwick* upon *Tweed*, no Election ſhall be " made of the Mayor, Bailiff or Bailiffs, or other chief Officer or Officers " of ſuch City, Borough or Town Corporate, upon the Day, or within the " Time appointed by Charter or Uſage for that Purpoſe; and that no " Election of ſuch Officer or Officers ſhall be made purſuant to the Direc- " tions herein before preſcribed; or ſuch Election being made, ſhall after- " * wards become void as aforeſaid; in every ſuch Caſe it ſhall and may be " lawful for his Majeſty's Court of King's Bench, upon Motion to be made " in the ſaid Court, to award a Writ or Writs of *Mandamus*, requiring the " Members or Perſons of ſuch City, Borough or Town Corporate, having " a Right, to vote at, or to do any other Act neceſſary to be done, in order " to ſuch Election, or to ſignify to the ſaid Court good Cauſe to the con- " trary; and thereupon to cauſe ſuch Proceedings to be had and made, as " in other Caſes of Writs of *Mandamus's* granted by the ſaid Court for " Election of Officers of Corporations, and of the Day and Time appointed, " in and by any ſuch Writ or Writs of *Mandamus*, for holding ſuch Aſſem- " bly, public Notice in Writing ſhall, by ſuch Perſon as the Court ſhall ap- " point, be affixed in the Market Place, or ſome other public Place with- " in ſuch City, Borough or Town Corporate, by the Space of ſix Days be- " fore the Day ſo appointed; and ſuch Officer and other Perſon reſpec- " tively, ſhall preſide in ſuch Aſſembly, as ought to have preſided at the " Election of ſuch Mayor, Bailiff or Bailiffs, or other chief Officer or Offi- " cers, or at the doing any other Act neceſſary to be done in order to ſuch " Election, in caſe the ſame had been made or done upon the Day herein " before preſcribed for that Purpoſe.

*Page 538 Fitzgib. 85. pl. 13. See 2 Sel. Caſ. 67. pl. 71. *Mandamus niſi* to put in Execution. 5 Geo. c. 12. Sel. Caſ. 387. pl. 314. To allow Expences of keeping a poor Perſon. 2 Sel. Caſ. 64. pl. 67. To take the Accounts of Surveyors of the Highways, and to reimburſe them. Sel. Caſ. 148. pl. 140.

" *Sect.* 3. And whereas in certain Boroughs and Towns Corporate within " that Part of *Great Britain* called *England*, *Wales*, and *Berwick* upon *Tweed*, " the Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, is or are

" to

To swear in an Ale-taster. Stra. 608. So a Director of the amicable Assurance. Str. 696. [†*Vide* Note at the End of this Act, fo. 539.] To restore Receiver of *Bedford Level*. Barnard, *K. B.* 195. To restore to Office of Yeoman of Woodwharf. 2 Str. 832. To restore Master of a Grammar School founded by the Crown. Str. 58. 2 Str. 897. To attend a Court Leet. 2 Stra. 1207. To restore a Chaplain. 2 Str. 797. Andr. 181. Barnard, *K. B.* 52. 2 Bur. Rep. 1044.

" to be nominated, elected or sworn at a Court-Leet, or View of Frank-
" pledge, or some other Court; and by Reason of the Contrivance or De-
" fault of the Lord, or his Steward, or such other Officer, by or before
" whom such Court ought to be held, in not holding the same, or by some
" Accident it hath happened, and may hereafter happen, that no due No-
" mination, Election or Swearing, of such Mayor †, Bailiff or Bailiffs or other
" chief Officer or Officers, hath been, or shall be had or made; be it fur-
" ther enacted by the Authority aforesaid, That in every such Case it shall
" and may be lawful to and for his Majesty's Court of King's Bench, upon
" Motion to be made in the said Court, to award a Writ of *Mandamus*, re-
" quiring the Lord, or his Steward, or other Officer, by or before whom
" such Court ought to be held, to hold, or cause to be holden, such Court-
" Leet, or other Court, and to do every other Act necessary to be done by
" him, in order to such Nomination, Election or Swearing, at such Day
" and Time as shall be for that Purpose judged proper by the said Court
" of King's Bench, and shall be appointed in such Writ; or to signify to
" the said Court good Cause to the contrary; and thereupon, to cause such
" Proceedings to be had and made, as in other Cases of Writs of *Manda-*
" *mus*, granted by the said Court for holding of any Court, and of the Day
" and Time appointed, in and by any such Writ of *Mandamus*, for hold-
" ing such Court, public Notice in Writing shall, by such Person as the
" said Court of King's Bench shall appoint, be affixed in the Market Place,
" or some other public Place within such Borough or Town Corporate,
" by the Space of six Days before the Day so appointed; and where a
" Nomination of Persons, in order to the Election of any such Mayor,
" Bailiff or Bailiffs, or other chief Officer or Officers, is to be made at
" such Court-Leet, or other Court; in every such Case, after such Nomi-
" nation made, all and every other Act and Acts necessary to be done, in
" order to such Election, shall be had, made and done at such Assembly,
" and in such Manner and Form as the same ought to have been had,
" made and done, in case such Election had been made upon the Day
" next after the Expiration of the Time prescribed for such Election by
" the Charter or Usage of such Borough or Corporation, according to the
" Directions herein before mentioned.

" *Sect.* 4. And be it further enacted by the Authority aforesaid, That the
" Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, who shall be
" elected pursuant to the Directions of this Act shall take the Oath, or
" Oaths, by Law required, at the Time of his Admission into such Office,
*Page 539 " * before such Officer as shall preside at such Election, in pursuance of this
" Act, who is hereby authorized and required to administer such Oath or
" Oaths, and shall have the same Privileges Precedence, Powers and Au-
" thorities, in all Respects, as any Mayor, Bailiff or Bailiffs, or other chief
" Officer or Officers, of the same City, Borough or Corporation, elected
" on the Days or Time fixed by Charter or Usage for that Purpose, ought
" to have or enjoy.

" *Sect.* 5. Provided always, That no such Election, nor any Act done in
" order thereunto, shall be valid, unless as great a Number of Persons hav-
" ing a Right to be present at and vote therein, shall be present at the As-
" sembly holden for such Purpose, and concur therein, as would respec-
" tively have been necessary to be present and concur in such Election or
" Act, in case the same had been made or done upon the Day, or within
" the Time appointed for that Purpose, by the Charter or Usage of such
" City, Borough or Corporation, saving only that the Presence of the Mayor,
" Bailiff or Bailiffs, or other chief Officer or Officers, who ought to pre-
" side, shall not be necessary.

Sect. 6. And be it further enacted by the Authority aforesaid, " That if
" any Mayor, Bailiff or Bailiffs, or other chief Officer or Officers of any
" City,

" City, Borough or Town Corporate, ſhall voluntarily abſent himſelf or " themſelves from, or knowingly or deſignedly prevent or hinder the Elec- " tion of any other Mayor, Bailiff, or other chief Officer in the ſame City, " Borough or Town Corporate, upon the Day, or within the Time ap- " pointed by Charter or ancient Uſage for ſuch Election, the Perſon or " Perſons, ſo offending, being thereof lawfully convicted, ſhall for every " ſuch Offence ſuffer Impriſonment for the Space of ſix Months, without " Bail or Mainprize, and ſhall be for ever diſabled to take, hold, or ex- " erciſe any Office belonging to the ſame City, Borough or Corporation.

Sect. 7. And be it further enacted, " That no Corporation ſhall be deem- " ed or adjudged to be diſſolved or diſabled from electing a Mayor, Bai- " liff or Bailiffs, or other chief Officer or Officers, by Reaſon of any Omiſ- " ſion or Default which hath already happened, in not nominating, elect- " ing or ſwearing a Mayor, Bailiff or Bailiffs, or other chief Officer or Of- " ficers of ſuch Corporation, upon the Day, or within the Time limited " for ſuch Nomination, Election or Swearing, by the Charter or Uſage of " ſuch Corporation, or by Reaſon of the Abſence of the Mayor, Bailiff or " Bailiffs, or other chief Officer or Officers, who ought to have preſided " at the Aſſembly for ſuch Nomination, Election or Swearing, or by Rea- " ſon of ſuch Election having become void, as aforeſaid; but every ſuch " Corporation ſhall be adjudged, deemed, and taken to be, and to have " been ſubſiſting and capable of electing ſuch Officer or Officers to all In- " tents and Purpoſes; any ſuch Omiſſion, Abſence, Default or Avoid- " ance, or any Defect, Diſability or Forfeiture ariſing therefrom, in any " wiſe notwithſtanding.

Sect. 8. Provided always, that nothing herein contained ſhall extend, " or be conſtrued to extend, to invalidate or make void any Charter here- " tofore granted to and accepted by any City, Borough or Town Corpo- " rate, or any Corporation within the ſame, or any of them, or any Elec- " tions or Acts had, made or done in purſuance of any ſuch Charter, nor " to make good the Election of any Officer or Member, or of any Perſon " claiming to be an Officer or Member of any City, Borough or Corpo- " ration, againſt whom any Judgment of *Ouſter* ſhall have been entered or " given upon any Information in the Nature of a *Quo Warranto*, or whoſe " Election ſhall have been avoided upon any Writ of *Mandamus*, on or be- " fore the laſt Day of *Michaelmas* Term in the Year of our Lord God 1724.

Sect. 9. It is further enacted, " That where any Writ of *Mandamus* ſhall " iſſue out of the Court of King's Bench in any of the Caſes aforeſaid, the " Perſon or Perſons, to whom ſuch Writ ſhall be directed, ſhall make his " or their Return to the firſt Writ of *Mandamus* †."

† This being a beneficial Law for the Subject, the Court hath been very liberal in the Conſtruction of it, therefore have granted a *Mandamus* for the Election of a Mayor, though there had not been any legal Mayor for four Years preceding. *Niſi Prius*, 197. cites Caſe of the Corporation of *Ordford*, 9 Geo 2.——So they have granted a *Mandamus* where there was a Mayor *de facto* at the Time, it appearing clearly there had not been a due Election. Caſe of the Borough of *Tintagel* 9 Geo. 2. *vide infra* 540. S. C. and *vide* Stra. 1003, 1157. and 6 Com. Dig. 418, *&c.*

Page 540 (E) Of the Authority by which it iſſues; and herein of the diſcretionary Power in the Court of granting or refuſing it.

Vide Tit. *Courts and their Juriſdiction.*

THIS general Juriſdiction and Superintendency is now only exerciſed by the Court of King's Bench, as the ſupreme Court for reſtraining and keeping all inferior Courts and Magiſtrates within their proper Bounds, and obliging them to execute that Juſtice with which they are inveſted.

Vern. 175.

And though a *Mandamus* may iſſue out of Chancery, yet on a Motion to the Lord Keeper, to grant a Mandatory Writ to the Chief Juſtice of the King's Bench, to command him to ſign a Bill of Exceptions, and a Precedent produced, where in a like Caſe ſuch a Writ had iſſued out of Chancery to the Judge of the Sheriffs Court in *London*; the Lord Keeper denied the Motion, for that the Precedent produced was to an inferior Court, and he would not preſume but the Chief Juſtice of *England* would do what ſhould be juſt in the Caſe.

But though the Court of King's Bench be intruſted with this Juriſdiction of iſſuing out *Mandamus's*, yet they are not obliged to do ſo in all Caſes wherein it may ſeem proper, but herein may exerciſe a diſcretionary Power, as well in refuſing as granting ſuch Writ; as where the End of it is meerly a private Right; where the granting it would be attended with manifeſt Hardſhips and Difficulties, *&c.* So even ſince the Statute 11 *Geo.* 1. *cap.* 4. for obliging Corporations to elect Officers, it hath been held, that this Court hath a diſcretionary Power of refuſing a Writ for that Purpoſe, but may firſt receive Information about the Election, and, if diſſatisfied about the Right, may ſend the Parties to try it in an Information.

Hil. 8 Geo. 2. *The King* ver. *Mayor and Burgeſſes of* Tintagel *in* Cornwal. 2 Stra. 1003, 1157. Andr. 280.

Sid. 169. Lev. 23. 2 Lev. 14. 2 Show. 74. Carth. 169. 10 Mod. 49.

Alſo in a doubtful Caſe, the Court of King's Bench may award a *Mandamus* to be conſidered of further on the Return, which may give more Light, and diſcover more fully the Juſtneſs of granting or refuſing it, and on ſuch Return may either eſtabliſh or quaſh the Writ.

Mandamus refuſed to be ſuperſeded, becauſe not returned. 2 Barnard, *K. B.* 132. 2 Kel. 219. pl. 162. To call a Veſtry refuſed. Str. 686. Lies not to ſwear in a Mayor, who has Judgment on an Information againſt him for Uſurpation. Str. 625. 2 Ld. Raym. 1447. To licence a Lecturer refuſed. 2 Str. 1192. 2 Ld. Raym. 1206. 2 Kel. 287. pl. 218. Quaſhed, being directed to Juſtices at large, inſtead of Juſtices preſent. Seſ. Caſ. 423. See ſtat. 8 & 9 *W.* 3. c. 30. So to inſert particular Perſons in Poor's Rate. 2 Str. 1259. So to ſign Certificate of a Settlement in a Pariſh, Court declaring it a very ſtrange Attempt. 2 Seſ. Caſ. 153. pl. 128. So to make an equal Poor's Rate. 2 Seſ. Caſ. 60. pl. 61. Fol. 37. Barnard. *K. B.* 82, 137. Str. 393. So for an equal Taxation on Land Tax Act. 11 Mod. 206. pl. 2, 6. So to aſſeſs a Roman Catholic double. 2 Seſ. Caſ. 62. pl. 64. *Mandamus* does not lie to make an equal Poor's Rate, where a Rate is in being, though unequal; but in ſuch Caſe if an Appeal be brought, and the Seſſions refuſe it, they may be compelled by *Mandamus* to proceed thereon. Andr. 24. Seſ. Caſ. 306. pl. 238. Fol. 37. To hold a Court of Conſervancy refuſed. 2 Barnard, *K. B.* 441. So to make an Order of Removal. Seſ. Caſ. 15. pl. 17. So to ſign Warrant of Diſtreſs, Party agreeing to pay the Rate. 2 Seſ. Caſ. 63. pl. 66. To empower Juſtices of the County to take Security of the Peace denied. 2 Seſ. Caſ. 67. pl. 71. For Licence to keep an Alehouſe not granted. 2 Str. 881. Andr. 180. Barnard. *K. B.* 402. Bur. Rep. 556. Nor for Rate to reimburſe. Str. 63 ‡.

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‡ It lies to Juſtices, to grant a Warrant to levy Balance of old Overſeers Accounts. *Rex* ver. *Juſtices of Somerſetſhire*, M. 8 Geo. 2. Stra. 992.

(F) To whom to be directed.

THE Writ is to be directed to him, who by Law is obliged to execute it, or to do the Thing thereby required; and therefore (*a*) where a *Mandamus* was granted to the Mayor, &c. of *Norwich*, it was moved, that the Senſe of the Mayor differed from the Majority of the Corporation, and that he would execute the Writ; whereas the Corporation were for returning an Excuſe &c. and they prayed, that the Mayor might be ordered to deliver the Writ to the Reſt of the Corporation; *Sed non allocatur*; for he is the Head and Principal, and (*b*) take your Courſe againſt him.

(*a*) Salk. 432. pl. 10, 701. pl. 6. 2 Ld. Raym. 1244.

* Page 541 The Court will not ſpecify to whom by Name,

Mandamus ſhall be directed. 2 Bur. Rep. 784. See *id.* 798. For Caſes on Directions, ſee Str. 55, 640. Andr. 180. Ld. Raym. 337, 559, 560. 12 Mod. 601. 2 Barnard, *K. B.* 330, 350. (*b*) That if the Mayor had made any Return, contrary to the Votes of the Majority concerned, it was at his Peril; and that the Way to puniſh him was by Information in *B. R.* Carth. 500.

If a *Mandamus* be directed to the two Bailiffs of a Town, to ſwear in other Bailiffs, and they object, that having ſworn in others, and being now no longer Bailiffs, and that the Writ not being directed to them in their natural Capacities, they are not obliged to pay any Obedience thereto; the Court will notwithſtanding oblige them to return the Writ; for if the Perſons ſworn in by them had no Right to be choſen, they ſtill continue Bailiffs, and ought to obey the King's Writ.

6 Mod. 133. *The Queen* verſus *The Town of Cliſtheroe.* 2 Ld. Raym. 848, 885. 12 Mod. 126, 251, 322.

Ld. Raym. 223. Comb. 324. Stra. 640. 2 Stra. 848, 895.

But where a *Mandamus* was directed to the Church-wardens of *W.* to reſtore *A.* to the Office of Sexton, and ſerved upon the late Church-wardens, after their Office was expired; and a Rule being made to ſhew Cauſe why an Attachment ſhould not go, for not obeying the *Mandamus*; and the whole Matter being diſcloſed by Affidavit, the Court allowed as a good Reaſon for their not returning the Writ, that they, at the Time of the Writ delivered to them, were not Church-wardens.

Trin. 5 Geo. 2. in *B. R. The King* ver. *Church-wardens of Wrexham.* 15 Vin. Abr. 214. pl. 6.

A *Mandamus* to the Mayor, Aldermen and Capital Burgeſſes of *D. viz.* whereas *A.* and *B.* &c. removed the Party complaining from his Office of Burgeſs, commanding them to command *A.* and *B.* to reſtore him, was quaſhed, for that it is abſurd, that the Writ ſhould be directed to one Perſon to command another.

2 Salk. 436. pl. 18. *The Queen* verſus *The Mayor &c. of Derby.*

(G) By whom to be returned.

THE Writ is to be returned by him to whom it is directed; and if any other return it in his Name, without his Privity and Conſent, an Action on the Caſe lies againſt him; alſo it is ſuch an Offence, for which the Court will grant an Attachment.

Skin. 368. pl. 15. Carth. 500. Comb. 422. 2 Show. 504. pl. 465.

If a *Mandamus* be directed to the Mayor, &c. and the Mayor, who is the moſt principal and proper Perſon, returns and brings in the Writ; the Court, upon Affidavits, will not examine whether there was the Senſe of the

Carth. 495. *The King* ver. *Mayor, &c. of Abingdon.*

2 Salk. 431. pl. 9. S. C. 12 Mod. 308, 404. Comb. 41, 213. 6 Mod. 133. Holt 440. pl. 10, 441. pl. 11. Ld. Raym. 559. and Leave given by the Court to file an Information againſt the Mayor.

Majority,

Majority, but will receive it, and leave the Parties to puniſh the Mayor for the Miſdemeanor, if he be guilty; but a peremptory *Mandamus* will be granted, if the Return be falſified.

(H) Of the Manner of inforcing Obedience to the Writ, and compelling a Return.

2 Salk. 429. pl. 4, 434. pl. 16. Ld. Raym. 391. 6 Mod. 25. Skin. 669. pl. 7. *Page 542 2 Ld. Raym. 848, 1233.

ON every *Mandamus* there regularly iſſues an *Alias* and *Pluries*, to oblige the Party to return the Writ; but the Court of King's Bench may make a peremptory Rule to return the firſt Writ; and, in Caſe of Diſobedience, grant an Attachment; alſo by the Statute 9 *Ann. cap.* 20. and 11 *Geo.* 1. *cap.* 4. Perſons * who are by Law required to make Returns to *Mandamus's*, in ſuch Caſes as are within theſe Statutes, muſt make their Return to the firſt Writ of *Mandamus*.

Mich. 9 Geo. 2. *The King* ver. *Baſkerville, Sheriff of Shropſhire.*

If an Attachment iſſues for not returning a *Mandamus*, and the Sheriff, who is to ſerve the Proceſs, takes Bail thereupon, this is ſuch a Miſdemeanor, for which an Attachment will be granted againſt him; for theſe are not like Attachments in Chancery, for want of an Anſwer, which are only as Attachments of Proceſs, but are Writs on Contempt, in Nature of Executions, and ſo not bailable by the Sheriff.

6 Mod. 152. See Ld. Raym. 126, 223, 559, 564, 710.

If a *Mandamus* is awarded for electing an Officer, and there is an Equality of Votes, ſo that the Electors cannot agree, it is ſaid, that they ſhall be all brought up as in Contempt, and laid by the Heels, till they do agree.

2 Ld. Raym. 840, 849, 885. 12 Mod. 126, 308, 322, 332, 410.

(I) What ſhall be ſaid a good Return.

2 Salk. 432. pl. 11. Ld. Raym. 559. Vent. 111

AS every *Mandamus* iſſues upon a Suppoſal of ſome Breach and Diſobedience of the Law, or Neglect of the Party's Duty to whom it is directed, the Return thereto muſt be certain to every Reſpect; and therefore it is ſaid not to be ſufficient to offer ſuch Matter as the Party may falſify in an Action, but alſo ſuch Matter muſt be alledged, that the Court may be able to judge of it, and determine whether the Party's Conduct be agreeable to Law or not.

Vent. 110. *The King* ver. *Clapham.*

Therefore, if to a *Mandamus* to the Lord Preſident and Council of the *Marches*, to admit a Perſon to the Exerciſe of the Office of Deputy-Secretary, the Return is, that *Non fuit tempore receptionis brevis deputatus conſtitutus*; this is naught; for if he were made his Deputy before, the Return was true; unleſs he made him his Deputy at the very Inſtant of the Receipt of the Writ.

2 Salk. 436. pl. 10. 2 Ld. Raym. 1244. *The Queen* ver. *Mayor, &c. of Norwich.*

To a *Mandamus* to admit a Perſon Alderman, the Party may return, that he was not qualified, or that he was not elected; alſo ſeveral Cauſes may be returned, but they muſt be conſiſtent; and therefore if the Return admits a good Election, and afterwards avoids it by Matter repugnant, this is naught,

6 Mod. 309. See Ld Raym. 225, 559.

A *Mandamus* to ſwear one into the Place of Town-Clerk; the Return was, that upon the Election *B.* had eighteen Voices, and the Party who ſued the *Mandamus* but ſeventeen; and that they ſwore in *B.* and it was held

held a bad Return, being argumentative, when it ſhould be expreſs and direct, that he was not choſen. 2 Ld. Raym. 1244, 1267. 1304, 1379, 1405. 10 Mod. 101, 174, 176. 12 Mod. 27, 113, 401. Comb. 396. Carth. 499. 2 Salk. 431. pl. 9. 699. pl. 3.

A *Mandamus* was granted to reſtore the Recorder of *Barnſtaple*, directed to the Mayor of the Corporation; and he returned, *quod non conſtat nobis* that he was ever elected; and the Return was adjudged inſufficient, and Reſtitution awarded. Raym. 153.

So, where to a *Mandamus* to reſtore a Town-Clerk, it was returned, that he *nunquam debito modo admiſſus*; and it was held a bad Return, being a Negative pregnant, and involving Matter of Law, when the plain Fact only ſhould be returned, ſo as to enable the Court to adjudge upon it, and the Party to bring his Action, in caſe it were falſe. Sid. 209. Keb. 655, 716, 733.

But if the *Mandamus* ſuggeſt, that he was *debito electus*, a Return *quod non fuit debito electus* is good, becauſe it anſwers the Suggeſtion in the Writ. Carth. 170. *Lambert's* Caſe. 2 Salk. 433. pl. 13.

5 Mod. 11. S. P. See 2 Bur. Rep. 1013. See other Caſes of Return in Seſ. Caſ. 422. pl. 332. 2 Barnard. *K. B.* 56. 2 Seſ. Caſ. 63. pl. 65. Barnard. *K. B.* 327, 353, 674, 763. 2 Ld. Raym. 1479. Andr. 105, 367. 2 Stra. 1111. 2 Barnard. *K. B.* 420. 2 Seſ. Caſ. 198. pl. 145. 2 Kel. 230. pl. 213. 2 Seſ. Caſ. 243. pl. 190. Str. 115, 609. 2 Barnard 430. 2 Str. 895. Forteſc. Rep. 200. 8 Mod. 99. 2 Str. 1235. 12 Mod. 601. Seſ. Caſ. 326 pl. 261. See Com. Dig. 178. Ld. Raym. 560. 12 Mod. 401. 2 Str. 1235. 2 Ld. Raym. 1379, 1405. Fitzgib. 195. 8 Mod. 380. 11 Mod. 174. pl. 16. 12 Mod. 23. Barnard. *K. B.* 412. But ſee the contrary held in 2 Str. 894, 895. Barnard. *K. B.* 381. 8 Mod. 325. 11 Mod. 174. pl. 16. 12 Mod. 23.

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* (K) Of traverſing the Return, and taking Iſſue thereon. * Page 543

THE Party to the Return of a *Mandamus* could not traverſe nor interplead, which is one Reaſon why the utmoſt Certainty was required in ſuch Return. Vent. 111. 2 Salk. 432. pl. 8.

But now by the 9 *Ann. cap.* 20. reciting, that divers Perſons had illegally intruded themſelves into, and taken upon them to execute the Office of Mayors, Bailiffs, Port-reeves, and other Offices within Cities, Towns Corporate, Boroughs and Places; and the great Difficulty of determining, where the Office was annual, the Right to the ſame, within the Compaſs of the Year, or where it was not annual, the Difficulty of determining the Right, before the Perſons had done divers Acts prejudicial to the Peace and Order of ſuch City, *&c.* and reciting the great Difficulty Perſons illegally turned out, or refuſed to be admitted, lay under, and the Dilatorineſs and Expence attending the Proceedings on Writs of *Mandamus*, it is therefore enacted, "That as often as, in any of the Caſes aforeſaid, any "Writ of *Mandamus* ſhall iſſue out of the King's Bench, the Courts of "Seſſions of Counties Palatine, or out of any the Courts of the Grand "Seſſions in *Wales*, and a Return ſhall be made thereunto, it ſhall and "may be lawful to and for the Perſon or Perſons, ſuing or proſecuting "ſuch Writ of *Mandamus*, to plead to or traverſe all or any the material "Facts contained within the ſaid Return; to which the Perſon or Perſons "making ſuch Return ſhall reply, take Iſſue, or demur; and ſuch further "Proceedings, and in ſuch Manner, ſhall be had therein, for the Determination thereof, as might have been had if the Perſon or Perſons, "ſuing ſuch Writ, had brought his or their Action on the Caſe for a falſe "Return; and if any Iſſue ſhall be joined on ſuch Proceedings, the Perſon Ld. Raym. 481.

"or

" or Perſons ſuing ſuch Writ, ſhall and may try the ſame in ſuch Place,
" as an Iſſue joined in ſuch Action on the Caſe ſhould or might have been
" tried; and in caſe a Verdict ſhall be found for the Perſon or Perſons
" ſuing † ſuch Writ, or Judgment given for him or them on Demurrer,
" or by *Nil dicit*, or for Want of a Replication or other Pleading, he or
" they ſhall recover his and their Damages and Coſts, in ſuch Manner as
" he or they might have done in ſuch Action on the Caſe as aforeſaid;
" ſuch Coſts and Damages to be levied by *Capias ad Satisfaciendum*, *Fieri*
" *Factas*, or *Elegit*, and a peremptory Writ of *Mandamus* ſhall be granted
" without Delay, for him or them for whom Judgment ſhall be given, as
" might have been, if ſuch Return had been adjudged inſufficient; and in
" caſe Judgment ſhall be given for the Perſon or Perſons making ſuch
" Return to ſuch Writ, he or they ſhall recover his or their Coſts of Suit,
" to be levied in Manner aforeſaid ‡."

† Where Defendants ſhall recover Coſts, *vide* ſ. 5. of this Statute.

‡ By ſ. 7. of this Statute, the Statutes of Amendment and Jeofails are extended to Proceedings on Writs of *Mandamus*.—If in a Proceeding under the Statute, no Damages are given by the Jury, the Want of it cannot be ſupplied by a Writ of Inquiry; but in ſuch Caſe the Party may bring an Action for a falſe Return; for the Act does not take away the Party's Right to bring ſuch Action, but only provides that in caſe Damages are recovered, by virtue of that Act, againſt the Perſon's making the Return, they ſhall not be liable to be ſued in any other Action, for making ſuch Return. Stra. 1051.—There are many Caſes to which the Statutes do not extend.—In all thoſe Caſes the Proceedings muſt be according to the Courſe of the Common Law.

(L) Of the Party's Remedy for a falſe Return.

11 Co. 99. *Bagg*'s Caſe. See Str. 808. Barnard, *K. B.* 82, 327. 12 Mod. 322, 408, 410.

IT is clearly agreed, that for a falſe Return to a *Mandamus* an Action on the Caſe lies; as, if upon a *Mandamus* to reſtore *T. S.* to his Place of Burgeſs of *P.* the Mayor, *&c.* return a good Cauſe, the Matter of which is falſe, an Action lies for the falſe Return.

*Page 544 Carth. 171, 172. *Sir Peter Rich* verſ. *Pilkington*, *Lord Mayor of London.*

* Alſo it hath been adjudged, that where the Return is made by ſeveral Perſons, the Action may be either joint againſt all, or ſeveral, being founded on a Tort or Injury; as if made by the Mayor and Aldermen, the Action may be brought againſt the Mayor only; and if upon Evidence it appears, that he voted againſt the Return, but was over-ruled by the Majority, the Plaintiff will be nonſuited †.

6 Mod. 152. S. P. and ſee the Authorities to the third Paragraph of p. 542.—† Where ſeveral join in an Application for a *Mandamus*, they muſt all join in the Action for a falſe Return. 1 Ray. 125.

Salk. 374. pl. 16. Ld. Raym. 584.

Alſo if the Matter concerns public Government, and no particular Perſon is ſo far intereſted as to maintain an Action, the Court will grant an Information againſt the particular Perſons that made the Return ‡.

‡ The Return muſt be filed and allowed before the Information can be moved for.

(M) Of

(M) Of awarding a peremptory Mandamus.

IF the Return be inſufficient, or falſified in an (*a*) Action on the Caſe, the Court regularly grants a (*b*) peremptory *Mandamus*, either to admit, (*c*) reſtore or diſcharge, &c. the Party, as the Caſe requires. 11 Co. 99.

(*a*) That on falſifying the Return, in an Action on the Caſe, no Motion can be made for a peremptory *Mandamus* till four Days are paſt after the Return of the *Poſtea*; becauſe the Defendant has ſo long to move in Arreſt of Judgment. 2 Salk. 430, 431. (*b*) Not to be granted in the firſt Inſtance. Skin. 669. pl. 7. Ld. Raym. 160. 5 Mod. 314. (*c*) But it is ſaid, that if the Court does not ſee Cauſe of Reſtitution, though there be no good Return to the Writ, yet they will not grant a peremptory *Mandamus*. 7 Mod. 83, 84. See Ld. Raym. 138, 559, 561. 2 Ld. Raym. 1008, 1379, 1405. 8 Mod. 325. Stra. 145, 609. 2 Ld. Raym. 1379. Stra. 686. 2 Stra. 894, 1246.

But the Action which falſifies the Return, is to be brought in that Court out of which the *Mandamus* iſſued; and therefore where in an Action on the Caſe in *C. B.* for a falſe Return to a *Mandamus*, Judgment was given for the Plaintiff on Demurrer; yet the Court of *B. R.* refuſed to grant a peremptory *Mandamus*; becauſe every *Mandamus* recites the Fact *prout nobis conſtat per recordum*, which cannot be ſaid in this Caſe, as the Court cannot take Notice of the Records of the Common Pleas. 2 Salk. 428. pl. 1. 1 Ray. 216. Skin. 670. pl. 8. S. C. Peremptory *Mandamus* granted for Warrant of Diſtreſs againſt old Overſeers of the Poor to levy a Sum in their Hands of the Pariſh Money. Sef. Caſ. 283. pl. 174. 2 Stra. 992. Peremptory *Mandamus* may go before any formal Judgment. Str. 697 ‡.

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‡ After a Writ of Error, brought upon a Judgment in an Action upon the Caſe for a falſe Return, a Motion was made for a peremptory *Mandamus*, but it was refuſed. Stra. 983.—See farther *poſt* 556. As to *Mandamus's*, to admit Apprentices to their Freedom.

Marriage and Divorce, ſee Page 569.

Maſter and Servant.

THE Relationſhip between a Maſter and a Servant from the Superiority and Power which it creates on the one Hand, and Duty, Subjection, and as it were, (*d*) Allegiance, on the other, is in many Inſtances applicable to other Relationſhips, which are in a ſuperior and ſubordinate Degree; ſuch as Lord and Bailiff, principal and Attorney, (*e*) Owners and Maſters of Ships, Merchants and Factors, and all others having Authority to enforce Obedience to their Orders, from thoſe whoſe Duty it is to obey them, and whoſe Acts, being conformable to their Duty and Office, are eſteemed the Acts of their * Principals; but theſe being treated of under their proper Heads, we ſhall here conſider this Relationſhip, as it more particularly affects Maſters and thoſe who are more properly called Servants and Apprentices. *Page 545

(*d*) Hence by the Statute 25 *E.* 3. Stat. 5. c. 2. it is Petit Treaſon for a Servant to kill his Maſter; in the Conſtruction whereof it hath been held to extend to a Miſtreſs, or Maſter's Wife. Plow. 86. 3 Inſt. 20. 4 Co. 46. [See 4 Com. Dig. fo. 12. (L. 1. &c.)] (*e*) Where a Maſter of a Ship is expreſly ſaid to be a Servant to the Owners, and the Owners ſhall anſwer for him as ſuch. 3 Mod. 323. 2 Vern. 643.

(A) Of

(A) Of the Manner of Hiring and Binding a Perſon Servant or Apprentice. 546.
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(N) Of

* (N) Of the Master's Authority over his Servant, and how far he may correct and punish him. 566. *Page 546
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(P) What a Master or Servant may justify doing in each other's Defence. 568.

(A) Of the Manner of Hiring and Binding a Person Servant or Apprentice.

THE Retaining a menial Servant and taking an Apprentice differ greatly as to the Manner; for as to the first it may be by Parol (*a*) Contract, or Agreement only, and therefore such a one may be discharged by Parol, and without Writing; but an Apprentice must be by Deed, and cannot be discharged without Deed, and must be retained by the Name of an Apprentice expressly, otherwise he is no (*b*) Apprentice though bound. 21 H. 6, 23. 3 Keb. 304. 6 Mod. 182. Ld. Raym. 1117. Salk. 68. pl. 7.

(*a*) That by the Contract he is considered as Servant, tho' he has not yet actually done any Service for his Master. Dalt. Just. cap. 58.——And on such Contract the Master may have an Action against him, if he either refuses to serve at all, or departs before the Time is expired for which he agreed to serve. Dalt. Just. c. 58.——And where the Master has his Remedy against another detaining him, *vide infra* Letter (O). (*b*) Burn 57. pl. 3.

A Servant may hire himself for what Time he pleases; but it is said, that if a Man retain a Servant generally, without expressing any Time, the Law will construe it to be for one Year, because that Retainer is according to Law. Co. Lit. 42.

Also it hath been adjudged, that if a Person retain a Servant for a Year, & *sic de anno in annum quamdiu ambabus partibus placuerit*, that after a second Year begun the Retainer holds good for another Year; and that it shall not be a Retainer for a Year certain, and afterwards at Will. 2 Keb. 16. *Cotes* ver. *Sadler*.

And as an Apprentice can only be bound by Deed, so it is necessary, according to the Custom of (*c*) some Places, that such Deed or (*d*) Indenture be inrolled; as in *London*, if the Indentures be not inrolled before the Chamberlain within a Year, upon a Petition to the Mayor and Aldermen, &c. a *Scire fac'* shall issue to the Master, to shew Cause why not inrolled; and if it was through the Master's Default, the Apprentice (*e*) may sue out his Indentures, and be discharged; otherwise if through the Fault of the Apprentice; as if he would not come to present himself before the Chamberlain, &c. for it cannot be inrolled, unless the Apprentice be in Court and acknowledges it. 2 Rol. Rep. 305. Palm. 361. Mod. Rep. 271. pl. 22. See 8 Mod. 191. 10 Mod. 144, 149. 11 Mod. 49. 12 Mod. 415.

(*c*) Where Persons binding themselves Apprentices to Mariners, their Indentures are to be inrolled in the next Corporate Towns. 3 Lev. 389. Stat 5 El. c. 4. s. 29 6 Mod. 69. 2 Vern. 64 pl. 57. *id.* 292. 4 Com. Dig. 80. (*d*) See Sel. Cas. 284. pl. 222. Bulstr. 192. And it must be stamped with a 2*s.* 6*d.* Stamp †. Burn 57. and also particular Duties paid. See Sat. 8. An. c. 9. s. 32. (*e*) Where it is necessary in order to prove him an Apprentice. Skin. 579. pl. 2. And see a Certificate relating to the Inrollment of Apprentices in vol. 3. of Lord *Bac.* Works 4to. 353.

† See the Index to the Statutes, *Octo.* Titles *Apprentices* and *Deed*.

But it hath been held, That this Custom does not extend to one bound Prentice to a Waterman, under twenty-one Years of Age; for the Company of 6 Mod. 69. Salk. 68. pl. 8.

of Watermen are but a Voluntary Society, and being free of that does not make one free of *London* ‡.

‡ By 6Geo. 3. c. 25.—If Apprentice abſents himſelf from Service before Time expired, he ſhall ſerve for ſo long Time as he abſented himſelf, or make Satisfaction, or be committed to the Houſe of Correction for three Months: This extends not to Apprentices giving more than 10*l.* or after ſeven Years elapſed beyond their Term. See further as to Diſputes between Maſters and Servants, in various Branches of Manufacture, *&c. &c.* provided for by ſeveral Statutes. See ſame collected by Dr. *Burn*, in his *Juſtice of Peace*, Tit. *Servants*.

Page 547 (B) **Who may ſerve, or are capable of binding themſelves Servants or Apprentices.**

Dalt. c. 58. IT is ſaid, that if a married Man and his Wife do bind themſelves to ſerve, they ſhall be compelled thereto, according to their Covenant or Agreement; and that if a Woman who is a Servant ſhall marry, yet ſhe muſt ſerve out her Time; and her Huſband cannot take her out of her Maſter's Service.

11 Co. 89. b. 2 Inſt. 379, 380. 3 Leon. 63. 7 Mod. 15. Vern. 328. 2 Vern. 492, 518. 8 Mod. 191. It ſeems clearly agreed, that by the (*a*) Common Law, Infants, or Perſons under the Age of twenty-one Years, cannot bind themſelves Apprentices, in ſuch a Manner as to intitle their Maſters to an Action of Covenant, or other Action, for departing their Service, or other Breaches of their Indentures; which makes it neceſſary, according to the uſual Practice to get ſome of their Friends to be bound for the faithful Diſcharge of their Offices, according to the Terms agreed on.

Stra. 604. (*a*) Nor in Equity. Abr. Eq. 6.—But if an Infant of five Years of Age, or other Perſon who is not *Potens in corpore*, be retained, and ſerve in the beſt Manner they can, their Maſters muſt pay them their Wages. Bro. Tit. *Labour* 46. Dalt. Juſt. c. 58.

A Perſon cannot be bound to a Surgeon unleſs he underſtands the *Latin* Tongue. 2 Bur. Rep. 892. But by the 5 *Eliz. cap.* 4. *ſect.* 43. it is enacted in the Words following, "And becauſe there hath been, and is ſome Queſtion and Scruple moved, "whether any Perſon being within the Age of twenty-one Years, and "bounden to ſerve as an Apprentice, in any other Place than in the ſaid "City of *London*, ſhall be bounden, accepted and taken as an Apprentice; "for the Reſolution of the ſaid Scruple and Doubt, be it enacted by the "Authority of this preſent Parliament, That all and every ſuch Perſon "or Perſons, that at any Time or Times from henceforth ſhall be bounden "by Indenture to ſerve as an Apprentice in any Art, Science, Occupation "or Labour, according to the Tenour of this Eſtatute, and in Manner "and Form aforeſaid, albeit the ſame Apprentice, or any of them, ſhall "be within the Age of twenty-one Years, at the Time of making their "ſeveral Indentures, ſhall be bounden to ſerve for the Years in their ſeve-"ral Indentures contained, as amply and largely to every Intent, as if the "ſame Apprentices were of full Age at the Time of making ſuch Inden-"tures; any Law, *&c.*"

Cro. Car. 179. *Gybert* ver. *Fletcher*. Cro. Jac. 497. S. P. But notwithſtanding this Statute, it hath been held, in an Action of Covenant againſt an Apprentice, for departing from his Maſter's Service without Licence, within the Time of his Apprenticeſhip; where the Defendant pleaded, that at the Time of making the Indenture he was within Age; and on Demurrer to this Plea, it was argued, that this Indenture ſhould bind the Infant, becauſe it was for his Advantage to be bound Apprentice, to be inſtructed in a Trade: It was alſo urged, that he was compellable by the 5 *Eliz. cap.* 4. *ſupra*, to be bound out an Apprentice. But all the Court reſolved, that although an Infant may voluntarily bind himſelf

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an Apprentice, and if he continue an Apprentice for ſeven Years, he may have the Benefit to uſe his Trade; yet neither at the Common Law, nor by any Words of the above-mentioned Statute, a Covenant or Obligation of an infant, for his Apprenticeſhip, ſhall bind him; but if he miſbehave himſelf, the Maſter may correct him in his Service, or complain to a Juſtice of Peace, to have him puniſhed according to the Statute; but no Remedy lieth againſt an Infant upon ſuch Covenant.

By the Cuſtom of *London*, an Infant unmarried, and above the Age of fourteen, may bind himſelf Apprentice to a Freeman of *London*, by Indenture with proper Covenants; which Covenants, by the Cuſtom of *London*, ſhall be as *(b)* binding as if he was of full Age. Moor 134. 2 Bulſt. 192. 2 Rol. Rep. 305. Palm. 361.

Mod. 271. 2 Keb. 687, See Mod. 191. 10 Mod. 144, 149. 11 Mod. 49. 12 Mod. 415. *(b)* And for a Breach an Action may be brought in any other Court, as well as in the Courts of the City. Moor 136.

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*(C) Of the Juriſdiction of Juſtices of Peace in binding out Apprentices, in obliging Maſters to provide for them, in compelling them to refund the Money had with them, and in diſcharging Apprentices from their Maſters.

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THE Juriſdiction of Juſtices of the Peace herein depends on divers Acts of Parliament, particularly on the 5 *Eliz cap.* 4. the moſt material Clauſe of which, as to this Purpoſe, is *Sect.* 35. which is as followeth: "That if any Perſon ſhall be required by any Houſholder, having and "uſing half a Plough-Land, at the leaſt, in Tillage, to be an Apprentice, "and to ſerve in Huſbandry, or in any other Kind of Art, Myſtery or "Science, before expreſſed, and ſhall refuſe ſo to do; that then, upon "Complaint of ſuch Houſekeeper, made to one Juſtice of the Peace of the "County where the ſaid Refuſal is, or ſhall be made, or of ſuch Houſholder "inhabiting in any City, Town Corporate, or Market-Town, to the "Mayor, Bailiffs or Head Officer of the ſaid City, Town Corporate, or "Market-Town, if any ſuch Refuſal ſhall be there, they ſhall have full "Power and Authority, by Virtue hereof, to ſend for the ſame Perſon ſo "refuſing; and if the Juſtice or the ſaid Mayor or Head Officer, ſhall "think the ſaid Perſon meet and convenient to ſerve as an Apprentice in "that Art, Labour, Science or Myſtery, wherein he ſhall be ſo then re-"quired to ſerve, that then the ſaid Juſtice, or the ſaid Mayor or Head "Officer, ſhall have Power and Authority, by Virtue hereof, if the ſaid "Perſon refuſe to be bound as an Apprentice, to commit him unto Ward, "there to remain until he be contented, and will be bounden to ſerve as "an Apprentice ſhould ſerve, according to the true Intent and Meaning "of this preſent Act, and if any ſuch Maſter ſhall miſuſe or evil intreat "his Apprentice, or that the ſaid Apprentice ſhall have any juſt Cauſe to "complain, or the Apprentice do not his Duty to his Maſter; then the ſaid "Maſter, or Apprentice, being grieved, and having Cauſe to complain, "ſhall repair unto one Juſtice of Peace within the ſaid County, or to the "Mayor, or other Head Officer of the ſaid City, Town Corporate, Market-"Town, or other Place, where the ſaid Maſter dwelleth, who ſhall, by his "Wiſdom and Diſcretion, take ſuch Order and Direction between the ſaid "Maſter and his Apprentice, as the Equity of the Cauſe ſhall require; and

" if for want of good Conformity in the Maſter, the ſaid Juſtice of Peace, " or the ſaid Mayor or Head Officer, cannot compound and agree the " Matter between him and his Apprentice, then the ſaid Juſtice, or the " ſaid Mayor, or other Head Officer, ſhall take Bond of the ſaid Maſter " to appear at the next Seſſions then to be holden in the ſaid County, or " within the ſaid City, Town Corporate or Market-Town, if the ſaid " Maſter dwell within any ſuch; and upon his Appearance, and hearing " of the Matter, before the ſaid Juſtices, or the ſaid Mayor, or other Head " Officer, if it be thought meet unto them to diſcharge the ſaid Appren- " tice of his Apprenticehood, that then the ſaid Juſtices, or four of them " at the leaſt, whereof one of them to be of the *Quorum*, or the ſaid " Mayor, or other Head-Officer, with the Conſent of three other of his " Brethren, or Men of beſt Reputation within the ſaid City, Town Cor- " porate or Market-Town, ſhall have Power, by Authority hereof, in " Writing under their Hands and Seals, to pronounce and declare that " they have diſcharged the ſaid Apprentice of his Apprenticehood, and the " Cauſe thereof; and the ſaid Writing, ſo being made and enrolled by the

*Page 549 " * Clerk of the Peace, or Town-Clerk, amongſt the Records that he keep- " eth, ſhall be a ſufficient Diſcharge for the ſaid Apprentice againſt his " Maſter, his Executors and Adminiſtrators; the Indenture of the ſaid " Apprenticehood, or any Law or Cuſtom to the contrary notwithſtand- " ing; and if the Default ſhall be found to be in the Apprentice, then the " ſaid Juſtices, or the ſaid Mayor, or other Head Officer, with the Aſſiſt- " ance aforeſaid, ſhall cauſe ſuch due Correction and Puniſhment to be mi- " niſtered unto him, as by their Wiſdom and Diſcretion ſhall be thought " meet.

" *Provided*, That no Perſon ſhall by Force or Colour of this Statute be " bounden to enter into any Apprenticeſhip, other than ſuch as be under " the Age of twenty-one Years."

By the 43 *Eliz. cap.* 2. *ſect.* 5. it is enacted, " That it ſhall be lawful " for the Church-wardens and Overſeers of the Poor, or the greater Part " of them, by the Aſſent of any two Juſtices of the Peace, to bind poor " Children Apprentices, where they ſhall ſee convenient, till ſuch Man- " Child ſhall come to the Age of twenty-four Years, and ſuch Woman- " Child to the Age of twenty-one Years, or the Time of her Marriage; " the ſame to be as effectual to all Purpoſes, as if ſuch Child were of full " Age, and by Indenture of Covenant bound him or herſelf."

By the 1 *Jac. cap.* 25. *ſect.* 23. 21 *Jac. cap.* 28. 3 *Car. cap.* 4. *ſect.* 22. this laſt mentioned Act is continued, with this further Addition, " That all " Perſons, to whom the Overſeers of the Poor ſhall, according to this Act, " bind any Children Apprentices, may take and receive and keep them as " Apprentices; any former Statute to the contrary notwithſtanding."

By the 8 & 9 *W.* 3. *cap.* 30. reciting, That whereas by an Act made in the 43 *Eliz. cap.* 2. *ſect.* 5. it is among other Things, enacted, That it ſhall be lawful for the Church-wardens and Overſeers of the Poor of any Pariſh, or the greater Part of them, by the Aſſent of two Juſtices of the Peace, whereof one to be of the *Quorum*, to bind poor Children Apprentices where they ſhall ſee convenient; but there being Doubts, whether the Perſons, to whom ſuch Children are to be bound, are compellable to receive ſuch Children as Apprentices, that Law hath failed of its due Execution; therefore it is enacted and declared, " That where any poor " Children ſhall be appointed to be bound Apprentices purſuant to the " ſaid Act, the Perſon or Perſons, to whom they are ſo appointed to be " bound, ſhall receive and provide for them, according to the Indenture " ſigned and confirmed by the two Juſtices of the Peace, and alſo execute " the other Part of the ſaid Indentures; and if he or ſhe ſhall refuſe ſo to " do, Oath being thereof made by one of the Church-wardens or Over- " ſeers of the Poor, before any two of the Juſtices of the Peace for that

" County,

"County, Liberty or Riding, he or ſhe ſhall for every ſuch Offence forfeit the Sum of 10*l.* to be levied by Diſtreſs; the ſame to be applied to the Uſe of the Poor of that Pariſh or Place where ſuch Offence was committed; ſaving always to the Perſon to whom any poor Child ſhall be appointed to be bound an Apprentice, as aforeſaid, if he or ſhe ſhall think themſelves aggrieved thereby, his or her Appeal to the next General or Quarter-Seſſions of the Peace for that County or Riding, whoſe Order ſhall therein be final, and conclude all Parties."

In the Conſtruction of theſe Statutes the following Opinions have been holden:

That by the 5 *Eliz. cap.* 4. the Juſtices of Peace might bind a poor Perſon to Huſbandry againſt the Conſent of his Maſter; but that neither by that Statute, nor the Statute 43 *Eliz. cap.* 2. which impowers the Church-wardens, *&c.* to raiſe a Stock of Money, by Way of Aſſeſſment on the Pariſh, for that Purpoſe, they could impoſe an Apprentice on a Tradeſman againſt his Conſent, but muſt aſſeſs and raiſe Money to bind him out. T. Raym. 65, 177. Sid. 99. Lev. 84. Vent. 325. S. P. *cont.* Carth. 94. Comb. 165. againſt *Holt.*

3 Mod. 269. Show. 76. *The King* ver. *Fairfax*, S. P. reſolved by three Judges 2 Ld. Raym. 1117. 12 Mod. 27. Stra. 143. 2 Stra. 1268.

*That though by the Statute 8 & 9 *W.* 3. *cap.* 30. the Maſter is bound under the Penalty of 10*l.* to keep an Apprentice bound to him purſuant to the Statute 43 *Eliz. cap.* 2. yet if two Juſtices bind a poor Girl to a Merchant, and he appeals to the Seſſions, where the Order is reverſed, it being thought unfit to compel a Merchant to take an Apprentice, the Court of King's Bench, on removing the Order before them, may confirm the Order of Seſſions, (as they did in this Caſe); for the Statute having given an Appeal to the Seſſions, they are made thereby proper Judges, whether the Perſon be a proper Perſon to impoſe an Apprentice on or not. *Page 550 2 Salk. 491. pl. 57. *Minchamp's* Caſe.

The Church-wardens and Overſeers need not aver, that the Parents were not able to maintain the Child, for they have a diſcretionary Power, by the Statute, of determining that. Comb. 289. *per Holt* C. J.

And as the Juſtices of Peace have a Power of impoſing an Apprentice on a Maſter, in Conſequence thereof an Indictment lies for Diſobedience to their Orders, either in not receiving, or receiving and after turning off, or not providing for ſuch Apprentice; for though an Act of Parliament preſcribes an eaſier Way of proceeding by Complaint, yet that does not exclude the Remedy by Indictment. 6 Mod. 163. Salk. 381. pl. 29. *The Queen* ver. *Gold.*

The Juſtices of Peace may diſcharge an Apprentice not (*a*) only on the Default of the Maſter, but alſo on his own (*b*) Default; but it hath been holden, that their Juriſdiction herein extends only to ſuch Apprentices as were bound to Trades within the Statute, and were compelled by them to ſerve; for that in ſuch Caſe it is but reaſonable that the Contracts, which were made by their Authority, ſhould be diſſolved by the ſame Power, but that they cannot diſcharge any voluntary Agreements made between the Parties. Skin. 108. pl. 7. 5 Mod. 139. 2 Salk. 471. pl. 4.

(*a*) The Order of Diſcharge need not be mutual; therefore if they order that the Servant ſhall be diſcharged from his Maſter, they need not diſcharge the Maſter from his Covenants; for when the Servant is diſcharged, the other is no longer Maſter. 5 Mod. 139. 2 Salk. 471. pl. 4. (*b*) A Perſon, after three Years Service, plainly appearing to be a natural Ideot, diſcharged, and Order affirmed. Skin. 114.—That by the Cuſtom of *London*, a Freeman may turn away his Apprentice for Gaming. 2 Vern. 291.—But if an Apprentice marries without the Privity of his Maſter, yet that will not juſtify his turning him away, but he muſt take his Remedy on his Covenant. 2 Vern. 492.

Therefore where an Order of Seſſions was made to diſcharge a Surgeon's Apprentice from his Maſter, for not inſtructing him in the Art of Surgery; but the Maſter being a *Mountebank* kept the Apprentice for a Tumbler on the Stage; the Order was quaſhed for Want of Juriſdiction in the Juſtices, becauſe Carth. 366. 5 Mod. 138. 2 Salk. 471. pl. 4. *Caſ. of Set. & Rem.* &c. pl. 29.

The King ver. *Gately.* because a Surgeon is not one of the Trades mentioned in the 5 *Eliz. cap.* 4. and here it was held, that the Juſtices have Power only over ſuch Apprentices who are bound to the Trades therein named, and not over Apprentices to other Trades.

Saund. 314. *Hawkſworth* and *Hillarys.* Salk. 67. pl 3. Skin. 108. pl. 7. Mod. Rep. 2. pl 6. 2 Show. Rep. 289. pl. 289. 2 Salk. 490. pl. 53. 11 Mod. 110. 12 Mod. 498, 553. Rep. 396. And yet it hath been reſolved, that the Juſtices may not only diſcharge a Merchant's Apprentice, (which has been agreed not to be a Trade within the Statute 5 *Eliz. cap.* 4.) but alſo to oblige the Maſter to refund Part of the Money which he had with him; and this Doctrine of refunding ſeems to be now eſtabliſhed, as founded on (*c*) great Reaſon, though not expreſly mentioned in the Act; for the Juſtices being authorized to diſcharge according to their Diſcretions, when the End of the Apprenticeſhip cannot be attained with one Perſon, it is but Juſtice the Maſter ſhould return Part of the Money he has received with his Apprentice, to place him out with a new Maſter.

(*c*) Where a Court of Equity will oblige a Maſter to refund. *Finch's* Vern. 46. pl. 2. Vern. 64. pl. 57, 491. Atk. Rep. 149. pl. 89.

The King ver. *Amies,* Trin. 7 Geo. 2. in *B. R.* 2 Barnard, *K. B.* 244, 296. Seſ. Caſ. 190. pl. 170. 2 Kel. 128. pl. 104. It hath been held, that an Order on the Maſter to return Money is good, though it is not averred that he had any with the Apprentice, for the Order being to return Money, is as neceſſary a Proof of the Receipt of it, as if it had been expreſly alledged; and in this Caſe the Court ſeemed to be of Opinion, that though the Juſtices had Juriſdiction as to Diſcharging and Obliging the Maſter to refund, as well in other Trades as thoſe mentioned in the Statute; that the Juſtices are not obliged in their Orders to ſet forth all the Steps they take in their Proceedings, * there being nothing in the Act which makes it neceſſary, and that there was a known and eſtabliſhed Diſtinction between Orders and Convictions.

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See 11 Mod. 110. pl. 4. Juſtices cannot order Monies to be returned on Diſcharge of an Apprentice. Str. 69.

Sand. 316. Carth. 198. Salk. 68. pl. 6. 5 Mod. 138. *Caſ. of Set. & Rem.* 133. pl. 176. 2 Salk. 491. pl. 56. It hath formerly been held, that the Seſſions cannot make an original Order of Diſcharge: but that, according to the Statute, the Parties ought firſt to apply themſelves to a Juſtice of Peace; and if he cannot compound the Matter, then he is to bind the Maſter to appear at the next Seſſions; but it hath been ruled of (*a*) late, and ſeems now eſtabliſhed, that an Order on an original Application is good, and that the previous Application to one Juſtice is only diſcretionary.

Mod. Rep. 287. pl. 33. 12 Mod. 349, 350, 353, 499. (*a*) So ruled in the Caſe of *The King* ver. *Amies.* Trin. 7 Geo. 2. 2 Barnard, *K. B.* 244, 279. 2 Kel. 128. pl. 104, 296. See Str. 143, 704. Seſ. Caſ. 113. pl. 109.

Salk. 67. pl. 3. (*b*) For tho' the Statute ſays the Diſcharge muſt be made on the Appearance of the Maſter, If the Maſter, being bound to anſwer at the Seſſions, does not appear, it is a Forfeiture of his Recognizance; but yet at the ſame Time the (*b*) Juſtices may proceed to make an Order againſt him.

yet it muſt have a reaſonable Conſtruction, ſo as not to permit the Maſter to take Advantage of his own Obſtinacy. 2 Salk. 490. pl. 53.

Sand. 316. Carth. 199. Comb. 344. (*c*) 2 Salk. 470. pl. 2. *Caſ. of Set. & Rem.* 134. The Order of Diſcharge muſt be under the Hands and Seals of the four Juſtices, according to the expreſs Appointment of the Statute; but it is (*c*) ſaid, that in a *Certiorari* to remove the Order, it is ſufficient in the Return to take Notice of the Order ſo made, for it is not neceſſary to certify the Diſcharge itſelf.

pl. 167. Carth. 198, 199. 7 Mod. 55. For other Caſes ſee Str. 704. Seſ. Caſ. 282. pl. 221. Fol. 225. 2 Str. 1014. Read. *Stat. Law* 91, 92. 3 Vin. Abr. 27. pl. 16. Str. 99, 143. 2 Str. 1013. Seſ. Caſ. 113. pl. 109. See Stat. 20 Geo. 2. c. 19. 26 Geo. 2. c. 27. 6 Geo. 3. c. 25.—[See the laſt Act mentioned *ante* 546. n.]

(D) Of the Neceſſity of ſerving an Apprenticeſhip as a Qualification to follow a Trade within the 5 Eliz. cap. 4.

AT Common Law, every Perſon might follow what lawful Trade he pleaſed; which being inconvenient in many Inſtances, and a Detriment to the Public, in permitting Perſons to exerciſe Trades in which they had little or no Skill or Experience; to prevent which Miſchief, and the better to train up and enure Perſons to Labour and Induſtry from their Youth, and thereby make them more ſkilful and expert. 11 Co. 53. 2 Bulſ. 191. Skin. 133. Sand. 312.

It is enacted by the (*a*) 5 *Eliz. cap.* 4. *ſect.* 31. "That it ſhall not be "lawful to any Perſon or Perſons, other than ſuch as now do lawfully uſe "or exerciſe any Art, Myſtery or Manual Occupation, to ſet up, occupy, "uſe or exerciſe any Craft, Myſtery or Occupation, now uſed or occupied "within the Realm of *England* or *Wales*, except he ſhall have been brought "up therein ſeven Years, at the leaſt, as an Apprentice, in Manner and "Form aboveſaid; nor to ſet any Perſon on Work in ſuch Myſtery, Art "or Occupation, being not a Workman at this Day, except he ſhall have "been Apprentice, as is aforeſaid; or elſe having ſerved as an Apprentice, "as is aforeſaid, ſhall or will become a Journeyman, or hired by the Year; "upon Pain, that every Perſon willingly offending, or doing the contrary, "ſhall forfeit and loſe for every Default forty Shillings for every Month." See Lord *Mansfield*'s Opinion of this Act in Bur. Rep. 6, &c. Black. Com. 415. (*a*) It is ſaid, that no Encouragement was ever given to Proſecutions upon this Statute, and that it would be for the common Good, if it was repealed; for no greater Puniſhment can be to the Seller than to expoſe Goods to Sale ill wrought; for by ſuch Means he will never ſell more; *per Delben* Juſtice. 3 Mod. 317. See Stat. 8 Ann. 9. ſ. 39.

* In the Conſtruction hereof it will be neceſſary to conſider, *Page 552

1. What ſhall be ſaid ſuch a Trade as a Perſon is prohibited to follow.

Herein we muſt obſerve, that it hath been ruled, that there are many Trades within the general Words and Equity of the Act, beſides thoſe which are particularly enumerated therein; yet it ſeems agreed, and hath frequently been (*b*) adjudged, that in every Indictment &c. it muſt be alledged, that it was a Trade at the Time of making the Statute; for the Words thereof are, *any Craft, Myſtery or Occupation, now uſed*, &c. from whence it ſeems to follow, that a new Manufacture, which to all other Purpoſes may be called a Trade, is yet not a Trade within this Statute. 2 Salk 611. pl. 3. 2 Ld. Raym. 1188. 11 Mod. 63. 64. pl. 5. 12 Mod. 311. Barnard, *K. B.* 30. Ld. Raym. 514. Str. 663. 2 Ld. Raym. 1410. Burn 53. (*b*) Palm. 528. Sid. 175. S P. adjudged. Keb. Rep. 473. pl. 88. 2 Salk. 611. pl. 3. Ld. Raym. 513. 2 Ld. Raym. 1188, 1189. Hardr. 54. Barnard, *K. B.* 277. 2 Keb. Rep. 226. pl. 83. 2 Barnard, *K. B.* 147. Sel. Caſ. 256. pl. 204. *id.* 287. So for not averring, that the Trade of a Tyler was an Art or Myſtery uſed in *England* at the Time of the making the Statute, though the Statute expreſly mentions it. 4 Mod. 145-6. But Comb. 288. Gilb. Caſ. 242. 2 Sel. Caſ. 223. 2 Show. Rep. 210, 211. pl. 218. Bur. Rep. 367. are all *expreſly contrary*.

Alſo it ſeems agreed, that the Act only extends to ſuch Trades as imply Myſtery and Craft, and require Skill and Experience; and that therefore (*c*) Merchants, Huſbandmen, Gardiners, &c. are not within the Statute; and on this Foundation it hath been held, that (*d*) a Hemp-dreſſer is not within the Statute, as not requiring much Learning or Skill, and being what every Huſbandman doth uſe for his neceſſary Occaſions. 8 Co. 130. 2 Bulſ. 191. Vent. 326. (*c*) But they are expreſly mentioned in ſ. 27, 29. (*d*) Cro Car. 409. pl. 4. Vent. 326. 2 Salk. 611. pl. 2. Ld. Raym. 514. 12 Mod. 311, 312.

It

It is ſaid in (*d*) 2 *Bulſ.* to have been adjudged, that an Upholſter is not a Trade within the Statute, as not requiring (*e*) Skill; but this hath been contradicted by a later (*f*) Reſolution, wherein it is ſaid to have been reſolved, that a (*g*) Barber and Taylor were Trades within the Statute.

(*d*) 2 Bulſ. 186. but no Reſolution. 2 Salk. 611. pl. 3. S. C. and denied to be Law. (*e*) But ſee Rol. Rep. 10. (*f*) 2 Lev. 243. Sid. 367. pl. 4. 2 Keb. Rep. 366. pl. 19. Ventr. 346. 2 Salk. 611. pl. 3. Ld. Raym. 514. (*g*) Lev. Rep. 87, 243. 2 Lev. Rep. 206. Sid. 367. pl. 4. Ventr. 326. Keb. Rep. 411. pl. 115. *id.* 422. pl. 143. See 11 Mod. 150. pl. 4.

2 Bulſ. 189, 190. Rol. Rep. 10. Ld. Raym. 514. 2 Salk. 611. pl. 2. (*b*) 2 Lev. 206. Vent. 326, 346. 2 Salk. 611. pl. 2. S. C. cited, and ſaid not to be reſolved. (*i*) 3 Keb. Rep. 816. pl. 38.

Alſo it is ſaid in 2 *Bulſ.* that a Pippin-monger is not within the Statute, becauſe there is no Myſtery in buying of Apples, and all his Skill is in ſo laying his Apples as to keep them from rotting; but this likewiſe hath been doubted in a late (*b*) Caſe, where it was debated, whether the Uſing of the Trade of a Coſtermonger or (*i*) Fruiterer be within the Statute; but there is no Reſolution.

11 Co. 54. a. 20 Vin. Abr. 317. pl. 1. *id.* 331, 332. Cro. Car. 499. pl. 4. Cro. Jac. 178. pl. 17. 2 Bulſt. 189. Sel. Caſ. Evid. 31. Hob. 183. pl. 22, 211. *id.* Bridgm. 141.

It is clearly agreed, that the following the common Trade of a Brewer, (*k*) Baker or Cook, is within the Statute, as Unſkilfulneſs herein may be very prejudicial to the Lives and Health of his Majeſty's Subjects; but it is at the ſame Time agreed, that the Exerciſing of any of theſe Trades in a Man's own Houſe or Family, or in a private Perſon's Houſe, is not within the Reſtraint of the Statute.

(*k*) Is expreſly mentioned. See ſ. 3. Mo. 886. pl. 1245. But a Biſcuit Baker is not.

2 Salk. 611. pl. 2, 610. pl. 1, 613. pl. 7. Ld. Raym. 513, 514. 12 Mod. 131.

On Motion to quaſh an Indictment for uſing the Trade of a Fellmonger, it was urged, that this was a Buſineſs which required no Skill, for that it was only to pull the Wool from the Skin; but *per Holt* Chief Juſtice, if in the Indictment it be averred to be a Trade at the Time of making the Statute, we will not quaſh it; for whether it was a Trade then or no, or whether any Skill be requiſite to the Exerciſe of it, is a Matter of Fact proper for the Trial of a Jury.

2 Salk. 611. pl. 3. 2 Ld. Raym. 1189.

So the Court refuſed to quaſh an Indictment for uſing the Trade of a Seamſtreſs, not having ſerved as Apprentice; becauſe it was ſet forth in the Indictment to be a Trade in *England* at the Time of making the Act; ſo that if this Trade of a Seamſtreſs be not within the Act, the Defendant will have the Advantage of it on the Trial †.

† If on the Trial it is not proved that the Defendant followed the Trade during ſome Part of the Time laid in the Indictment, and for one Month of that Time, at leaſt, the Defendant will be intitled to an Acquittal, and the Court will expect clear and poſitive Proof, as little Encouragement is now given to Proſecutions on this Statute. Alſo if the Defendant has followed the Buſineſs ſeven Years, tho' he has not ſerved an Apprenticeſhip, he ought to be acquitted. See *infra* 554.

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2 Salk. 611. pl. 3. *The King* ver. *Harper.* 2 Ld. Raym. 1189.

* But it is ſaid, that the Court had quaſhed an Indictment for following the Trade of a Merchant-Taylor ‡, becauſe they did not know what was meant by it, and it ſeemed to them Nonſenſe and unintelligible.

——‡ See *infra* 584. n. the laſt.

Vent. 346.

A Coachmaker is within this Statute.

2. What Manner of following or exerciſing a Trade ſhall be ſaid within the Statute.

It ſeems agreed, that the following a Trade within this Statute, muſt be ſuch whereby the Party gets his Livelihood; and that therefore the uſing of the Trade of a Brewer, Baker, Cook, Taylor, *&c.* in one's own Houſe, or in the private Family of another, without any Reward, is not within the Statute. 11 Co. 54. Hob. 183. 2 Brownl. 289. 20 Vin. Abr. 321. pl. 1. See 12 Mod. 641.

But in an Action for uſing the Trade of a Clothier, not having been Apprentice to that Trade; where by ſpecial Verdict it was found that *A.* was a *Turkey* Merchant, and exported great Quantities of *Engliſh* Cloth into the *Levant*; and for this Purpoſe *only* he hired ſeveral Cloth-workers, who had been all Apprentices to the ſame Trade, and kept alſo a Maſter-Workman of that Trade to inſpect their Work; and that by theſe Men he made great Quantities of *Engliſh* Cloth, all which he tranſported; and that he the ſaid *A.* kept a Dye-houſe, and hired Men of that Trade to dye his own Clothes, and no other: It was reſolved to be within the Reſtraint of the Statute, though the Cloth was made for his (*a*) own Merchandize only, and though made by Perſons who had been Apprentices; for here they are not Traders, but Hirelings, and he is the Tradeſman who hath all the Profit, as *A.* in this Caſe has. Carth. 162. 2 Salk. 610. pl. 1. 3 Mod. 313. *Hobs qui tam* ver. *Young.* Show. 241, 266. Comb. 179. Holt 66. pl. 1. Skin. 428. pl. 5.

(*a*) For the Cloth is not confined to the Uſe of his own Family, but vended out for the Sake of Commerce; and whether the Utterance be in *England* or in *Turkey* is not material. 2 Salk. 610. pl 1. See Bur. Rep. 2.

So if a Man keeps Journeymen Shoemakers to make Shoes for Exportation, this is an Exerciſing the Trade of a Shoemaker within this Statute Carth. 164.

But it hath been held, that this Statute doth not reſtrain a Man from uſing ſeveral Trades, ſo as he had been an Apprentice to all; wherefore it indemnifies all Petty Chapmen in little (*b*) Towns and Villages, becauſe their Maſters kept the ſame mixed Trades there before. Carth. 163. Mod. Rep. 26. pl. 70. 2 Mod. 26. Vent. 51. 2 Keb. Rep. 583. pl. 121. *id.* 790. pl. 47. 3 Keb Rep. 782. pl. 28. Black. Com. 416. Show. Rep. 242.

(*b*) It ſeems to be the better Opinion, that this Statute hath not abrogated the particular Cuſtoms concerning Trades in particular Towns and Villages. Mod. Rep. 26. pl. 70. 2 Barnard *K. B.* 226. Bur. Rep. 367. and that therefore a Widow, by Cuſtom, may continue her Huſband's Buſineſs; and it ſeems, by ſome Opinions, ſhe may do it without any ſuch Cuſtom, for that the Wife ſerves as an Apprentice; but for this *vide* Cro. Car. 347, 516, 517. 2 Bulſ. 187. 8 Co. 130. Palm. 541. 11 Co. 54. Noy 5. Hutt. 131. Hob. 211. Sand. 311. Carth. 163. 10 Mod. 70, 71. Show. Rep. 242. Barnard. *K. B.* 367. 2 Ld. Raym. 1248.

If a Coachmaker keeps Servants to make his Wheels, and Workmen to curry his own Leather, this is againſt the Statute, becauſe it is he only who receives all the Profits of the ſeveral Trades, and the Wheelright and the Currier are but his Servants. Carth. 163, 164. *per Holt.* Show. Rep. 267. Comb. 179.

So in a Caſe upon this Statute, proſecuted by the Horners Company againſt a Comb-maker in *London*, for uſing the Trade of a Horner, *viz.* in preſſing Horn for making Combs, which Preſſing did not belong to their Trade; and this was adjudged a Breach of the Statute, for a Horner is a particular Trade, and a very ancient Company in *London*. Carth. 162 cited *per Holt* Ch. Juſt. Comb. 180. Show. Rep. 242. 1 Mod. 190.

3. What

*Page 554 3. What Kind of Service will be a ſufficient Qualification within the Statute.

Salk. 67. pl. 5. 2 Salk. 613. pl. 7. S. P. being a hard Law. 12 Mod. 46. Bur. Rep. 2. Comb. 254. Ld. Raym. 738.

As to this it hath been reſolved, that there is no Occaſion for an actual Binding, but that the Following a Trade for ſeven Years is a ſufficient Qualification within the Statute.

Carth. 163. *per Cur.* Seſ. Caſ. 290. pl. 227.

(*a*) And for the like Reaſon it ſeems, that a Wife living with her Huſband ſeven Years, may after his Death continue the Trade; for the Act does not require a Man or a Woman to be an actual Apprentice, but the Words are *tanquam* an Apprentice. *Vide* the Authorities *ſupra*.

So where an Action was brought on this Statute, and upon Not guilty pleaded, it appeared that the Defendant's Father kept the ſame Trade, and that he the Defendant for ſeveral Years had been employed by his Father therein; and it was held, that he might lawfully uſe that Trade, for that he had been (*a*) *quaſi* an Apprentice to it, which was ſufficient to ſatisfy the Statute.

Ca. *Law and Eq.* 71.

So if a Man lives with another, that uſes a Trade which the other is not qualified for uſing, ſeven Years, he may ſet up the Trade as well as if he had lived with one never ſo well qualified.

Salk. 67. pl. 2. *The King* ver. *Fox.* 12 Mod. 251. 2 Show. Rep. 155. pl. 141. 3 Keb. Rep. 550. pl. 55.

Alſo it hath been held, that the Service need not be in any particular Country; and therefore an Indictment for uſing the Trade of a Taylor, not having ſerved an Apprenticeſhip ſeven Years, was quaſhed, becauſe only ſaid, not having ſerved as an Apprentice *infra Regnum Angliæ aut Walliam*; for it may be he did ſo beyond Sea; and if it were any where it ſuffices.

Ca. *Law and Eq.* 70. See 3 Keb. Rep. 550. pl. 55.

So it hath been held, that Serving five Years to a Trade out of *England*, and two in *England*, is ſufficient to ſatisfy the Statute, but that there muſt be a Service of a full Time either in *England* or out of *England*; and therefore Serving five Years in a Country, where by the Law of the Country more is not required, will not qualify a Man to uſe the Trade in *England*.

4. By whom the Offence of following a Trade without a Qualification is cognizable.

This Matter depends chiefly on the Statute 31 *Eliz. cap.* 5. *ſect.* 7. whereby it is enacted, "That all Suits for uſing a Trade without having "been brought up in it, ſhall be ſued and proſecuted in the General Quar- "ter-Seſſions of the Peace, or Aſſiſes of the ſame County where the Offence "ſhall be committed, or otherwiſe inquired of, heard and determined in "the Aſſiſes, or General Quarter Seſſions of the Peace for the ſame "County where ſuch Offence ſhall be committed, or in the Leet within "which it ſhall happen, and not in any wiſe out of the ſame County "where ſuch Offence ſhall happen or be committed."

Cro. Jac. 178. Hob. 184. Salk. 373. pl. 14.

In the Conſtruction hereof it hath been holden, that it reſtrains not a Suit in the King's Bench or Exchequer, for ſuch Offence happening in the ſame County where theſe Courts are ſitting; for the Negative Words of the Statute are not, that ſuch Suits ſhall not be brought in any other *Court*, but that they ſhall not be brought in any other *County*; and the Prerogative of theſe High Courts ſhall not be reſtrained without expreſs Words.

Hob. 184, 327. Cro. Jac. 85. pl. 9.

But where the Offence is in a different County, ſuch Suits in theſe, or any other Courts, out of the proper County, ſeem to be within the expreſs Words of the Statute ‡. Yet

‡ *Vide infra* 555.

* Yet it hath been doubted, whether an Action of Debt, or Information in the Courts of *Weſtminſter-hall*, were not to be conſtrued to be out of the Meaning of the Statute; but it ſeems to be now ſettled, in the Conſtruction of the Statute 21 *Jac.* 1. *cap.* 4. which provides, that no Action of Debt or Information, or other Suit whatever, can be brought in any Court of *Weſtminſter-hall* on any penal Statute, made before the ſaid Statute of 21 *Jac.* 1. for any Offence, therein excepted, for which the Offender may be proſecuted in the Country; unleſs ſuch Offence ſhall be committed in the ſame County in which ſuch Court ſhall ſit. Page 555 Sid. 303. Keb. 584. 2 Lev. 204. Vent. 8, 364. 2 Lev. 204. Salk. 372. pl. 13. 5 Mod. 425. Ld. Raym. 370. Jon. 193.

But theſe Statutes hinder not the Removal of any Indictment into the King's Bench by *Certiorari*, after which it may be tried there, or in the County by *Niſi Prius*.

It hath been held, that Quarter-Seſſions of Boroughs may receive Indictments on the 5 *Eliz. cap.* 4. as well as thoſe of the County at large, in that there is no Danger of Oppreſſion, becauſe a *Certiorari* lies. 6 Mod. 220. 2 Salk. 370. pl. 2. 2 Ld. Raym.

1038, 1179. Comb. 254, 255. See Bur. Rep. 251.

5. Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified.

The Plaintiff, in an Action on this Statute 5 *Eliz. c.* 4. muſt (*a*) alledge in his Declaration, that the Defendant did not uſe the Trade at the Time of making the Statute; for though it cannot be preſumed that he did, after ſuch a Length of Time, yet as it is, the Statute makes him liable, and ſubjects him to a Penalty; the Proſecutor muſt ſhew that he has tranſgreſſed the Law, and that he is intitled to his Action †. (*a*) Need not. 3 Salk. 42. 4 Mod. 145. 2 Kel. 212. pl. 165. Sid. 302. pl. 9. *Dring* v. *Reſpaſs.*

† *Sed qu.* If that is omitted, but the Charge is, for following the Trade, *contrary to the Statute*, whether it is not ſufficient?

An Indictment for following the Trade of a *Cutler*, not being an Apprentice, *contra form'* 5 *Eliz. cap.* 4. was quaſhed on Demurrer; becauſe the Trade of a Cutler was averred to be a Trade then uſed *infra hoc Regnum Angliæ*, whereas this Kingdom was not then ſubſiſting. 2 Kel. 212. pl. 165. *The King* ver. *Briton*, Paſch.

5 Geo. 2. 2 Barnard *K. B.* 147, 172. S. C.

It has been held, that an Indictment againſt two, or more, for following a Joint-Trade, without having ſerved a ſeven Years Apprenticeſhip, required by the Statute, is naught, in that it would be abſurd to charge them jointly, becauſe the Offence of each Defendant ariſes from the Defect peculiar to himſelf. Stra. 623. 5 Mod. 180. Salk. 382. pl. 29. 2 Rol. Abr. 81. (N) pl. 6. Vent. 302.

2 Sef. Caſ. 221. pl. 154. 2 Ld. Raym. 1248.

(E) Of aſſigning and turning over Apprentices to other Maſters.

THE Placing out an Apprentice to a particular Perſon ariſes from an Eſteem, and a good Opinion of the Party to whom he is ſo committed; that he will not only inſtruct him in his Trade or Calling, but will alſo be careful of his Health and Safety; and therefore the Law has made it ſuch a Perſonal Truſt or Confidence, which the Maſter cannot aſſign or transfer over to another; he muſt alſo have him under his own Care and Inſpection, and 2 Stra. 1267. Salk. 68. pl. 7. Ld. Raym. 683. 12 Mod. 553, 554. Hob. 134. pl. 180.

Brownl. 67. See Fortesc. Rep. 321. 8 Mod. 236. 12 Mod. 446. *Cas. of Set. and Rem.* 78. pl. 101. Stra. 48. Fol. 219. Sel. Cas. 114. pl. 110.

and cannot send him abroad, though under the Pretence of Improvement, unless by express Agreement, and unless the Nature of his Business requires it, and implies such a Power as that of a Merchant-Adventurer, Sailor, &c. are said to do; therefore it hath been adjudged, that a Surgeon sending his Apprentice a Voyage to the *East-Indies*, though in Company with other Surgeons, and the better to instruct him in the Art of Surgery, was a Breach of his Covenant, whereby he bound himself to retain, teach, keep and employ the said Apprentice in his own House and Service, &c.

*Page 556 March 3. Keb. 250.

* But by the Custom of *London*, a Freeman of *London* may turn over his Apprentice to another Master, being a Freeman; and such second Master shall have the same Benefit of the Apprentice's Covenants, as shall the Apprentice of the Covenants on the Side of the Master, as if he had been originally bound to him.

Comb. 324. *The King* ver. *Chaplain.*

But it hath been held, that though Justices of Peace have a Jurisdiction of discharging Apprentices, and may bind them to other Masters, that they cannot turn them over; and therefore an Order that an Apprentice, whose Master was dead, should serve the Remainder of his Time with his Master's Widow's second Husband, was quashed; because the Justices have nothing to do about turning over an Apprentice; and that though he applied to them, that could not give them a Jurisdiction.

(F) Of making Apprentices free.

Sid. 107. pl. 20. 2 Show. 154. pl. 138.

WHerever by the Custom of any Town, Borough, &c. the Serving an Apprenticeship intitles the Party to his Freedom, the Persons to admit him refusing, without sufficient (*a*) Cause, may be compelled thereto by *Mandamus*.

(*a*) Mr. *Common Serjeant* said, that if a Man trade upon his own Account within the seven Years of his Apprenticeship, the Chamberlain of *London* will not make him free, because he has not fully served an Apprenticeship of seven years. Ld. Raym. 383.

Lev. 91. Sid. 107. Keb. Rep. 458. pl. 57. *id.* 470. pl. 79. *id.* 659. pl. 43. T. Raym. 69. *Townsend's* Case.

Therefore, where to a *Mandamus* to the Mayor, &c. of *Oxford*, to admit a Person to be free of that City, who had served seven Years Apprenticeship; to which it was returned, that he put himself Apprentice seven Years according to the Custom, and that he covenanted to serve seven Years, and not to marry within the Time, and that within the first two Years he married, and so broke his Covenant; and that his Master accepted of him to serve for the Residue of the Time, which he did, but not as an Apprentice, but rather as a Journeyman; and though it was urged, that by his Breach of Covenant he lost his Right of Freedom, yet the Court held the contrary; and that though an Action of Covenant might lie, yet that it was no Loss of his Freedom; and therefore awarded a peremptory *Mandamus* to admit him.

5 Mod. 402. Carth. 448. 12 Mod. 190. Ld. Raym. 337. 2 Ld. Raym. 1238. 2 Bur. Rep. 1004, 1005.

So where a *Mandamus* to the Mayor, &c. of *Lincoln*, to admit *A.* to his Freedom, he having served an Apprenticeship there; and the Mayor returned, that *A.* (being a Quaker) refused to take the usual Oath, according to the Custom of the said City, but offered to take the solemn Affirmation and Declaration; and the Court held this sufficient to intitle him to his Freedom, within the Statute 7 & 8 *W.* 3. *cap.* 34.

S. P. *The King* ver. *Mayor of Lincoln.*

6 Mod. 227, 260. See Andr. 1. Com. Rep. 240. pl. 134, 243. pl. 136. 2 Kel. 280. pl. 213.

Also it is frequent for Masters to bind themselves to make their Apprentices free at the End of their Time, which they must perform according to their Covenants.

stat. 6 & 7 *W.* 3. c. 17. s. 12. 8 *An.* c. 9. s. 39.

(G) How

(G) How Apprentices are to be taken Care of, when their Maſters happen to (a) die.

IT ſeems agreed, that if a Man be bound to inſtruct an Apprentice in a Trade for ſeven Years, and the Maſter dies, that the Condition is diſpenſed with, being a Thing perſonal; but if he be bound further, that in the mean Time he will find him in Meat, Drink, Cloathing and other Neceſſaries, here the Death of the Maſter doth not diſpenſe with the Condition, but his Executors ſhall be bound to perform it, as far as they have Aſſets. Sid. 216. pl. 21. Keb. 761, 820. Lev. 177. 3 Salk. 41, 42. *Page 557 2 Stra. 1266, 1267. See Burn 58.

Lev. 177. denied to be Law. 2 Stra. 1267.——(a) There ſeems to be no ſufficient clear Proviſion, what ſhall be done with an Apprentice upon the Maſter's dying, which is a Caſe which muſt needs often happen. Burn's Obſerv. 245.

But if a Perſon is bound Prentice by Juſtices of Peace, and the Maſter happens to die before the Term expired, the Juſtices have no Power to oblige his Executor, by their Order, to receive ſuch Apprentice, and maintain him; for by this Method the Executor is deprived of the Liberty of pleading *Plene adminiſtravit*, which he may do, in caſe Covenant be brought againſt him, and muſt maintain the Apprentice, whether he hath Aſſets or not. Carth. 231. Salk. 66. pl. 1. Show 405. *The King* ver. *Peck.* 12 Mod. 27. *Caſe of Set. & Rem.* 117. pl. 155, 290. pl. 325.

But it is ſaid, that in the Caſe of the Maſter's dying, by the Cuſtom of *London*, the Executor muſt put the Apprentice to another Maſter of the ſame Trade. Salk. 66. pl. 1, 204. pl. 2. *Per Holt* C. J. March 3.

pl. 6. Keb. Rep. 250. pl. 15. *Beh. Priv. Lond.* 339, 340.

(H) Of Servants Wages, how recoverable.

IT is clearly agreed, that if a Perſon retains a Servant, and agrees to pay him ſo much by the Day, Month, or Year, that he may have an Action againſt the Maſter on the Contract, or againſt his Executors; and that every ſuch Retainer will be preſumed to be in Conſideration of Wages, unleſs the contrary appears. 9 Co. 88. a. b. 2 Rol. Rep. 269.

So if a Man be retained in *London*, to ſerve beyond Sea, he may have his Action for his Wages in *England*; and lay his Action in any County, in like Manner as an Obligation bearing Date at *Roan* in *France*, may be ſued in *England*, alledging the Place to be in ſuch a County where he brings his Action. Brownl. 54.

" As to the Juriſdiction of Juſtices of Peace herein, by the 5 *Eliz. cap.* " 4. *ſect.* 15. for the Declaration and Limitation what Wages Servants, " Labourers and Artificers, either by the Year or Day, or otherwiſe, ſhall " have and receive, it is enacted, That the Juſtices of Peace of every Shire, " Riding and Liberty, within the Limits of their ſeveral Commiſſions, or " the more Part of them, being then reſiant within the ſame, and the She- " riff of that County, if he conveniently may, and every Mayor, Bailiff " or other Head Officer within any City or Town Corporate, wherein is " any Juſtice of Peace, within the Limits of the ſaid City or Town Cor- " porate, and of the ſaid Corporation, ſhall yearly at every General Seſ- " ſions firſt to be holden and kept after *Eaſter*, or at ſome Time convenient " within Bridgm. 119.

" within ſix Weeks next following every of the ſaid Feaſts of *Eaſter*, aſ-
" ſemble themſelves together; and they ſo aſſembled, calling unto them
" ſuch diſcreet and grave Perſons of the ſaid County, or the ſaid City or
" Town Corporate, as they ſhall think meet, and conferring together, re-
" ſpecting Plenty or Scarcity of the Time, and other Circumſtances neceſ-
" ſary to be conſidered, ſhall have Authority by Virtue thereof, within the
" Limits and Precincts of their ſeveral Commiſſions, to limit, rate and ap-
" point the Wages, as well of ſuch and ſo many of the ſaid Artificers,
" Handicraftſmen, Huſbandmen, or any other Labourer, Servant or Work-
" man, whoſe Wages in Time paſt hath been by any Law or Statute rated,
" and appointed, as alſo the Wages of all other Labourers, Artificers,
" Workmen or Apprentices of Huſbandry, which have not been rated,
" as they the ſame Juſtices, Mayor, or other Head Officers, within their
" ſeveral Commiſſions or Liberties, ſhall think meet by their Diſcretions
" to be rated, limited or appointed by the Year, Week, Month or other-
" wiſe, with Meat and Drink, or without Meat and Drink; and what Wages
*Page 558 " * every Workman or Labourer ſhall take by the Great for Mowing,
" Reaping or Threſhing of Corn and Grain, or for mowing or making of
" Hay, or for Ditching, Paving, Railing or Hedging by the Rod, Perch,
" Lugg, Yard, Pole, Rope or Foot, and for any other Kind of reaſonable
" Labour or Service, *&c.*"

In the Conſtruction of this Statute, the following Opinions have been holden:

2 Ld. Raym. 820, 821. Forteſc. Rep. 317, 318. That though the Statute only gives the Juſtices Power to ſet the Rate for Wages, and not to order Payment; yet grafting hereupon they may now, from the frequent Practice, and the Indulgence the Law gives to Remedies for Wages, order Payment, as well as aſſeſs the Rates.

6 Mod. 91, 204. 10 Mod. 68. Seſ. Caſ. 35. pl. 37. *Caſe of Set. & Rem.* 234. 2 Salk. 441. pl. 3, 442. pl. 5. 484, 485. 3 Salk. 262. Str. 8, 475. Fol. 418.

Hil. 8 Geo 2. *Shergold* and *Halloway* in *B. R.* That though a ſingle Juſtice may compel Payment, yet the Power of ſettling Wages is only in the Seſſions; and that a ſingle Juſtice cannot arreſt the Party refuſing to pay in the firſt Inſtance.

2 Stra. 1002. 2 Seſ. Caſ. 100. pl. 100, 22 Vin. Abr. 408. pl. 16.

Ca. *Law and Eq.* 68. 6 Mod. 91. That Juſtices of Peace have no Juriſdiction to judge of Wages, except in Caſe of Huſbandmen; but yet the Court in Favour of Servants will always, unleſs the contrary appears upon the Face of the Order, preſume Servants to be Servants in Huſbandry, and will admit of no collateral Proof to the contrary.

2 Jon. 47. 5 Mod. 140. Comb. 3. 6 Mod. 91, 204. Therefore an Order, that a Perſon ſhall pay ſo much to his Coachman, was quaſhed; for here it appears, upon the Face of the Order, that he is not a Servant in Huſbandry.

10 Mod. 68. 3 Salk. 261. pl. 19. *Caſe of Set. & Rem.* 231. pl. 272, 273. Carth. 156.

6 Mod. 204, 205. And on the Authority of this Caſe it hath been held, that the Juſtices cannot make Orders for the Payment of Footmen, Bricklayers, Carpenters, *&c.* Servants Wages; becauſe their Juriſdiction is confined to the Wages of ſuch Servants, whom they may compel to ſerve according to the Statute.

2 Salk. 442. pl. 5. 6 Mod. 204. Forteſc. Rep. 317. *Caſe of Set. & Rem.* 234. 3 Salk. 261. pl. 20. So where, upon the Face of the Order, it appeared to be for the Payment of the Wages of two Perſons retained by *A.* Overſeer of the Works in the Gardens of *Hampton-Court*, the Order was quaſhed. But in this Caſe it was held, that had the Order been general, *viz.* to pay ſo much to two of his Labourers, or two of his Servants, the Court would have ſuppoſed them Servants in Huſbandry; but that here there was no Room for ſuch an Intendment, ſince the contrary appeared.

So where one *Raycraft*, a Juſtice of Peace in *Middleſex*, made an Order for the Payment of a Seaman's Wages; and, upon an Action brought againſt him, the Plaintiff recovered 30 *l.* Damages. 5 Mod. 140. For more Caſes on this Subject, ſee 22 Vin. Abr. 408. pl. 15. 2 Ld. Raym. 1305. 4 Burn 61. 11 Mod. 266, 267. Forteſc. Rep. 247. Stat. 20 Geo. 2. c. 19. ſ. 1. 2 Seſ. Caſ. 99. pl. 99.

(I) What Acts of the Servant are deemed the Maſter's, of which the Maſter may take Advantage.

THERE are ſeveral Acts, which, being done by a Servant, will be equally effectual and advantageous as if done by the Maſter himſelf. Hence it is held, that continual Claim made by a Servant is good; as if he enter into a Part and Claim, *&c.* or if the Maſter ſays, that he dares not go * to any Part of the Land, nor approach nearer than *D.* and commands his Servant to go to *D.* and claim, and the Servant does ſo; this is ſufficient, though the Servant had no Fear, for he doth as much as he was commanded to do, and all that his Maſter durſt, or ought by the Law, to do. Lit. ſ. 433. Co. Lit. 257. b. * Page 559

But if the Maſter be in Health, and command his Servant to go to the Land and claim, *&c.* in this Caſe a Claim made by the Servant, as near as he dares, is void; for he does not do all that he is commanded, nor ſo much as the Maſter durſt have done. Lit. ſ. 435. Co. Lit. 258. b.

But if the Maſter be ſick, or a Recluſe, (one who, by Reaſon of his Order, cannot go out of his Houſe) and he command his Servant to go and claim for him, and the Servant goes as near as he dares by Reaſon of Fear, *&c.* this is ſufficient, though the Command were to go to the Land; and yet, regularly, when a Servant doth leſs than he is commanded, his Act is void; but when a Servant exceeds his Maſter's Command, it is void only ſo far as he hath exceeded. Co. Lit. 258. a.

If a Feoffment with Livery be made of Land, the Servant of the Owner being in Poſſeſſion, the Livery is void, though made with the Conſent of the Servant; for the Servant continuing in Poſſeſſion, it muſt be only for the Uſe and Benefit of him that placed him there, and conſequently the Poſſeſſion of the Servant muſt be looked upon as the Poſſeſſion of the Maſter; and the Servant having no Intereſt, but in Right of his Maſter, his Conſent was void, and he could neither make a Surrender, nor a Tenancy at Will, to the Feoffor. 2 Rol. Abr. 5.

The Maſter hath an Intereſt in the Labour and Acquiſitions of his Servant, and his Acts herein are ſaid to be for the Benefit of the Maſter; according to the Rule, *Quicquid acquiritur ſervo acquiritur Domino*; but the Maſter of a hired Servant cannot maintain Trover for any Property acquired by the Servant; nor can he have any other Remedy againſt a Perſon who employs him, but an Action on the Caſe *per quod ſervitium amiſit*. Co Lit. 117. a.

But it is otherwiſe of an Apprentice; and therefore where a Waterman's Widow took an Apprentice, who went to Sea, and earned two Tickets, which came to the Defendant's Hands; the Widow brought Trover, and had Judgment; for what the Apprentice gains, he gains to his Maſter; and whether legally Apprentice, or not, is no Ways material, for it is enough if he be ſo *de facto*†. Salk. 68. pl. 8. *Barber* and *Dennis*. 12 Mod. 415.

† It is a common Caſe, for Maſters to recover the Wages earned by run-away Apprentices at Sea, from the Parents or others, who receive ſuch Wages.

Godb. 360-1. *Seignior* and *Walmer.* It is ſaid, that the Maſter ſhall have Advantage of his Servant's Contracts, in the ſame Manner as he ſhall be bound by them, as to thoſe Matters which come within his Compaſs as a Servant; as where a Servant was ſent by a Maſter to a Debtor, and appointed by him *ad Componendum et agreandum* the Money due from the Debtor; and there being a Promiſe made to the Servant, to pay what was due upon the Balance and Agreement, it was held, that the Maſter might maintain an Action in his own Name, on the Promiſe to his Servant.

Stamf. 60. Bro. Tit. *Appeal* 92. If the Servant is robbed of the Maſter's Goods, the Maſter or Servant may have an Appeal.

Latch 127. *Dodderidge.* S. P. and he that begins firſt ſhall recover, and prevent the other of his Action. *Per*

Rol. Abr. 98. Cro. Jac. 223. If a Servant is couzened of his Maſter's Money, the Maſter may have an Action on the Caſe againſt the Couzenor †.

† In a late Caſe at *Guildhall*, a Maſter recovered, in an Action for Money had and received, a large Sum, which his Servant had ſquandered away, and loſt, (his Maſter's Property,) in the Inſurance of Tickets, in the Lottery; againſt the Lottery-Office-Keeper.

But for this *vide* Tit. *Hue and Cry.* If a Servant be robbed of his Maſter's Money, though in the Abſence of his Maſter, the Maſter may maintain an Action for it againſt the Hundred.

Page 560 (K) **What Acts of the Servant ſhall be deemed the Maſter's, for which the Maſter ſhall anſwer and be bound.**

THE Reaſon why the Acts of a Servant are, in many Inſtances, eſteemed the Acts of the Maſter, ariſes from the Relation between a Maſter and Servant; for as in Strictneſs every Body ought to tranſact his own Affairs; and it is by the Favour and Indulgence of the Law, that he can delegate the Power of acting for him to another, it is highly reaſonable that he ſhould anſwer for ſuch Subſtitute, at leaſt *civiliter*; and that his Acts being purſuant to the Authority given him, ſhould be deemed Acts of the Maſter.

11 E. 4. 6. Therefore if a Servant ſells a Piece of Cloth, and warrants it to be good, an Action of Deceit lies againſt the Maſter.

5 Co. *Pilkington's* Caſe. 2 Rol. Abr. 693. Cro. Eliz. 181. So if a Man brings a Horſe to a Smith to be ſhod, and the Servant pricks it; or if the Servant of a Surgeon makes the Wound worſe; in both theſe Caſes an Action lies againſt the Maſter.

9 H. 6, 53. Rol. Abr. 95. So if the Servant of a Taverner ſells Wine to another, which is corrupted, an Action on the Caſe lies againſt the Maſter, though he did not command the Servant to ſell it to any (*a*) particular Perſon.

(*a*) If a Servant ſells an unſound Horſe, or other Merchandize, in a Fair, no Action lies againſt the Maſter, unleſs he commanded him to ſell to a particular Perſon. 9 H. 6, 53. Rol. Abr. 95. S. C. Fitz. *Action ſur le Caſe* 5. S. C. Poph. 143. and 2 Rol. Rep. 6. S. C. cited.——But if by the Command and Covin of the Maſter, he ſells to a particular Perſon, an Action lies againſt the Maſter, for it is then his own Sale. 9 H. 6, 53. Rol. Abr. 95. Bridgm. 128. S. C. cited.

Cro. Jac. 471. 2 Rol. Rep. 28. So if a Goldſmith makes Plate, wherein he mingles Droſs, ſo that it is not according to the Standard, and by his Servant ſells it; an Action lies againſt the Maſter, becauſe it fails in the Price in Silver.

But

But if *A.* being poſſeſſed of certain artificial and counterfeit Jewels of the Value of 168*l.* and, knowing them to be ſuch, delivers them to *B.* his Servant, commanding him to tranſport the ſaid Jewels to *Barbary*, and them to ſell to the King of *Barbary*, or ſuch other Perſon as would buy them; but (*b*) gives *B.* no Charge to conceal their being counterfeit; and thereupon *B.* goes into *Barbary*, and, knowing thoſe Jewels to be counterfeit, ſhews them to *C.* for good and true Jewels, and affirming to *C.* that they were worth 810*l.* deſires *C.* to ſell them to the ſaid King for 810*l.* which Money *C.* pays *B.* and *B.* thereupon immediately returns to *England*, and pays the 810*l.* to *A* his Maſter; and after, the Jewels being diſcovered to be counterfeit, *C.* is impriſoned by the ſaid King, till he repays the 810*l.* out of his own Effects; of all which Matters *C.* gives Notice to *A.* and demands Satisfaction, *&c.* yet no Action lies againſt *A.* for Jewels are in themſelves of an uncertain Value, and *B.* was not by *A.* particularly directed to *C.* and all that was done *quoad C.* was the voluntary Act of the Servant, for which the Maſter is not bound to anſwer.

2 Rol. Rep. 26, 27. Bridg. 125. Poph. 143. Cro. Jac. 469. *Southern* ver. *Haw.*

(*b*) According to the Report of this Caſe in Cro. Jac. it is ſaid, that the Court inclined againſt the Plaintiff, principally becauſe *A.* did not order *B.* to conceal their being counterfeit.

King *E.* 6. ſold a Quantity of Lead to *A.* and appointed the Lord *North*, who was then Chancellor of his Court of Augmentations, to take Bond for Payment of the Money; the Lord *North* appointed one *B.* who was his Clerk, to take the Bond, which was done, who delivered it to the Lord; and he delivered it back again to his Clerk, in order to ſend it to the Clerk of the Court of Augmentations; *B.* ſuppreſſed this Bond; and it was held by all the Judges, that the Lord *North* was * chargeable to the King; becauſe the Poſſeſſion of the Bond by his Servant, and by his Order, was his own Poſſeſſion.

Dyer 161. a. pl. 48. 3 Mod. 323. S. C. cited.

* Page 561

So where an Officer of the Cuſtoms made a Deputy, who concealed the Duties, and the Maſter, being ignorant of the Concealment, certified the Cuſtoms of that Part of the Revenue into the Exchequer, upon Oath; he was adjudged to be anſwerable for this Concealment of his Servant.

Dyer 258. b. pl. 38. 3 Mod. 323. S. C. cited.

So where the Leſſor was bound, that the Leſſee ſhould quietly enjoy; and it was found, that his Servant by his Command, and he being preſent, entered; this was held to be a Breach of the Condition, for the Maſter was the principal Treſpaſſer.

4 Leon. 123. *Seaman* and *Browning*. 3 Mod. 323. S. C. cited.

Two are conſtituted Poſt-Maſters General by Letters Patent, purſuant to the Statute 12 *Car.* 2. *cap.* 35. and in the Patent there is a Power to make Deputies, and appoint Servants at their Will and Pleaſure, and to take Security of them in the Name and Uſe of the King; and that they, the Poſt-Maſters General, ſhould obey ſuch Orders as from Time to Time ſhould come from the King; and as to the Revenue, ſhould obey the Orders of the Treaſury; and it is farther granted to them, that they ſhould not be chargeable for their Officers, but only for their own voluntary Faults and Miſbehaviour; and this granted with a Fee of 1500*l. per Annum*: And *A.* having Exchequer Bills, incloſes them in a Letter directed to *B.* at *Worceſter*, and delivers it at the Poſt-Office at *London*, into the Hands of *J. S.* who was appointed by the Poſt-Maſter General to receive Letters, and had a Salary; the Letter having miſcarried, and the Exchequer-Bills loſt, it was held by three Judges, againſt *Holt* C. J that the Poſt-Maſters General are not liable; and this from the Multiplicity of Servants they are obliged to employ, and againſt whom it is impoſſible for them to ſecure themſelves, the Inconſiderableneſs of the *Præmium*, *&c.* †.

Carth. 487. Salk. 17. pl. 8, 143. 5 Mod. 455. Ld. Raym. 646. Comyns 100. pl. 68. *Lane* verſus *Robert Cotton* and *Sir Thomas Frankland*. 12 Mod. 482.

† *Vide* the Caſe, and *qu.* if the Opinion of *Holt* was not the moſt rational, the Reaſon aſſigned for the Judgment ſeeming a very weak one.

Vent. 190, 233. Raym. 220. 3 Keb. 72, 112, 135. Mod. 85. 2 Lev. 69. *Morſe* ver. *Sluce*. 2 Salk. 440. pl. 1. Carth. 58. 3 Lev. 259.

It hath been held, that Owners of Ships were anſwerable to Freighters for the Acts of Maſters and Mariners, in the ſame Manner as other Maſters are for their Servants; and ſhould anſwer for their Embezilments, Secreting of Goods, &c. But this proving a great Diſcouragement to Trade, by the 7 *Geo.* 2. *cap.* 15. it is provided, that for ſuch Embezilments, &c. without the Owners Knowledge, the Owners ſhall only forfeit the Value of the Ship or Veſſel, with all her Appurtenances, and the full Account of the Freight due, or to grow due, for and during the Voyage wherein ſuch Embezilment, &c.

Boſon verſus *Sandford*.

Dect. & Stud. Dial. 2. c. 42. 2 Vern. 643. Comb. 450-1. Ld. Raym. 224. 3 Salk. 234. pl. 4.

The Acts of a Servant are deemed the Acts of the Maſter, in dealing and contracting for his Maſter, in thoſe Things in which he has a general Authority; as (*a*) if a Servant uſually buys for the Maſter on Tick, and the Servant buys ſome Things without the Maſter's Orders, yet if the Maſter were truſted by the Trader, the Maſter is chargeable, though the Things never came to the Maſter's (*b*) Uſe.

(*a*) Show. 95. ſo ruled upon Evidence, by *Holt* C. J. (*b*) That coming to the Maſter's Uſe, clearly implies an Authority from the Maſter, and ſhall charge him. Brownl. 64.

Show. 95. *Per Holt* C. J. Brownl. 64. Ca. *Law and Eq.* 110. *Page 562*

But if a Man ſends his Servant with ready Money to buy Meat, or other Goods, and the Servant buys upon Credit, the Maſter is not chargeable.

So if the Maſter had forbid the Tradeſman to truſt his Servant, this ſhall excuſe the Maſter, on Evidence.

And herein it is ſaid, that a Servant, by tranſacting Affairs for his Maſter, does thereby derive a general Authority and Credit from him; which general Authority is not liable to be (*c*) determined for a Time, by any particular Orders or Inſtructions, to which none but the Maſter and Servant are privy; for that, if this ſhould prevail, there would be an End of all Dealing, but with the Maſter.

(*c*) A Caſe cited between *Monk* and *Clayton*, where the Act of a Servant, though out of Place, bound his Maſter, by reaſon of the former Credit given him by his Maſter's Service, the other not knowing that he was diſcharged.

2 Salk. 442. pl. 4. 5 Mod. 398. 6 Mod. 36. Ld. Raym. 928. Com. Rep. 138. pl. 92.

If a Maſter ſends his Servant to receive Money, and the Servant inſtead of Money takes a Bill, and the Maſter, as ſoon as told thereof, diſagrees, he is not bound by this Payment; but Acquieſcence, or any ſmall Matter will be (*d*) Proof of the Maſter's Conſent; and that will make the Act of the Servant the Act of the Maſter.

Ward and *Evans*, & *vide* 10 Mod. 109, 110. 11 Mod. 72. (*d*) If a Merchant's Apprentice draws a Bill in this Manner, *I promiſe to pay ſuch a Sum for my Maſter*; to charge the Maſter with this Note, it is ſaid, there ought to be either an Authority precedent, or a Conſent ſubſequent; or that the Maſter had intruſted him with his Affairs ‡; otherwiſe the Maſter ſhall not be chargeable. Comb. 450. Ld. Raym. 224. 3 Salk. 234. pl. 4.

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‡ To make the Maſter liable in ſuch Caſe, *qu.* if there ſhould not be Evidence, that he had given Authority to his Servant, to make ſuch Notes?

Salk. 282. pl. 11. ruled by *Holt* at *Niſi Prius*, and the Plaintiff nonſuited accordingly. (*e*) That if a Carrier's Porter re-

If *A.* brings Caſe againſt the Maſter of a Stage-Coach, on the Cuſtom of the Realm, for a Trunk loſt by his Negligence; and on Evidence it appears, that the Trunk was delivered to the Servant who drove the Coach, who promiſed to take Care of it, and that the Trunk was loſt out of his Poſſeſſion; the Action does not lie againſt the Maſter; for a Stage-Coachman is not within the Cuſtom as a (*e*) Carrier is, unleſs he take a diſtinct Price for the Carriage of Goods, as well as Perſons; and though Money be given

given to the Driver, yet that is a Gratuity, and cannot bring the Master within the Custom; for no Master is chargeable with the Acts of his Servant, but when he acts in Execution of the Authority given by his Master; and then the Act of the Servant is the Act of the Master †.

ceives Goods, the Carrier shall be liable. Comb. 118. *Per Dolben* Justice.

† Most if not all Stage Coaches do now carry Goods for Hire, and therefore come within the Description of Carriers.

The Master must also answer for Torts and Injuries done by his Servant, in Execution of his Authority; as where a Pawn-Broker's Servant took a Pawn, the Pawner came and tendered the Money to the Servant, who said, he had lost the Goods; upon which the Pawner brought Trover against the Master, and it was held well.

2 Salk. 441. pl. 2. *per Holt* C. J. at *Nisi Prius* at *Guildhall* Ld. Raym. 738. Cas. Temp. Holt 642. pl. 3.

So where the Servant of *A.* with his Cart run against another Cart, wherein was a Pipe of Sack, and overturned the Cart, and spoiled the Sack; it was held, that an Action lay against *A.* ‡

2 Salk. 441. pl. 2. cited. Ld. Raym. 739.

‡ As there is very little genuine Wine, the best Method is to declare for Wine, and for a certain Liquor called Wine, of such a Denomination.

So where a Carter's Servant run his Cart over a Boy; it was held, the Boy should have his Action against the Master, for the Damage he sustained by this Negligence.

2 Salk. 441. pl. 2. cited. Ld. Raym. 739.

So where the Servant of *A.* brought a Coach and two ungovernable Horses of his Master's to *Lincolns-Inn-Fields*, a Place much frequented by People, and there drove them to make them tractable, and fit them for a Coach; and the Horses being unruly, and for Want of Care, *&c.* run upon the Plantiff, and hurt and wounded him; in an Action brought both against the Master and Servant, it was held, that it well lay; and that it shall be intended the Master sent the Servant to train the Horses there.

Vent. 295. 2 Lev. 172. 3 Keb. 650. *Michael* and *Alestree.*

(L) For what Acts of his shall the Servant himself answer to others.

IF a Master command his Servant to do what is lawful, and he misbehave himself, or do more, the Master shall not answer for his Servant, but the Servant for himself, for that it was his own Act; otherwise it would be in the Power of every Servant to subject his Master to what Actions or Penalties he pleased.

Skin. 228. pl. 7.

* And on this Foundation it hath been ruled, that if a Man command his Servant to do a lawful Act, as to pull down a little Wooden House, (wherein the Plaintiff was, and would not come out, and which was carried upon Wheels into the Land, to trick the Defendant out of Possession,) and bid him take Care that he hurt not the Plaintiff; if, in doing this, the Servant hurt the Plaintiff, in Trespass of Assault and Wounding brought against the Master he may plead Not guilty, and give this in Evidence; for that he was not guilty of the Wounding, and the Pulling down the House was a lawful Act.

* Page 563 Skin. 228.

But it is laid down as a Rule, that, in every Case where the Master has not Power to do a Thing, whoever does it by his Commandment is a Trespasser as well as the Master.

8 E. 4, 45. *Per Choke.*

22 E. 4, 45. *Per Jenny.* If a Maſter locks a Man into his Houſe, and delivers the Key to his Servant, if the Servant be ignorant that any Body be there, the Servant is not chargeable; but if he knows that the Maſter had impriſoned one tortiouſly, and he ſtill keep him in Priſon, he is liable to an Action.

If the Servant of a Taverner ſells Wine that is corrupted, (*a*) knowing it to be ſo, no Action of Deceit lies againſt the Servant, for he did it but as a Servant.

Rol. Abr. 95. (*a*) If the Attorney in an Action of Debt knows of, and was Witneſs to, a Releaſe of the Debt, made before the Action brought for it; yet no Action lies againſt the Attorney, for he acted only as a Servant, and in the Way of his Calling. Mod. 209. [*Sed qu.*]

Rol. Abr. 95. 2 Rol. Rep. 270. *Broking* ver. *Came.* If the Servant of *A.* leaſe Lands to another for Years, reſerving a Rent to *A.* and, to perſuade the Leſſee to accept thereof, he promiſes, that he ſhall enjoy the Land, during the Term, without Incumbrances; if the Land be incumbered, *&c.* the Leſſee may have an Action on the Caſe againſt the Servant, becauſe he made an expreſs (*b*) Warranty.

(*b*) If one command his Servant to ſell an ill Horſe, and the Servant ſells him for a good one, whereby the Servant is arreſted and indamaged; yet the Servant ſhall not have his Remedy againſt his Maſter. Cro. Jac. 471. [*Qu.* If the Servant did not know it was an ill Horſe?]

Yelv. 137. *Talbot* ver. *Godbolt.* If a Man draws a Bill, to which he puts his Seal in this Form: *Memorandum, That I have received of* J. S *to the Uſe of my Maſter, the Sum of* 40l. *to be paid at* Michaelmas *following*; the Servant is liable hereby, for though in the Premiſſes it is ſaid to be to the Uſe of his Maſter, yet the Payment being indefinite, muſt be underſtood to be by him who ſealed the Bill; but it is ſaid, that if it had been to be repaid by his Maſter, that (*c*) the Servant had not been liable.

(*c*) Whether he who ſpeaks for or fetches Goods for his Maſter, without any particular Promiſe of paying for them, is liable to pay for them; and where, upon the Circumſtances of ſuch a Caſe, though he may be held liable at Law, a Court of Equity will relieve; *vide* Preced. Chan. 46. Abr. Eq. 308.

Mich. 7 Geo. 2. in *B. R. Thomas* ver. *Biſhop.* 2 Kel. 136. pl. 116. 2 Barnard. *K. B.* 320. 2 Stra. 955. So where Mr. *Mildmay*, Agent to the *York Buildings* Company, reſiding in *Scotland*, drew a Bill of Exchange in Favour of *J. S.* on their Caſhier in *London*; which Bill runs thus: To —— *Biſhop*, Caſhier to the Honourable Governor and Aſſiſtants of the *York Buildings* Company, at their Houſe in *Wincheſter-ſtreet*. Sir, Pray pay to *J. S.* or his Order, 200*l.* and place it to the Account of the Company for Value received, as *per* Advice, by your humble Servant, *Charles Mildmay*. The Letter of Advice referred to, was directed to the Governor and Company, informing them of the Draught made upon Mr. *Biſhop*, in Favour of *J. S.* (but it did not appear that this was the uſual Method of drawing Bills on the Company; Mr. *Biſhop* accepted the Bill generally, *viz.* Accepted by *J. Biſhop*; and if this Acceptance ſhould charge him in his own Right, was the Queſtion; which was ſaved for the Judgment of the Court, after a Verdict at *Niſi Prius* for the Plaintiff; and it was reſolved it ſhould.

* (M) For what Acts of his ſhall the Servant anſwer and be reſponſible to his Maſter: And herein,

* Page 564

1. Where by an implied Truſt or Confidence a Servant ſhall anſwer in a Civil Action.

IF a Man commits Money to his Servant to carry to ſuch a Place, and he is robbed, the Servant ſhall not anſwer for it; for a Servant only undertakes for his Diligence and Fidelity, and not for the Strength and Security of his Defence, and therefore ſhall not be obliged to preſerve his Maſter's Property at all Adventures; and herein the Law, as now ſettled, makes a Difference between a Servant and another independent Perſon; for every other Perſon has naturally no more than the ſingle Care of his own Affairs, and is not bound in Point of Duty to defend or intermeddle with the Property of another; but where he will officiouſly create to himſelf ſuch an Undertaking, he is obliged to anſwer the Loſs, if any happen; but a Servant is, by the Duty of his Place, under the Command of his Maſter, and is bound, in Point of Neceſſity, to take Care of another's Affairs. Now the firſt Contract, whereby he becomes a Servant, implied no more than an Undertaking for his Care and Obedience; and whenever he afterwards intermeddles in the Affairs of his Maſter, it is but in Conſequence of that original Contract, and therefore cannot be extended any further; and ſince, when he firſt contracted, it was no more than an Undertaking for his own Care and Fidelity, whenever he intermeddles with his Maſter's Affairs, it is under that general Undertaking, and by Conſequence he cannot be charged but for Deficiency, in Point of Care, or of Faithfulneſs; and therefore is not anſwerable for any inevitable Accident. 8 Co. 84, & *vide* Tit. *Bailment.*

But if *A.* is employed by *B.* to ſail from *England* to the *Indies*, and *A.* covenants, that he or his Servants will not thence import any Callicoes, *&c.* and *A.* retains *C.* as his Servant in this Voyage, and acquaints him with the Covenants, and notwithſtanding *C.* falſly and frudulently brings thence certain Callicoes, *&c. A.* ſhall have an Action againſt *C.* for though no Action lies by a Maſter for the bare Breach of his Command, yet if a Servant does any Thing falſly and frudulently, to the Damage of his Maſter, an Action will lie. Sid. 298. Lev. 188. 2 Keb. 88. *Huſſey* and *Pacey.*

So if a Merchant's Servant takes his Maſter's Goods that are arrived at a Port in *England*, and, before Payment of the Cuſtoms, lands them, *per quod* the Goods are forfeited and ſeiſed by the King; the Maſter may have an Action of Treſpaſs upon the Caſe againſt his Servant. Rol. Abr. 105. Cro Jac. 265. Lane 65. S. C. *Leveſon* ver. *Kirk.*

So if a Servant, that drives his Maſter's Cart, by his Negligence ſuffers the Cattle to periſh, an Action upon the Caſe lies againſt him. 7 H. 4. 14. Bro. Tit. *Action ſur Caſe*, 34.

If a Man deliver a Horſe to his Servant to go to Market, or a Bag of Money to carry to *London*, which he neglects to do, the Maſter may have an Action of Account or Detinue againſt him. 21 H. 4. 14. Moor 248.

A Maſter ſends his Servant, that uſed to tranſact Affairs of that Nature for him, on *Saturday* Morning with a Note drawn upon Sir *Stephen Evans*, with Orders to get from Sir *Stephen* either Bank-Bills or Money, and turn them into Exchequer-Notes; but the Servant having other Buſineſs of his Maſter's upon his Hands, to ſave himſelf the Time and Trouble of going to Sir *Stephen*, goes to *B.* and prevails with him to give him a Bank-Bill for Sir *Stephen's* Note, and then in purſuance of his Maſ- 10 Mod. 109. *Nickſon* ver. *Brehan.*

*Page 565 *ter's Orders invested it in Exchequer Notes, which he brought to his Master, not letting him know but that he had gone to Sir *Stephen*; Sir *Stephen Evans* failing on the *Monday* following, it was adjudged that this Loss should fall on the Master, and not on *B.* and the Court was of Opinion, that the Master could not recover it of the Servant, the Loss being occasioned by a mere Accident, and not by either Folly or Negligence.

2. Where Servants or Apprentices shall be punished criminally, for Acts done in relation to their Masters.

Hale's Hist. P. C. 505, 666. At Common Law, a Servant or Apprentice, without any Regard to Age, might be guilty of Felony in feloniously taking away the Goods of their Master, though they were Goods under their Charge, as a Shepherd, Butler, &c. and may at this Day for any such Offence be indicted, as for a Felony at Common Law; but at Common Law, if a Man had delivered Goods to his Servant to keep, or carry for him, and he carried them away *animo furandi*; this was considered only a Breach of Trust, but not Felony.

But now by the Statute of 21 *H.* 8. *cap.* 7. it is enacted, That all and "singular Servants, to whom any Caskets, Jewels, Money, Goods or "Chattels, by his or their Masters or Mistresses shall from henceforth be "delivered to keep, that if any such Servant or Servants withdraw themselves from their Masters or Mistresses, and go away with the Caskets, "Jewels, Money, Goods or Chattels, or any Part thereof, to the Intent to "steal the same, and defraud his or their Masters or Mistresses thereof, "contrary to the Trust and Confidence to him or them put by his or their "Masters or Mistresses, or else being in the Service of his or their Masters or Mistresses, without any Assent or Commandment of his Master "or Mistres, imbezil the same Caskets, Jewels, Money, Goods or Chattels "or any Part thereof, or otherwise convert the same to his own Use, with "like Purpose to steal it; that if the said Casket, Jewel, Money, Goods or "Chattels that any such Servant shall go away with, or which he shall imbezil, with Purpose to steal as aforesaid, be of the Value of 40 *s.* or "above, that then the same false, fraudulent, or untrue Act and Demeanor "shall from henceforth be deemed and adjudged Felony, &c. Provided "it extend not to *Apprentices*, nor to any Person under the Age of "*eighteen* Years; but every such Apprentice, or Person within that Age, "doing that Act, shall be, and stand in the like Case, as they were before "the making of this Act."

Hale's P. C. 666-7. By the Act of 27 *H* 8. *cap.* 17. Clergy was taken away in this Case, if the Indictment were laid specially upon the Act of 21 *H.* 8. *cap.* 7. and pursuant to the same, and by the Act 28 *H. cap.* 2. this Act of 21 *H.* 8. *cap.* 7 was made perpetual; but by the Act of 1 *E.* 6. *cap.* 12 these Acts were both repealed; but again, by the Act of 5 *Eliz. cap.* 10. *sect.* 3. this Act of 21 *H.* 8. *cap.* 7. was re-enacted and made perpetual; but it did not revive the Act of 27 *H.* 8 *cap.* 17. for taking away Clergy. But now by 12 *Ann. cap.* 7. Clergy in such Cases is taken away from Facts committed in any House or Out house, except as to Apprentices under the Age of *fifteen* Years robbing their Masters.

In the Construction of this Statute the following Opinions have been holden.

Hawk. P.C. 92. 1. That it extends only to such as were Servants to the Owner of the Goods both at the Time they were delivered, and also at the Time when they were stolen.

Dyer 3. pl. 2, 3. 3 Inst. 105. Hawk. P.C. 92. 2. That it is strictly confined to such Goods as are delivered *to keep*; and therefore that a Receiver, who having received his Master's Rents runs away with them, or a Servant, who being intrusted to sell Goods,

or

* or to receive Money done on a Bond, ſells the Goods, &c. and departs with the Money, is not within the Statute; but that a Servant who receives his Maſter's Goods from another (*a*) Servant, to keep for the Maſter, is as much guilty as if he had received them from the Maſter's own Hands; becauſe ſuch a Delivery is looked upon as a Delivery by the Maſter. * Page 566

(*a*) Or the Maſter's Wife, ſhe being as well his Miſtreſs as if ſhe were Sole. Hale's Hiſt. P. C. 668.

3. That it includes not the Waſting or Conſuming of Goods, howſoever wilful it may be; nor the Taking away of an Obligation, or any other bare *Choſe in Action*. Hawk. P. C. 92.

4. That it extends not to the Taking of ſuch Things, whereof the actual Property is not in the Maſter at the Time; and therefore, that if a Servant having Money or Corn, &c. delivered to him, melt down the Money of his own Head, without the Command of his Maſter, into a Piece of Plate, or turn the Corn into Malt, and then run away with them, that he is not within the Statute; becauſe the Property of theſe Things is ſo far changed, by altering them in ſuch a Manner, that they cannot be known again, and the Maſter cannot afterwards take them, without being a Treſpaſſer; but it is agreed, that if a Servant make a Suit of Clothes of Cloth, or a Pair of Shoes † of Leather, delivered to him by the Maſter, and then run away with them, that he is within the Statute; becauſe the Property is no Way altered; and even in the firſt Caſe, *Hawkins* ſeems to be of Opinion, that the Taking of the Plate and Malt is within the Statute; and that the whole Act of the Servant, taken together, ſhould be deemed a Converſion of the Maſter's Goods to his own Uſe, with an Intent to ſteal them, which brings it within the expreſs Letter of the Statute; and on which Foundation it hath been reſolved, that a Servant who changes his Maſter's Money from Silver to Gold, and then runs away with it, is within the Statute. Cromp. 50. Dalt. c. 102. Hawk. P. C. 92.

† How can a Pair of Shoes be within the Statute, if the Leather was not of the Value of 40 *s.* which is not very probable?

(N) Of the Maſter's Authority over his Servant, and how far he may correct and puniſh him.

IT is clearly agreed, that a Maſter may correct and puniſh his Servant in a reaſonable Manner for abuſive Language, Neglect of Duty, &c. and that in an Action of Aſſault and Battery brought againſt him, he may juſtify, that he was (*b*) his Servant, gave provoking Language, &c. and that therefore *moderate caſtigavit*; and on Iſſue of (*c*) *immoderate caſtigavit*, if it appears in Evidence, that the Puniſhment was ſuch as is uſual from Maſters to their Servants, the Maſter will be acquitted. 38 H. 6. 25. Sid. 175.

(*b*) It is ſaid, that the Maſter in his Juſtification muſt ſet forth the Retainer, the Place where, and in what Buſineſs, being Matters iſſuable. Sid. 177.

(*c*) Where the Plaintiff replied *non moderate caſtigavit*, held well, though not ſo pertinent an Iſſue as *immoderate caſtigavit*. Vent. 70. Sid. 444. 2 Keb. 623.

But as ſuch Correction muſt be moderate, it has been held, that the Maſter cannot juſtify wounding his Servant; as in Aſſault, Battery and Wounding, and Impriſonment, &c. Defendant juſtifies, for that he and the Plaintiff were Servants to the Sheriff of *Suff'*; and that the Plaintiff, when he ſhould have been attending in Court, was at a Conventicle; and that he, by Command of the Sheriff, *leviter & molliter manus impoſuit* upon the Plaintiff, and brought him thence; which is the ſame Treſpaſs, 2 Mod. 167. 8 Mod. 120, 218, 330.

&c.

*Page 567 * &c. and on Demurrer to this Plea it was held ill; becauſe as to the Wounding † he ſays nothing at all, and in that he cannot juſtify.

21 H. 6. 26.
2 Inſt. 316.

† He ſhould have pleaded Not guilty to the Wounding, and now in ſuch Caſe, by virtue of the Stat. 4 *Ann.* c. 16. ſ. 4. the Defendant might plead double, Not guilty to the Whole, and juſtify as to a Part of the Treſpaſs.

Alſo it hath been held, though a Maſter may beat his Servant, that yet he cannot delegate that Power to another; for though a Lord might beat his Villein, either with Cauſe or without, and he could have no Remedy, yet if another by his Command did it, the Villein might have had an Action.

2 H. 4. 4.
11 H. 4. 75.
9 Co. 76. a.
2 Mod. 167.
2 Cro. 360.
Ld. Raym. 62, 310. 2 Stra. 953. F. N. B. 392. Black. Com. 416. 3 Vin. Abr. 20.

Hale's Hiſt. P.C. 454.

From this Authority which a Maſter hath over his Servant, it is held in Law, that if a Maſter deſigneth moderate Correction to his Servant, and accordingly uſeth it, and the Servant, by ſome Misfortune, dieth thereof, this is not Murder, but *per Infortunium*; becauſe the Law alloweth him to uſe moderate Correction; and therefore the deliberate Purpoſe hereof is not *ex malitia præcogitata*.

But if the Maſter deſign an immoderate or unreaſonable Correction, either in reſpect of the Meaſure, or Manner, or Inſtrument thereof, and the Servant die thereof; this *per* (*a*) *Hale* cannot be excuſed from Murder if done with Deliberation and Deſign; nor from Manſlaughter, if done haſtily, paſſionately, and without Deliberation; and herein, ſays he, Conſideration muſt be had of the Manner of the Provocation, the Danger of the Inſtrument which the Maſter uſeth, and the Age or Condition of the Servant that is ſtricken; and the like of a School-maſter towards his Scholar.

(*a*) 1 Hale's Hiſt. P. C. 454.

——And *per Hawkins*, where a School-maſter in correcting his Scholar, or a Father his Son, or a Maſter his Servant, or an Officer in whipping a Criminal condemned to ſuch Puniſhment, happens to occaſion his Death, if ſuch Perſons in their Correction be ſo barbarous as to exceed all Bounds of Moderation, and thereby cauſe the Party's Death, they are guilty of Manſlaughter at the leaſt; and if they make uſe of an Inſtrument improper for Correction, and apparently indangering the Party's Life, as an Iron Bar, or Sword, &c. or kick him to the Ground, and then ſtamp on his Belly and kill him, they are guilty of Murder. Hawk. P. C. 73-4. for which are cited Bracton, lib. 1. c. 4. H. P. C. 31. Cromp. 28. Dalt. c. 96. Keilw. 136. Kelyn. 65. 5 Mod. 287. Foſt. *Cr. Law* 262. See Salk. 47. pl. 4. Ld. Raym. 138. Comyn. Rep. 13. pl. 8. Comb. 406. 3 Salk. 191. pl. 20.

(O) Of the Maſter's Remedies againſt others for inticing away, and other Injuries done in relation to his Servant.

21 H. 6. 31. pl. 18.

IT is clearly agreed, that from the Intereſt a Maſter has in the Labour and Service of his Servant, he may maintain an Action for inciting (*b*) or taking him away.

(*b*) But it is ſaid, that for taking away a Man's Servant out of his actual Service, Treſpaſs will lie ‡; but that for inticing him, only an Action on the Caſe. Salk. 380. pl. 17. 2 Ld. Raym. 1116.

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‡ *Sed qu.* To maintain Treſpaſs, if it muſt not be done with Force?

Noy 10, 106.
Leon. 240.
Keilw. 180.
2 Lev. 63.

Alſo, if without any Inticement a Servant leave his Maſter, without Licence or juſt Cauſe, and *J. S.* knowing him to be his Servant, retains him, an Action lies.

But

But it hath been held, that an Indictment does not lie for inticing away a Servant, being a private Injury, which may be redreſſed by Civil Action. Salk. 380. pl. 17. Black. Com. 417. 3 Salk. 191. pl. 21. 6 Mod. 99, 182, 289. 2 Ld. Raym. 1116. *The Queen* ver. *Daniel.*

In Caſe the Plaintiff declared, that *J. S.* 19 *Sep.* 16 *Car.* 2. was retained as an Apprentice to ſerve the Plaintiff for nine Years, and continued in his ſaid Service till the 31ſt of *October* 21 *Car.* 2. when the Defendant procured the ſaid *J. S.* to leave the Plaintiff's Service, *&c.* (*a*) *per* * *quod* the Plaintiff *totum proficuum quod ratione ſervitii præd'* J. S. *per totum reſiduum termini recipere potuiſſet totaliter perdidit, &c.* and after (*b*) a Verdict for the Plaintiff, and general Damages given, though it appeared the Term was not expired, it was intended that Damages were given for all the Term, as well the Time to come as paſt; for the Damages muſt be intended to be taxed according to the Declaration; and if it ſhould be intended otherwiſe, it would be uncertain to what Time they were taxed, whether to the Exhibition of the Bill, or Verdict given; and Judgment arreſted accordingly. T. Raym. 200. Com. Rep. 232. pl. 129. * Page 568 2 Saund. 169, 170. Lev. 299. *Hambleton* ver. *Veere.*

(*a*) The Plaintiff declared for a Batteryofhis Servant 19. *Jan.&c. per quod* he loſt his Service for a long Time, *viz.* for the Space of ſix Months then next following, *&c.* Hob. 284. after a Verdict for the Plaintiff, tho' the Original bore *Teſte* before the End of the ſix Months, yet the Plaintiff had his Judgment; for the *Viz.* was more than needed, being not of the Subſtance of the Action, but for Aggravation of Damages only. All. 23. *per Cur'*; but yet *vide* Cro. Jac. 619. Yelv. 94. (*b*) Where upon a Demurrer it may be helped, for the Plaintiff may take Damages for the Departure only. Mod. 271. pl. 22.

For the Battery of a Servant, the Maſter as well as Servant may bring an Action, and each ſhall recover Damages, for both are injured; the Servant in his Perſon, and the Maſter (*c*) by the Loſs of his Servant's Labour; and therefore a Recovery in an Action brought by one of them, cannot be pleaded in Bar to an Action brought by the other. And. 13. 9 Co. 113. 10 Co. 131. Style 94. 2 Bulſt. 198. Sid. 175.

(*c*) And as it is this that intitles the Maſter to his Action, he muſt always declare *per quod ſervitium amiſit.* Cro. Jac. 618. Rol. Rep. 393.—And therefore the Defendant may plead Not guilty, and give it in Evidence, that he did not loſe his Service. 2 Rol. Abr. 682.

But if a Man beats another's Servant to that Degree that he dies thereof, the Maſter loſes his Action, and muſt proceed by Indictment; for the private Injury to him is drowned in the general Injury to the Public. Yelv. 89, 90. Brownl. 205. 2 Rol. Abr. 568. R. Raym. 339.

If a Surgeon, in Conſideration of a Sum of Money, undertakes to cure my Servant of a Hurt, and he applies unwholeſome Medicines thereto, on Purpoſe to make the Wound worſe, by which I loſe the Service of my Servant for a long Time, I may have an Action on the Caſe againſt the Surgeon. Rol. Abr. 98. Rol. Rep. 124. 2 Bulſt. 332.

(P) What a Maſter or Servant may juſtify doing in each other's Defence.

FROM the Relationſhip between a Maſter and Servant it hath been agreed, that a Maſter killing a Perſon in Defence of his Servant, or a Servant in Defence of his Maſter, are not guilty of Murder, and that in thoſe Caſes, the Act of the Aſſiſtant ſhall have the ſame Conſtruction, as the Act of the Party aſſiſted ſhould have had, if it had been done by himſelf. Hale's Hiſt. P. C. 484.

Alſo

2 Rol. Abr. 546. Owen 151. *Cont.* Salk. 407. pl. 2.

Alſo a Servant may juſtify an Aſſault in Defence of his (*a*) Maſter; and by ſome Opinions, ſo may a Maſter in Defence of his Servant; but others hold that he cannot; becauſe in ſuch Caſe he may have an Action *per quod ſervitium amiſit* †.

(*a*) But he cannot juſtify in Defence of his Maſter's Son, becauſe not Servant to him. Dalt. c. 72. Crompt. 136. —Nor in Defence of his Maſter's Goods. 2 Lutw. 1481.——† Why may not the Maſter juſtify in Defence of his Servant if he does no more than is neceſſary?—He may juſtify interfering to preſerve the Peace. And why not to prevent Damage to his Servant, inſtead of lying by for an Action, Prevention of Injury, being much better.

Rol. Abr. 687. 2 Brownl. 276.

A Servant ſhall not avoid a Deed made by Dureſs to his Maſter, nor *vice verſa*.

Bro. *Maintenance* 6, 14. 2 Rol. Abr. 116. Moor 814. *Page 569

As to a Maſter's maintaining a Servant, or a Servant his Maſter, in Suits and legal Proceedings, it is agreed, that a Maſter may go along with his Servant, or with his Domeſtick Chaplain, to retain Counſel; alſo * he may pray one to be of Counſel for him, and may go with him, and ſtand with him, and aid him at the Trial, but ought not to ſpeak in Court in Favour of his Cauſe: Alſo if the Servant be arreſted, the Maſter may aſſiſt him with Money to keep him from Priſon, that he may have the Benefit of his Service; but the Maſter cannot ſafely lay out Money for the Servant in a real Action, unleſs he have ſome of his Wages in his Hand; but theſe, with the Servant's Conſent, he may ſafely diſburſe.

Hetl. 79. 2 Rol. Abr. 116. Keilw. 50.

As to a Servant's Maintaining his Maſter, it is agreed, that a Perſon retained generally as a Servant, and not for a particular Occaſion only, may lawfully ride about to ſpeed his Maſter's Buſineſs; and may go to Counſel for him, and ſhew his Evidence to the Counſel, or to the Jury, and ſtand by him at a Trial; but cannot lawfully lay out his own Money in the Suit ‡.

‡ But *qu.* if he may not legally lend him Money for the Purpoſe?

Marriage and Divorce.

MARRIAGE is a Compact between a Man and a Woman for the Procreation and Education of Children; or an Exchange of mutual Vows, performed in the Preſence of God, and with proper Ceremonies; and ſeems to have been firſt inſtituted as neceſſary to the very Being of Human Society; for without the Diſtinction of Families, there can be no Encouragement to Induſtry, or any Foundation for the Care of acquiring Riches; and therefore all well-ordered Societies have ſettled the Solemnities of Marriage, and ordained that the ſame ſhould continue during Life; and the Reaſon is, becauſe Children gradually arriving one after another, they have hardly done with the Care of their Education, till the Parents are unfit for ſecond Marriages; and therefore it is convenient that Marriages ſhould continue during Life, that the mutual Care of the Parents might be employed in making Proviſion for their Children; and that the Love and Reſpect of their Children might be repaid to both Parents, without Diſtraction or Confuſion; which could not be well done, if the Marriage was to be diſjoined, and their Intereſt was to ſever after the Concern of Education was over: Beſides, the Intereſt of Marriage could not be conveniently carried on, if there were a Proſpect that

that the Marriage was any otherwiſe to be determined but by Death only; for each Perſon would be injuriouſly drawing out of the common Stock, to the Injury of their joint Concern, and to the Prejudice of the Education of their Offspring: Beſides that, ſuch a joint Intereſt cannot be well and commodiouſly carried on without a mutual Friendſhip and Endearment, which muſt be leſſened and deſtroyed by the Proſpect, that the Contract might be determined by the Humour of either Party. Hence it is, that Fornication and all other Luſts are unlawful, becauſe Children are begotten without any Care or Preparation for their Education; and the Crime of Adultery receives this further Aggravation, that it not only intails a ſpurious Race on the Party, for whom he is under no Obligation to provide, but likewiſe deſtroys that Peace and mutual Endearment which ought always to ſubſiſt in the Marriage State.

* We ſhall therefore conſider what is herein injoined or forbidden under the following Heads. *Page 570

(A) **What Perſons may marry within the Levitical Degrees.** 570.

(B) **Of Eſpouſals and Marriage Contracts; and herein of the Difference between Contracts** in præſenti **and** futuro, **and the Remedies for the Violation thereof.** 573.

(C) **Of the Solemnization and Ceremonies requiſite to a compleat Marriage; and herein of the Offence of performing the Ceremony without due Authority or Licence.** 575.

(D) **Of Offences againſt the Rights of Marriage.** 576.

And herein,

1. Of the Offence of a forcible Marriage. 576.
2. Of the Offence of marrying an Infant Female under the Age of ſixteen, without Conſent of Guardian. 577.
3. Of the Offence of procuring an Improvident Marriage; and therein of Marriage Brokage Contracts and Agreements. 578.

(E) **Marriage how long to continue; and herein of the ſeveral Kinds of Divorces.** 578.

And herein,

1. Of Elopement. 578.
2. Of the Offence of taking away a Wife, and of criminal Converſation. 580.
3. Of the ſeveral Kinds of Divorces. 582.

(A) What

(A) What (a) Persons may marry within the Levitical Degrees.

(a) At what Age Persons may contract and intermarry, *vide* Head of *Infants.*— Of Marriages by Ideots and Lunaticks, *vide* Head of *Ideots and Lunaticks.*

HEREIN first, we must take Notice of the Statute of (b) 32 *H.* 8. *cap.* 38. by which it is enacted, "That no Reservation or Prohibition (God's Law except) shall trouble or impeach any Marriage without "the (c) Levitical Degrees; and that no Person of what Estate, Degree "or Condition soever he be, shall be admitted to any of the Spiritual "Courts within the King's Realm, or any of his Grace's other Lands and "Dominions, to any Process, Plea or Allegation contrary to the Statute."

(b) For the general Exposition of this Statute, *vide* Co. Lit. 24, 235. 2 Inst. 683-4. Hob. 181.
(c) But the Statute does not restrain the Ecclesiastical Courts from Divorces upon other Accounts; as upon the Account of Insufficiency, Adultery, Precontract, &c. Vaugh. 206, &c.

Vaugh. 206, &c. Since this Statute, it hath been clearly agreed, that if the Spiritual Court proceeds to impeach or dissolve a Marriage out of the Levitical Degrees, that then the Temporal Courts are to prohibit them; for by that Statute all Marriages, that are out of those Degrees, are declared to be good and *Page 571 * lawful; and therefore, if the Spiritual Court molest Persons in doing that which is declared lawful to be done by the Statutes of the Realm, they are by the Temporal Courts to be prohibited, because they exceed their Jurisdiction, thus bounded by the Temporal Law; but where the Law has not bounded them, their Jurisdiction still continues; and therefore within the Levitical Degrees they are still Judges of Incest.

Rol. Abr. 340, 457. Vaugh. 208, 220. We must likewise observe, that if a Person marry his Cousin within the Levitical Degrees, yet they continue Husband and Wife, till a Sentence of Divorce be pronounced.

The Degrees prohibited by the Levitical Law, are such as are said to be against the Law of Nature, and such as are against the Divine positive Law.

Grot. de Jure 1, 5. Vaugh. 221. 242, &c. Those against the Law of Nature, are all Marriages between the ascending and descending Line *in infinitum*; and this is said to be contrary to the Law of Nature, because it tends to the Destruction of the natural Will of the Creator, which designed the Preservation and Continuance of such Inhabitants of the World as he originally created; and all Acts of Men that tend to the Destruction of such *Species*, as Murder of an innocent Person, are said to be against the Law of Nature; and therefore Incest, between the ascending and descending Line, is contrary to the Law of Nature; for the Mother would never have preserved and educated the Female Issue, if it had been admitted to the Father to have had Access to them; and Fathers would never have educated and preserved their Male Issue, if they might have ascended the Bed of their Mothers. There is also another Reason why this is called unnatural, and that is, because it destroys the natural Duties between Parents and Children; for the Parent could never preserve or maintain that Authority that is necessary for the Education and Government of his Child; nor the Child that Reverence that is due to the Parent in order to be educated and governed, if such indecent Familiarities were admitted. There likewise seems to be a natural Reason against this, or any near Intercourse between Collaterals, which is drawn from that which is observed in Brute Creatures, *viz.* that it is necessary to cross the Strain, in order to continue the *Species*. It may be, that there being the same Tone and Figure in the Blood, and a similar Conformation of Vessels, the Circulation of it becomes torpid and inactive; whereas a new Mixture of others of the same Kind, where there is a different Figure and Motion of the Blood and Spirits, may add a new Vigour and Ability to the Animal Oeconomy.

Those

Thoſe prohibited by the poſitive Divine Law, are all Collaterals to the third Degree; and though this be not contrary to the Law of Nature, yet it ſeems eſtabliſhed on very ſtrong Reaſons; for if a Concourſe between Brothers and Siſters might be allowed, or their Marriages be tolerated, the Neceſſity there is that they ſhould be educated together, and the frequent Opportunities they have with each other, would fill every Family with Lewdneſs, and create Heart-burnings and unextinguiſhable Jealouſies between Brothers and Siſters, where the Family was numerous; and it would confine every Family to itſelf, and hinder the propagating common Love and Charity among Mankind; becauſe there would be a Danger of taking a Wife out of any Family, if Women were liable to be corrupted by ſuch vicious Freedoms. This Prohibition is likewiſe carried to Uncles and Aunts, Nephews and Nieces; becauſe upon the Death of the Father and Mother they come into the Education of Children *loco parentum*; and by Conſequence it was neceſſary to propagate the ſame Reverence of Blood in ſuch near Degrees, that the Uncle might have the ſame Regard and Command as a Father, and a Niece the ſame Duty as a Daughter; it was alſo neceſſary, in order to perfect the Union of Marriage, that the Huſband ſhould take the Wife's Relations in the ſame Degree, to be the ſame as his own without Diſtinction, and ſo *vice verſa*; for if they are to be the ſame Perſon as was intended by the Law of God, they can have no Difference in Relations; and by Conſequence, the Prohibition touching (*a*) Affinity muſt be carried as far as the Prohibition touching Conſanguinity. Vaugh. 222. *Page 572 (*a*) According to the Text xviii.

Levit. ver. 16. *The Nakedneſs of thy Brother's Wife ſhalt thou not uncover, it is thy Brother's Nakedneſs.*

The Law in *Leviticus*, *cap.* xviii. *ver.* 6. is, *That none of you ſhall approach to any that is near of Kin, to uncover their Nakedneſs*; which Words being general, muſt be underſtood and expounded by the Examples from the 6th to the 20th Verſe; among which we find many Prohibitions to Collaterals in the third Degree, both in Affinity and Conſanguinity; but there is no Example of Collaterals in the fourth Degree, either in Affinity or Conſanguinity; and therefore the Law of Marriage opens to Relations in the fourth Degree; and the Jewiſh Lawyers, in computing their Degrees, computed them according to the natural Order of Things; that is, from the *Præpoſitus* up to the common Stock, and ſo down to the other Relations; which is the fair and natural Order of computing Proximity; and in this Order of Computation, Couſin Germans are held to be of the fourth Degree, and to have Liberty to marry. *Selden, Ux' Hebraica*, lib. 1. c. 4.

This likewiſe was the antient Senſe of the Chriſtian Church, and even of the Church of *Rome* in the Time of Pope *Gregory*; for in Writing to *Auſtin* Biſhop of *Canterbury* he ſays, *In quarta generatione contracta matrimonia minime ſolverentur*; but afterwards, when they found that Diſpenſations for inceſtuous Marriages brought great Profit to the Church of *Rome*, and knowing it had obtained univerſally in the Chriſtian Church, that it was lawful to marry in the fourth Degree, Pope *Alexander* II. began a new Computation of Degrees; and he ſaid, that the Secular Computation, which was the Computation of the Civil Law, was not properly adapted to the Deciſions touching Inceſtuous Marriages; but they ought to compute up to the common Stock, where the Relation joined, becauſe there the Blood was connected; and therefore they computed the Degrees according to the Diſtance of the Perſon remoteſt from the common Stock; for according as the remoteſt was diſtant from the common Stock, ſo they computed the Relation between the Parties; ſo that the firſt Couſins that are in the fourth Degree, by the received Computation in the Moſaick and Civil Law, were now by the Canonical Computation thrown into the ſecond Degree; and by this Alteration of the Computation of Degrees, they forbad not only Vaugh. 210.

firſt

firſt Couſins but ſecond and third Couſins to marry, unleſs they obtained Diſpenſations †.

† As to theſe different Computations of Degrees ſee 2 Black. Com. fol. 206. &c. and *vide* 1 Black. Com. 435.

The Intention of the Statute above-mentioned was to reſtore every Thing according to the Prohibition expreſſed in the Law of God; and plainly, the Levitical Computation of Degrees was in the Manner they computed in the Civil Law; and agreeably hereunto hath been the Reſolution in our Law.

Vaugh. 302. *Hill* ver. *Good.* Carth. 271. S. P. admitted.

Hence it hath been adjudged, that the Marriage of two Siſters, one after the other, was inceſtuous, being in the ſecond Degree; although it was objected, that the Verſe in xviii *Levit.* being, *thou ſhalt not take a Wife to her Siſter to vex her*, &c. the Prohibition relating to Polygamy, to Jealouſy and Vexing, the Reaſon thereof ceaſed with the Death of the firſt Wife; in the ſame Manner as if *Moſes* had ſaid, thou ſhalt not take a Wife to her Siſter to vex her, beſides the other in her Life-time. But herein the Court held, that though the Vexing, in one Part of the Text, related to the Life of the Wife, yet by another Part it is made unlawful for ever; and that from theſe Words, *None of you ſhall approach to any that is near of Kin to him, to uncover their Nakedneſs*; which makes the Nearneſs of Kin the chief Cauſe of the Prohibition, and is the Reaſon that runs through the whole Chapter; and that therefore the Vexing refers only to the *Page 573 * Life of the Wife, but the Inceſtuous Copulation is the ſame after her Death, the Nearneſs of Kin ſtill continuing.

Raym. 464. *Watkinſon* ver. *Mergatron.* 2 Jon. 191. S. C.

So it hath been reſolved, that marrying the Siſter's Daughter is inceſtuous, being in the third Degree.

Moor 907. Cro. Eliz. 228. 4 Leon. 16. S. C. *Man's* Caſe.

So it hath been reſolved in Variety of Books and Caſes, that the Marriage with the Wife's Siſter's Daughter was inceſtuous, being likewiſe in the third Degree; and the Degree of Affinity being the ſame with that of Conſanguinity.

2 Lev. 254. 3 Keb. 660. Hob. 181. Noy 29. Sid. 434. 2 Jon. 118. 2 Show. 70. 5 Mod. 448. 3 Lev. 364. 2 Lutw. 1075.

Vaugh. 206. 2 Vent. 9. *Harriſon & Ux'* ver. *Dr. Burwell.*

But upon a Prohibition for proceeding againſt a Perſon in the Eccleſiaſtical Court who had married the Widow and Relict of his Great Uncle, it was adjudged, that ſuch Marriage, being in the fourth Degree, was out of the Levi ical Law, and therefore lawful.

Mich. 30 Car. 2. in *C. B Oxenham & Ux'* ver. *Gayre.*

On a Motion for a Prohibition to the Court of the Biſhop of *Exon*, for preſenting *J. S.* for Inceſt, who had married the Daughter of his Brother of the Half Blood, it was reſolved that no Prohibition ſhould go; for the Court ſaid, though the Brothers were not of the Whole Blood, yet were they Brothers, and therefore the Marriage inceſtuous; they agreed, that if the Father marries the Mother, and the Son the Daughter, this was lawful enough; and *North* cited the Caſe of the Earl of *Mancheſter*, who had married his Great Aunt's Huſband's ſecond Wife; and this was held by Divines and Civilians, a good Marriage, for *affinis mei affinis non eſt mihi affinis.*

5 Mod. 161. Comb. 356. *Hains* ver. *Jeſcott.*

On a Motion for a Prohibition, for proceeding againſt a Perſon in the Eccleſiaſtical Court, who had married his Siſter's Baſtard Daughter; it was urged for the Prohibition, that though the Levitical Law forbids a Man to approach to any near of Kin to uncover their Nakedneſs, yet that this cannot be intended of a Baſtard, becauſe he is of Kin to no Perſon whatſoever, &c. but the Court inclined not to grant a Prohibition.

(B) Of Eſpouſals and Marriage Contracts; and herein of the Difference between Contracts in præſenti and futuro, and the Remedies for the Violation thereof.

Swinburne defines Eſpouſals in this Manner, *Sponſalia ſunt mutua repromiſſio nuptiarum rite inter eos, quibus jure licet, facta*; which comprehends, *1ſt*, That this Promiſe muſt be mutual; *2dly*, That it muſt be done *rite*, or duly; *3dly*, That it muſt be entered into by them who may lawfully marry. *Swinb. of Eſpouſals, ſ. 11.*

Such Contracts are divided into Contracts *in præſenti*, and Contracts *in futuro*.

A Contract *in præſenti*, or *per verba in præſenti*, as, *I marry you, you and I are Man and Wife, &c.* is by the Civil Law eſteemed *ipſum matrimonium*, and amounts to an actual Marriage; which the very Parties themſelves cannot diſſolve by Releaſe, or other mutual Agreement; it being as much a Marriage in the Sight of God, as if it had been *in Facie Eccleſiæ*, with this Difference, that if they cohabit before Marriage *in Facie Eccleſiæ*, they are for that puniſhable by Eccleſiaſtical Cenſures; and if, after ſuch Contract, either of them lies with another, they will puniſh ſuch Offender as an Adulterer. Swinb. 74. 2 Salk. 438. pl. 3. 6 Mod. 155.

* A Contract *in futuro*, as, *I will marry you, &c.* may be inforced in the Spiritual Court, but ſuch Contract either Party may releaſe; alſo if either Party marry another Perſon, ſuch ſecond Marriage diſſolves the Contract. *Page 574 Swinb. ſ. 10, 11. This Remedy is taken away by 26 Geo. 2. c. 33. ſ. 13.

But it hath been reſolved, that an Action will lie at Common Law for the Violation of ſuch an Executory Contract *per verba de futuro*, for the Temporal Loſs to the Party; and though the Party hath a Remedy in the Spiritual Court. But it ſeems, that by bringing an Action at Common Law, and that appearing on Record, the Remedy in the Spiritual Court is actually releaſed; for now in Lieu of a Performance of the Contract he ſhall recover Damages: Alſo the Defendant ſhewing, that he hath been ſued for the ſame Matter in the Spiritual Court, and producing a Sentence againſt the Plaintiff, the Plaintiff, notwithſtanding any Proof of his, will be nonſuit; becauſe that they were the proper Judges in the Spiritual Court, whether it were a Precontract or not. Leon. 147. Rol. Abr. 22. Cro. Eliz. 79. Styl. 295. Carter 233. *Dickenſon* ver. *Holecroft*. Salk. 24. pl. 6. 5 Mod. 411. 6 Mod. 172. Salk. 120. pl. 1. 121. See Ld. Raym. 378. 12 Mod. 214. 2 Stra. 938. Carth. 467. 4 Mod. 411.

Such Promiſes are good, though the Time of Marriage be not agreed on; but in ſuch Caſe it is neceſſary, to intitle the Party to his Action, to alledge that he offered to marry her, and that ſhe refuſed. Carth. 467.

In an Action againſt Huſband and Wife, the Plaintiff declared, that he promiſed to marry the Defendant's Wife, while Sole, and that ſhe the ſame Time promiſed to take him for her Huſband; and averred, that he tendered himſelf, and that ſhe refuſed, *&c.* It was objected, that Marriage was no Advancement to a Man, though it was to a Woman; alſo, that no Time was laid when this Agreement was to have been executed: But the Court over-ruled both Objections. Carth. 467. Salk. 24. pl. 6. S. C. *Harriſon* verſus *Cage & Ux'*. 5 Mod. 411. 2 Salk. 437. pl. 2. S. P. and the Diſtinction between a Man and a Woman exploded.

The

Salk. 24. pl. 6. This Action must be founded on reciprocal Promises; and therefore if the Promise be on one Side only, it does not bind, being only a *Nudum pactum*.

Trin. 5 & 6 Geo. 2. *Holt* ver. *Ward*. 2 Stra. 850, 937. Barnard. *K. B.* 209. Fitzgib. 175. But if a Man of full Age and a Female of fifteen promise to intermarry, and afterwards he marries another, an Action lies against him; for though such Promise may be said to be voidable, as to the Infant, yet it shall be binding on the Person of full Age, who shall be presumed to have acted with sufficient Caution; otherwise this Privilege allowed Infants, of rescinding and breaking through their Contracts, which was intended as an Advantage to them, might turn greatly to their Prejudice.

Moor 169. 4Co. 29. S.C. Sid. 13. S.C. cited, and denied by *Twisden*; & *vide* Salk. 120. pl. 1. 121. If *A.* contracts himself to *B.* and after marries *C.* and *B.* sues *A.* upon this Contract in the Spiritual Court, and there Sentence is given, that *A.* shall marry and cohabit with *B.* which he does accordingly; they are Baron and Feme, (*a*) without any Divorce between *A.* and *C.* for the Marriage of *A.* and *C.* was a mere Nullity †.

(*a*) But if a Woman maketh a Contract of Matrimony with *J. S.* and then marrieth with *J. D.* who is seised of Lands and dieth, she shall have Dower of his Lands; because such Marriage was not void, but voidable only, by reason of the Pre-contract. Moor 226. Perk. 34.— † But now *vide* 26 Geo. 2. c. 33.

2 Lev. 65. but Skin. 196. pl. 10. seems *cont.* & Stra. 34. It hath been held, that the Clause in the Statute of Frauds and Perjuries, 29 *Car.* 2. *cap.* 3. *sect.* 4. relating to Marriage-Agreements, extends as well to a Promise to marry, as to the Payment of Marriage-Portions. Ld. Raym. 387. 2 Eq. Cas. Abr. 248. are expresly so ‡.

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‡ A Promise to marry another, if broken, where the Promises are mutual, and the Parties might legally contract, subjects the Person, breaking such Promise, to an Action for Damages, notwithstanding the Statute: for such Actions are every Day maintained.

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*Page 575 (C) Of the Solemnization and Ceremonies requisite to a compleat Marriage; and herein of the Offence of performing the Ceremony without due Authority or Licence.

Rol. Abr. 357. Moor 169. As to the Loyalty of Marriage, and of the different Kinds of Trial, *vide* Tit. *Bastard*. IN order to make the Marriage compleat, so as to intitle the Wife to Dower, the Issue to inherit, &c. the same must be celebrated *in* (*a*) *Facie Ecclesiæ*; and therefore the private Contract, without the Priest's Blessing, makes no Marriage; though such Contract may be inforced in the Spiritual Court.

(*a*) Before the Time of Pope *Innocent* the Third, there was no Solemnization of Marriage in the Church; but the Man came to the House where the Woman inhabited, and led her Home to his own House, which was all the Ceremony then used. Moor 170. *Per Goldingham*, Doctor of the Civil Law, *arguendo*.

Rol. Abr. 340. Co. Lit. 33. 6 Co. 22. Keilw. 52. Dyer 13. Cro. Car. 488, 493. Sid. 65. Also, though the Marriage be solemnized *in Facie Ecclesiæ*, yet if it were without Consent, it is void; and therefore if a Man takes *E. S.* to Wife by *Duress*, the same is void, though solemnized *in Facie Ecclesiæ*.

A. and

A. and *B.* being Sabbatarians, were married by one in their own Way, who uſed the Form of the Common Prayer, except the Ring, but was a mere Layman; the Wife dying, the Huſband took out Adminiſtration to her; but upon Application of her Siſter, the Letters of Adminiſtration were repealed, and the Sentence of Appeal affirmed by the Delegates; for the Huſband, demanding a Right due to him as Huſband, muſt bring himſelf within the Rules preſcribed by that Juriſdiction to whom he applies; alſo the conſtant Form of pleading Marriage is, that it was *per preſbyterum ſacris ordinibus conſtitutum*; and an Act of Parliament was made confirming the Marriages contracted during the Uſurpation.

Salk. 119. pl. 14. *Heydon* ver. *Gould*; & *vide* 2 Salk. 438. pl. 3. 3 Lev. 376. 2 Show. 300. pl. 303.

(*b*) A Marriage ſolemnized by a Perſon in Prieſt's Orders is good and binding, though there was no Publication of Banns or Licence to diſpenſe therewith; but herein it ſeems agreed, that not only the Party performing the Ceremony, but alſo the Parties married, being Lay Perſons, are puniſhable by Eccleſiaſtical Cenſures; and for acting contrary to ſuch ancient Canons as have been received and allowed in this Kingdom; but it ſeems agreed, that the Canons of 21 *Jac.* 1. bind not the Laity, not having been univerſally received, and being made only in Convocation where the Laity are not repreſented.

5 Co. 32. Co. Lit. 344. Jon. 259. 2 Salk. 673. 6 Mod. 189. (*b*) But now By 26 Geo. 2. c. 33. ſ. 8. Marriages without Banns or Licence are void; for which ſee the Act.

Alſo by the (*c*) 7 & 8 *W.* 3. *cap.* 35. *ſect.* 2. it is enacted, "That every "Parſon, Vicar or Curate, who ſhall marry any Perſons in any Church or "Chapel, exempt or not exempt, or in any other Place whatever, without "Publication of the Banns of Matrimony between the reſpective Perſons "according to Law, or without Licence for the ſaid Marriages firſt had "and obtained, ſhall for every ſuch Offence forfeit the ſum of One Hun"dred Pounds."

(*c*) For the Puniſhment on Gaolers permitting ſuch Marriages, *vide* 10 Ann. c. 19. ſ. 176. —And on Perſons erecting Offices for making Inſurances on Marriages, 10 Ann. c. 26. ſ. 109.

And by *Sect.* 3. of the ſaid Statute, it is enacted, "That every Par"ſon, Vicar or Curate, who ſhall ſubſtitute or employ, or knowingly and "wittingly ſhall ſuffer and permit any other Miniſter to marry any Perſons "in any Church or Chapel, to ſuch Parſon, Vicar or Curate belonging or "* appertaining, without Publication of Banns, or Licences of Marriage firſt "had and obtained, ſhall for every ſuch Offence forfeit the Sum of One "Hundred Pounds; the aforeſaid reſpective Forfeitures to be recovered "by Action of Debt, Bill, Plaint or Information, in any of his Majeſty's "Courts of Record; wherein no Eſſoin, Wager or Protection of Law, or "any more than one Imparlance ſhall be allowed; one Moiety thereof to "his Majeſty, his Heirs and Succeſſors, and the other Moiety to him or "them who ſhall inform, or ſue for the ſame."

But ſee now the above cited Stat. 26 Geo. 2. c. 33. *Page 576 2 Burn's *Eccleſ. Law*, 36. pl. 5. 12 Vin. Abr. 235. pl. 3. 15 Vin. Abr. 254. pl. 6. 2 Eq. Caſ. Abr. 585. pl. 3. 2 Bur. Rep. 898, 1079.

And by *Sect.* 4. of the ſaid Statute it is enacted, "That every Man "ſo married without Licence, or Publication of Banns as aforeſaid, ſhall "forfeit the Sum of ten Pounds, to be recovered, together with Coſts of "Suit, in Manner as aforeſaid, by any Perſon who ſhall inform or ſue for "the ſame; and likewiſe, that every Sexton or Pariſh-Clerk, who ſhall "knowingly or wittingly aid, promote and aſſiſt at ſuch Marriages, ſo ce"lebrated without Banns or Licences, as aforeſaid, ſhall forfeit the Sum of "five Pounds; to be recovered with Coſts of Suit, in Manner as aforeſaid, "by any Perſon who ſhall inform or ſue for the ſame" †.

†By 26 Geo. 2. c. 33.

Clandeſtine Marriages are made void. It directs where Licences ſhall be grantable. Perſons ſolemnizing clandeſtine Marriages, are declared guilty of Felony, and may be tranſported. Marriages of Infants, by

(D) Of Offences againſt the Rights of Marriage: And herein:

1. Of the Offence of a forcible Marriage.

BY the 3 *H.* 7. *cap.* 2. it is enacted in the Words following: "Where "Women, as well Maidens as Widows and Wives, having Sub- "ſtances, ſome in Goods moveable, and ſome in Lands and Tenements, "and ſome being Heirs apparent unto their Anceſtors, for the Lucre "of ſuch Subſtances, be oftentimes taken by ſuch Miſdoers contrary to "their Will, and after married to ſuch Miſdoers, or to other by their "Aſſent, or defiled, to the great Diſpleaſure of God, and contrary to the "King's Laws, and Diſparagement of the ſaid Women, and utter Heavi- "neſs and Diſcomfort of their Friends, and to the evil Enſample of all "other; it is therefore enacted, That what Perſon or Perſons from hence- "forth, that taketh any Woman ſo againſt her Will unlawfully, that is "to ſay, Maid, Widow, or Wife, that ſuch Taking, Procuring, and "Abetting the ſame, and alſo receiving wittingly the ſame Woman ſo "taken againſt her Will, and knowing the ſame, be Felony; and that "ſuch Miſdoers, Takers and Procurators to the ſame, and Receitors know- "ing the ſaid Offence in Form aforeſaid, be henceforth reputed and judg- "ed as principal Felons. Provided alway, that this Act extend not to "any Perſon taking any Woman only claiming her as his Ward, or "Bond-woman."

Sect. 3. and by 39 *Eliz. cap.* 9. "All Perſons who ſhall be Principals "or Procurers, or Acceſſories before ſuch Offence committed, are con- "cluded from the Benefit of the Clergy."

In the Conſtruction of the ſaid Statute of 3 *H.* 7. *cap.* 2. the following Points have been reſolved.

That the Indictment for this Offence muſt ſet forth, both that the Woman hath Lands or Goods, or that ſhe was Heir Apparent, and that
*Page 577 * the Taking was for Lucre; and alſo that ſhe was married or defiled; for
Hob. 182. Cro. Car. 485. Daliſ. 22. And. 115. 3 Inſt. 68. the enacting Clauſe, in ſaying, that what Perſon takes any Woman *ſo* againſt her Will, plainly reſtrains the Taking to ſuch as is within the Preamble; *(a)* but it needs not ſet forth, that the Taking was with an Intention to marry or defile.

Savil 59. 12 Co. 20, 110. *Stat. Tri.* Vol. 5. Fol. 468. *Swandſon*'s Caſe. *(a)* Yet theſe Words, *ea intentione ad ipſam maritand'*, are uſually inſerted in Indictments upon this Statute; and it is ſafeſt ſo to do. Hale's Hiſt. P. C. 660.

Hal. Hiſt. P. C. 660. Hawk. P.C. 110. It is ſaid in *Hale*, that to make the Offence Felony within this Statute, the Taking muſt be againſt her Will; but herein by *Hawkins*, that it is no Manner of Excuſe, that the Woman at firſt was taken away with her own Conſent; becauſe if ſhe afterwards refuſe to continue with the Offender, and be forced againſt her Will, ſhe may from that Time as properly be ſaid to be taken againſt her Will, as if ſhe had never given any Conſent at all; for till the Force was put upon her ſhe was in her own Power.

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by Licence, without Conſent of Parents, &c. are void. It directs in what Caſes Application is to be made to the Chancellor. It declares that no Suit ſhall be in the Eccleſiaſtical Courts to compel Marriage by reaſon of any Contract, &c. It directs how Regiſters are to be made. It does not extend to Marriages of the Royal Family: Nor to *Scotland:* Nor to Marriages among Quakers, Jews, &c.

That

That it is not material, whether a Woman taken againſt her Will be at laſt married or defiled with her Conſent, or not, if ſhe were under the Force at the Time; becauſe the Offender is in both Caſes equally within the Words of the Statute, and ſhall not be conſtrued to be out of the Meaning of it, for having prevailed over the Weakneſs of a Woman, whom by ſo baſe Means he got into his Power. Cro. Car. 493. 3 Keb. 193. Vent. 243. *Brown's* Caſe.

That thoſe who after the Fact receive the Offender, but not the Woman, are not Principals within this Statute; becauſe the Words are, *receiving wittingly the ſame Woman ſo taken, &c.* but it ſeems clearly that they are Acceſſories after the Offence, according to the known Rules of Common Law. 3 Inſt. 61. Daliſ. 22. St. P. C. 44. Hal. Hiſt. P. C. 661.

That thoſe who are only privy to the Marriage, but no ways Parties to the forcible Taking away, or conſenting thereto, are not within the Statute. Hal. Hiſt. P. C. 660.

That where a Woman is taken by Force in the County of *A.* and married in the County of *B.* the Offender may be indicted and found Guilty in the County of *B.* becauſe the continuing of the Force there, amounts to a forcible Taking within the Statute. Cro. Car. 448. Hob. 183. Hale's Hiſt. P. C. 660.

It hath been adjudged, as is the conſtant Practice at this Day, that on an Indictment for a forcible Marriage, grounded on this Statute, the Wife may be a Witneſs againſt the Huſband; for it being by Force, it cannot be ſaid a Marriage *de Jure*, ſo as to make them one Perſon in Law. Cro. Car. 488. Vent. 243. 4 Mod. 8.—But had ſhe freely, without Conſtraint, lived with him, that thus married her, any conſiderable Time, her Examination in Evidence might be more queſtionable. Hale's Hiſt. P. C. 661.

2. Of the Offence of marrying an Infant Female under the Age of ſixteen, without Conſent of Guardian.

By the 4 *Ph. & Mar. cap.* 8. it is provided, "That it ſhall not be "lawful for any Perſon to take away any Maid, or Woman-Child un- "married and within the Age of ſixteen Years, from the Parents or "Guardian in Socage, and that if any Woman-Child or Maiden, being "above the Age of twelve Years, and under the Age of ſixteen, do at any "Time aſſent or agree to ſuch Perſon that ſhall make any Contract of "Matrimony, (contrary to the Form of the Act) that then the next of "Kin of ſuch Woman-Child or Maid, to whom the Inheritance ſhould "deſcend, return or come, after the Deceaſe of the ſame Woman-Child "or Maid, ſhall, from the Time of ſuch Aſſent and Agreement, have, "hold and enjoy all ſuch Lands, Tenements and Hereditaments, as the "ſaid Woman-Child or Maid had in Poſſeſſion, Reverſion and Remainder "* at the Time of ſuch Aſſent and Agreement, during the Life of ſuch "Perſon that ſhall ſo contract Matrimony; and after the Deceaſe of ſuch "Perſon ſo contracting Matrimony, that then the ſaid Land, *&c.* ſhall "deſcend, revert, remain and come to ſuch Perſon or Perſons as they "ſhould have done in caſe this Act had never been made; other than him "only that ſo ſhall contract Matrimony." 3 Inſt. 62. 3 Mod. 84. A Baſtard is within this Act. 2 Stra. 1162. *Page 578

3. Of the Offence of procuring an improvident Marriage and therein of Marriage-Brokage Contracts and Agreements.

It is of ſuch Conſequence, that all Marriages ſhould proceed from free Choice, and not from any Compulſion or ſiniſter Means, that it hath been held a Matter indictable, or an Offence for which the Court will grant an Information, to procure an improvident or an unequal Marriage. Lev. 257. 5 Mod. 221.

But for this *vide* Abr. Eq. 89, 90. And on this Foundation, that Marriage ought to be free, Marriage-Brokage Bonds and Contracts have been declared to be void, and decreed to be given up and cancelled.

Show. Par. Ca. 76. *Hall* ver. *Patter.* So, though it was decreed in Chancery, that a Bond of 1000*l.* Penalty, for the Payment of 500*l.* given for the procuring a Marriage between Perſons of equal Rank, Fortune, &c. was good; yet upon an Appeal to the Houſe of Lords, the Decree was reverſed; for that ſuch Bonds to Match-Makers are of dangerous Conſequence, and tend to the Betraying and Ruining Perſons of Fortune and Quality, and are not to be countenanced in Equity; and that Marriage ought to be procured by the Mediation of Friends and Relations; and that ſuch Bonds would be of evil Example to Executors, Guardians, Truſtees, Servants and others who have the Care of Children.

Abr. Eq. 90. Nor will the Court only decree a Marriage-Brokage Bond to be delivered up, but a Gratuity of fifty Guineas, actually paid, to be refunded; for that ſuch Bargains are in no Shape to be countenanced.

An Uncle gives his Niece by Will 1200*l.* the Niece marries, but, antecedent to the Marriage, the Father takes a Bond from the then intended Huſband to pay him 200*l.* in caſe the Daughter ſhould happen to die without Iſſue Male, living her Huſband: The Daughter did die without Iſſue Male, living her Huſband; whereupon the Father ſued the Huſband at Law upon this Bond; and the Huſband brought his Bill in Equity to be relieved againſt this Bond, and had a Decree accordingly; for it appearing that no Money was paid, nor Conſideration for entering into it, the Court took it to be in Nature of a Marriage-Brokage Bond, and ſo therefore ordered it to be delivered up.

(E) Marriage how long to continue; and herein of the ſeveral Kinds of Divorces. And herein,

1. Of Elopement.

(*a*) That a Wife may have Alimony, without any Separation. Moor 874. MARRIAGE, for the Reaſons already given, being to continue during Life, a Wife can in no (*a*) Caſe whatſoever leave her Huſband, for in doing it ſhe breaks the moſt ſolemn Vow, which is made in the Preſence of God and in the Face of the Church, that ſhe will cleave to him during Life; and therefore, if a Woman runs away from her Huſband, without any (*b*) Provocation, he ſhall not anſwer for any (*c*) Contract ſhe makes, nor be obliged to anſwer for her Neceſſaries.

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(*b*) But if a Huſband turn away his Wife, or by ill Uſage obliges her to go away, he gives her Credit wherever ſhe goes, and muſt pay for Neceſſaries for her. Salk. 118. pl. 10. 6 Mod. 121. 2 Ld. Raym. 1006. but for this *vide* Tit. *Baron and Feme.* (*c*) That a Court of Equity will not aſſiſt a Wife, who elopes, with Alimony. Vern. 53.

2 Inſt. 435. Co. Lit. 32, 40 F.N.B. 150. Rol. Abr. 680. Alſo, if a Woman elope from her Huſband, ſhe loſes her Dower; but it ſeems, that Elopement was no Bar of Dower at the Common Law, though a Divorce were ſued and obtained for the Adultery; but now by the Statute of *W.* 2. *cap.* 34. it is expreſly provided, that in ſuch Caſe the Wife ſhall loſe her Dower; the Words of which are, *Si uxor ſponte reliquerit virum ſuum & abierit, & moretur cum adultero ſuo, amittat in perpetuum actionem petendi dotem ſuam, quæ ei competere poſſet de tenementis viri ſui, ſi ſuper hoc convin-*

convincatur, niſi vir ſuus ſponte & abſque coertione Eccleſiæ eam reconciliet, & ſecum cohabitare permittat, in quo caſu reſtituatur ei actio and though ſhe does not go away *ſponte*, but is taken againſt her Will, yet if after ſhe conſents, and remains with the Adulterer, ſhe ſhall loſe her Dower; for the Remaining with him, without Reconciliation, is the Bar of Dower, not the Manner of the Going away; and this was the old Way of preventing the Crime; for they thought it unfit that ſuch Wife, that did not ſhare in the Labours of the Huſband, ſhould have any Family Proviſion.

In *Dyer* there is a Precedent of ſuch Elopement pleaded, and Iſſue taken upon the Reconciliation of the Huſband; but it is there held, that the Defendant cannot give in Evidence any other Elopements than that which is pleaded; for there may be divers Elopements and divers Reconciliations, and Defendant, at his Peril, ought to take Iſſue on one only; that is, as I underſtand the Book, upon the laſt; for if there be divers Reconciliations, yet, if ſhe afterwards elope, the ſhewing that ſhe was once reconciled after Elopement, will not take away what is ſet up in Bar of Dower. Dyer 107. a.

If a Woman be raviſhed, and remain with the Raviſher againſt her Will, ſhe ſhall not loſe her Dower; but if after ſuch Raviſhment ſhe conſent to remain with him, ſhe ſhall loſe it, though the Book thinks the contrary; and in the Caſe cited by him, ſhe anſwered only to the Elopement, and not to the Remaining with the Adulterer; but if ſhe voluntarily goes away from her Huſband, though ſhe remain all her Life-time with the Adulterer againſt her Will; or if ſhe remains not with him, but he turns her away, yet ſhall ſhe loſe her Dower; but if ſhe be reconciled, as the Statute ordains, then ſhe ſhall be endowed, though the Huſband hath aliened the Land in the mean Time. Perk. 354. Brook 12. Rol. Abr. 680. 2 Inſt. 436. Co. Lit. 32. b.

If ſhe elopes, and lives in Adultery in any other the Manors or Lands of her Huſband, ſome (*c*) Books ſay ſhe ſhall not loſe her Dower; either becauſe it cannot be intended a Running away from her Huſband, when ſhe remains in any of his Manors or Lands, or becauſe he is to take Care that no ſuch live there: But my Lord (*d*) *Coke* holds the contrary; and ſays, though ſhe cohabits with her Huſband in the ſame Houſe, yet without his Reconciliation *ſponte*, ſhe ſhall loſe her Dower; *a fortiori* in the other Caſe; for the Adultery, and the Remaining with the Adulterer, are the Cauſes of her being barred of Dower; and ſo, though ſhe do cohabit, and be reconciled to her Huſband, yet if it be by Church Cenſures, ſhe ſhall loſe her Dower; though (*e*) *Rolle* ſays, if ſhe elopes, and after lives with her Huſband for ſome Years till his Death, by his Conſent, without Compulſion of the Church, ſhe ſhall not be barred of her Dower, though it be not averred, that ſhe was reconciled to her Huſband; which ſeems reaſonable enough, the Permiſſion to cohabit with him being an Argument and Proof of the Huſband's Reconciliation. (*c*) Perk. 355. F. N. B. 150. Rol. Abr. 680. (*d*) 2 Inſt. 436. (*e*) Rol. Abr. 680.

*If a Man grants his Wife, with her Goods, to another, and ſhe lives with the Grantee all the Life-time of the Huſband, yet ſhe ſhall loſe her Dower, by Reaſon of her living with him in Adultery; and in that Caſe, where ſuch a Grant was pleaded, it was held, 1*ſt*, That the Grant was void. 2*dly*, That it did not amount to a Licence, or, if it did, that it was void. 3*dly*, That after the Elopement, there ſhall be no Averment admitted *quod non fuit adulterium*; though the Grantee and the Woman married after the Huſband's Death; and though in that Caſe, they brought Sentence of Purgation of the Adultery from the Spiritual Court, yet it was not allowed againſt ſuch Preſumption. *Page 580 2 Inſt 435. Rol. Abr. 680. Dyer 106. b. in Margine.

If the Huſband's Relations keep him from his Wife, ſo that ſhe does not know what is become of him, and give out that he is dead, and thereupon procure her to releaſe all Marriages and Intereſts which ſhe can have in him as her Huſband, and alſo perſwade her to marry again, which ſhe does, with one who has Notice that her firſt Huſband is alive, but ſhe herſelf has no Rol Abr. 680. *Green ver. Harvey.*

no Notice of it; though ſhe lives in Adultery with this Man, and though her Huſband be not out of the Realm, nor beyond the Seas, ſo that ſhe ought to have taken Notice of his being alive; yet becauſe ſhe *non reliquet virum ſponte*, as the Statute ſays, but by Perſuaſion of his Friends, not knowing herſelf but that he was dead, this is no ſuch Elopement as will bar her of her Dower.

2. Of the Offence of taking away a Wife, and of criminal Converſation.

2 Inſt. 180-1, 434. Dyer 256. b.

At Common Law, the Huſband may have an Action of Treſpaſs *de uxore abducta cum bonis viri*; alſo this Offence is prohibited by the Statute of *Weſtm.* 2. *cap.* 13. and a further Puniſhment inflicted than was at the Common Law; alſo by *Weſtm.* 2. *cap.* 34. it is puniſhable at the Suit of the King, by the Words following, *De mulieribus abductis cum bonis virorum ſuorum habeat Rex ſectam de bonis ſic aſportatis.*

47 E. 3. *Action ſur l' Statut'* 37. 2 Inſt. 435. *cont'.*

If the Wife be *infra annos nubiles*, *viz.* under the Age of twelve Years at the Time of taking away, ſome have holden, that the Huſband ſhall not have a Writ *de uxore abducta cum bonis viri*; but my Lord *Coke* holds the contrary, and that ſhe is *uxor* until Diſagreement.

2 Inſt. 434.

If the Wife be taken away, and after be divorced, or if ſhe die, yet the Huſband ſhall have his Action *De uxore abducta cum bonis viri*; for in this Action he ſhall not recover his Wife, but Damages; and he cannot have an Action for taking her away as his Servant, becauſe the Law gives him an Action in another Form.

2 Inſt. 435. Cro. Jac. 538, 539. that it may be *Cepit & abduxit* as well as *Rapuit.*

Alſo it is held, that though the Words of the Writ be *Rapuit*, *&c.* yet here it is taken for a violent Taking away, and not when carnal Knowledge is had; ſo as this Action may be brought againſt Women as well as Men.

Mich. 17 Car. 2. at *Oxford*, in *B. R. Walker* ver. *Rich.* Ent. 1654. in *Engliſh.*

In an Action of Treſpaſs *de uxore abducta cum bonis viri ſui*, the Jury found for the Plaintiff, *quoad* taking ſome Goods, but as to all the Reſt, for the Defendant. It was alledged, 1*ſt*, That this Action concludes *contra formam ſtatuti*, and ſo the Plaintiff makes his Caſe upon the Statute, and has failed in Proof; for the Verdict is for the Defendant, as to the Taking away the Wife, which is the only Matter provided againſt by any Statute. *Sed non allocatur*; for *per Cur'*, if a Man brings an Action at Common Law, and concludes *contra formam ſtatuti* generally, it ſhall not hurt; but if he recites a Statute in particular, and lays the Fact to be *contra formam ſtat' prædict'*, there he muſt make his Caſe within the Statute, elſe he has failed of his Caſe; and it has been adjudged, than an Indictment of Barretry concluding *contra formam ſtat'* is
*Page 581 * good, though there be no Statute that is expreſs againſt it. 2*dly*, That it does not lay *per quod Conſortium amiſit.* 3*dly*, That the Word *Raviſh in Engliſh* implies a carnal Knowledge only; (though in Latitude it ſignifies alſo a forcible taking away) and ſo the Matter amounts to a Felony of the Plaintiff's own ſhewing, for which he can have no Action of Treſpaſs; but to theſe the Court paid no Regard, becauſe they were made immaterial by the Verdict.

Cro. Car. 89, 90. adjudged, and affirmed *in Cam' Scacc'*. Cro. Jac. 538.

Alſo the Huſband alone may bring an Action for the Battery, carrying away and detaining of his Wife, *per quod ſolamen & conſortium* of his ſaid Wife *amiſit*; becauſe the Action is founded upon the ſpecial Damage done to himſelf, and will be no Bar to another Action brought by Baron and Feme, or by the Feme, after the Death of the Baron, for the ſame Battery.

S. P. adjudged. 2 Rol. Abr. 556. Jon. 440. Lit. Rep. 339. 2 Rol. Rep. 51. S. P. adjudged.

In

In Treſpaſs and falſe Impriſonment by Baron and Feme, *per quod negotia domeſtica* of the Huſband *remanſerunt infecta ad grave damnum ipſorum*. It was objected, that this being laid as a ſpecial Damage to the Huſband, the Action ought to have been brought by him alone; but adjudged for the Plaintiffs after Verdict, being only Matter in Aggravation of Damages. Salk. 119 pl. 12. 6 Mod. 127. 2 Ld. Raym. 1031. *Ruſſel* ver. *Corne.*

In Treſpaſs by Baron and Feme, for Beating the Feme, they may declare, that it was *ad damnum ipſorum*, notwithſtanding a Feme Covert can have no Damages, for this Action will ſurvive. Sid. 387. Palm. 393. 3 Mod. 120.

And as the Huſband may bring an Action for the Battery, carrying away and detaining his Wife; ſo alſo may he have an Action againſt a Perſon for having criminal Converſation with her, although the Wife conſent to the Adulterer; for this is a Matter in which ſhe cannot aſſent, by Reaſon of the Injury to the Huſband, and his Intereſt in her. 7 Mod. 79.

Alſo the Huſband may not only bring an Action at Law for the criminal Converſation, in which he ſhall be repaired in Damages, but may alſo proceed in the Eccleſiaſtical Court for the Adultery and Solicitation of Chaſtity; and the Proceedings in the one Court ſhall be no Bar to the other. 2 Salk. 553.

But where there was an Indictment for aſſaulting, beating, wounding and endeavouring to raviſh the Wife of *B.* upon which the Party was convicted; and afterwards the Huſband brought an Action of Treſpaſs for the ſame Cauſe; and the Party being alſo libelled againſt in the Spiritual Court for the ſame Fact, *viz.* for ſoliciting her Chaſtity, moved for a Prohibition to the Proceedings in the Spiritual Court; and though it was urged for the Juriſdiction of the Spiritual Court, that they may puniſh for the Solicitation and Incontinence, and that this Suit was *pro ſalute animæ*, the others for Fine and Damages: But *per Cur'*, a Prohibition was granted; for it being an Attempt and Solicitation to Incontinence, coupled with Force and Violence, it does by Reaſon of the Force, which is temporal, become a temporal Crime *in toto*; as if one ſays, *Thou art a Whore and a Thief*, or *Thou keepeſt a Bawdy-Houſe*, which are temporal Matters, the Party ſhall not proceed in the Spiritual Court; whereas if it were only, *Thou art a Whore*, a Libel lies in the Spiritual Court; ſo if it be ſaid of a Woman, that ſhe is a Bawd only, and not that ſhe keeps a Bawdy-houſe. But *per Holt* C. J. If one commit Adultery, and the Huſband bring Aſſault and Battery, this ſhall not hinder the Spiritual Court; for it is a criminal Proceeding there, and no Indictment lies at Common Law for Adultery.

* 3. Of the ſeveral Kinds of Divorces. *Page 582

Divorces are either ſuch as (*a*) diſſolve *a Vinculo Matrimonii*, and ſet the Parties entirely at Liberty, ſo that they may marry whom they pleaſe afterwards; or ſuch as ſeparate *a Menſa & Thoro*, from Bed and Board only; in which laſt the Marriage continues in Force, ſo that if either of them marry any other, ſuch Marriage is void. Co. Lit. 235. a. Cro. Car. 462.

(*a*) Where ſuch Sentence of Divorce is given in the Spiritual Court, the Iſſue ſhall be perpetually bound, ſo long as that ſtands in Force; and ſhall not at Common Law be admitted to make any proof to the contrary. 7 Co. 43. *Ken*'s Caſe. Jenk. 289. Cro. Jac. 186.

A Divorce by Reaſon of *(b)* Precontract † diſſolves *a Vinculo Matrimonii*; 47 E. 3. 78. 18 H. 6. 34.

Rol. Abr. 360. (*b*) *Per* 32 H. 8. c. 38. No Divorce could be for any Precontract after Marriage ſolemnized in the Face of the Church, and conſummate with bodily Knowledge, or Fruit of Children; but *quoad* this Matter, this was repealed *per* 2 & 3 E. 6. c. 23. and the whole Act *per* 1 & 2 Ph. & M. c. 8. *parag.* 20. and the 32 H. 8. c. 38. *quoad* ſo much only as was not repealed by 2 & 3 E. 6. c. 23. was revived *per* 1 Eliz. c. 1. *parag.* 11. ſo that *quoad* this Matter, the 32 H. 8. c. 38. ſtands repealed.——† *Qu.* If ſince 26 Geo. 2. c. 33. any ſuch Divorce can now be had, as no Suit or Contract of Marriage, to compel the ſame, can be ſupported in the Eccleſiaſtical Courts?

for

for the Party being under a prior Engagement, the ſecond Marriage is null and void, and conſequently the Iſſue of ſuch ſecond Marriage are Baſtards.

Co. Lit. 235. *Vide ſupra* Letter (A).

So a Divorce by Reaſon of Conſanguinity and Affinity diſſolve *a Vinculo Matrimonii*; ſuch Marriage being againſt the Divine poſitive Law, and therefore void.

Co. Lit. 235. 5 Co. 98. But for this Kind of Divorce, *vide* be divorced from one Woman *propter perpetuam generandi impotentiam*, and then marry another, and have Iſſue by the ſecond Marriage, which continues without Divorce, the Iſſue are lawful; for a Man may be *habilis & inhabilis diverſis temporibus*; and the ſecond Marriage is not avoided by any Divorce, and therefore ſtands good in Law. 5 Co. 98. *Bury's* Caſe. Noy 72. Moor pl. 366. S. C. by the Name of *Morris* ver. *Webber*.

So a Divorce by Reaſon of Frigidity, or Impotence, diſſolves the Marriage abſolutely (*c*) becauſe the End of the Contract cannot be anſwered.

(*c*) 5 Co. 9. Moor 225. 2 Leon. 169. And. 185. Dyer 178. pl. 40.

Rol. Abr. 681. 2 Leon. 169. Moor 226. Cro. Car. 462. 2 Inſt. 684, 687.

A Divorce *Cauſa Profeſſionis* is reckoned by ſome amongſt the Cauſes that diſſolve the *Vinculum Matrimonii*, the Monks and Nuns, by their being profeſſed, having vowed perpetual Chaſtity; but others hold, that in ſome Caſes it does not, and that in ſuch the Wife ſhall be endowed; but it is ſaid, this Divorce is now taken away by 32 *H.* 8. *cap.* 38. and other Acts, made on Purpoſe to take away that and other ſcrupulous Divorces.

Rol. Abr. 357.

And though theſe Kinds of Divorces diſſolve *a Vinculo Matrimonii*, yet the Iſſue between them are not Baſtards, till there be a Divorce actually had; for though ſuch Marriages be unlawful, yet they remain good till Sentence of Divorce be pronounced; and conſequently the Iſſue muſt be eſteemed legitimate, till ſuch a Diſſolution.

Rol. Abr. 681. Co. Lit. 32. a. 33. b. 7 Co. 70. 5 Co. 98. 2 Leon. 169.

Alſo, though a Divorce *Cauſa Præcontractus*, *Cauſa Conſanguinitatis*, *Cauſa Affinitatis*, or *Cauſa Frigiditatis*, diſſolve the *Vinculum Matrimonii*, and leave the Parties at Liberty to marry again; yet if either of the Parties die before ſuch Sentence of Divorce be actually pronounced, it cannot be pronounced (*d*) after; and therefore if the Huſband die before ſuch Divorce, the Iſſue are legitimate, and his Wife *de facto* ſhall have Dower; for it was *legitimum matrimonium quoad dotem*, and the Biſhop ought to certify, that they were *legitimo matrimonio copulati*.

(*d*) But tho' in Caſe of Inceſt a Divorce cannot be had after the Death of one of the Parties, ſo as to baſtardize the Iſſue, yet the Spiritual Court may proceed to puniſh the Survivor for the Inceſt. Carth. 271. 4 Mod. 182. Salk. 121.

*Page 583 Co. Lit. 235. Cro. Car. 462. 7 Co. 42. Noy 108.

* A Divorce *Propter adulterium* does not diſſolve the Marriage, but only makes a Separation *a Menſa & Thoro*; leſt married Perſons ſhould commit the Crime in order to diſſolve the Marriage; and though ſuch a Divorce does not baſtardize the Iſſue, yet the Children born in ſuch a State of Separation are *prima facie* not preſumed to be the Huſband's, unleſs it can be proved that they cohabited afterwards; but ſuch Divorce does not bar the Wife of Dower.

Cro. Car. 462.

So a Divorce *Propter ſævitiam* or *Metum* is of the ſame Nature, and does not diſſolve the Bond of Matrimony; but is only a Proviſion for the Woman's Safety, that ſhe may avoid her Huſband's Cruelty and ill Uſage.

Merchant

Merchant and Merchandize.

AS no one Man can turn his own Induſtry to all the ſeveral Varieties that are neceſſary for a convenient Livelihood, but muſt by a careful and laborious Diligence in any one Affair, or particular Branch of Buſineſs, acquire more than is neceſſary for his own Subſiſtence; and as the Neceſſities and Materials of Life are various, and not all of them to be acquired by the Labour of any one particular Perſon; and as they are likewiſe periſhable, and not long to be preſerved without Alteration and Corruption, hence aroſe the Neceſſity of Bartering and Exchanging, and that one Man ſhould imploy his Time in one Art and Means of Living; and that that which was redundant from ſuch Art of his ſhould be communicated to others, in Exchange for the other Neceſſaries of Life which he wanted, and wherewith they abounded, and that the periſhable Materials ſhould be exchanged for thoſe more permanent and durable, or to receive of the ſame hereafter, when the Party became old and unfit for Labour.

And as this Neceſſity of Permutation and Exchange begot at firſt the Notion of Merchandize, ſo, when the ſeveral Ornaments of Life were brought to Light, the Ways of Traffick and Exchange grew more extended and inlarged; and civilized States brought from (*a*) other Countries ſuch Materials as they themſelves wanted, and which were the Produce of thoſe Places; and ſuch as tended to inrich and aggrandize themſelves, and were neceſſary to a polite and adorned Way of Living.

(*a*) It is Foreign Trade that renders us, ſays *Molloy*, rich, honourable, and great; that gives us a Name and Eſteem in the World; that makes us Maſters of the Treaſures of other Nations and Countries, and begets and maintains our Ships and Seamen, the Walls and Bulwarks of our Country. Molloy 416.

Hence it is, that in every civilized and well regulated State, and eſpecially in an Iſland, Trade and Merchandize ſhould be protected and incouraged, and that it ſhould be free to all Perſons; as every one, who would live, is under a Kind of natural Neceſſity to Labour, in which he has a Property, being the Means of Livelihood; which to hinder him from, would be as cruel as to deprive him of Life itſelf; and therefore it ſeems agreed, from the fundamental Principles of our Government, that the King cannot regularly prohibit Trade, nor lay a Penny Impoſition on it; but • Page 584 that every Man may uſe the Sea, and trade with other Nations, as freely as he may uſe the Air.

And this Freedom of Trade is not only allowed by the Common Law, but hath alſo been aſſerted and eſtabliſhed by the Care and Wiſdom of Princes and Parliaments; and to this Purpoſe it is provided by *Magna Charta*, *cap.* 30. That (*b*) all Merchants, (*c*) if they were not openly pro-

(*b*) This reſpects Aliens only; which ſtrongly proves that the *Engliſh* had this Liberty before; otherwiſe they would not have extended it to Aliens, and left the *Engliſh* without it. 2 Inſt. 57. (*c*) This Prohibition muſt be by Act of Parliament, becauſe it concerns the whole Realm, which is implied in the Word *Openly*, and relates to Aliens only. 2 Inſt. 57.

hibited

hibited before) ſhall have their ſafe and ſure Conduct to depart, come and carry, buy and ſell without any Manner of evil Tolts, by the old and rightful Cuſtoms, &c.

But notwithſtanding this Freedom of Trade, yet it ſeems (*c*) agreed, that the King may in Time of War, and for the Public Service and Safety, lay an Embargo on Ships, and imploy the Ships of his Subjects in the Public Service; but this, ſays my Lord Chief Juſtice *Holt*, ought to be upon great Emergencies, and for the Public Benefit, and not for the private Intereſt of any Perſon or Society: Alſo it ſeems agreed, that the King may, by his Writ of (*d*) *Ne exeat regnum*, retain a Subject from going out of the Realm; and may by his (*e*) Privy Seal command any of his Subjects to return out of a foreign Nation, on Pain of having their Lands ſeiſed, &c. It hath likewiſe been holden, that the King by his (*f*) Prerogative might reſtrain his Subjects from trading with an (*g*) Infidel Nation, State or People, without his Licence; and on this Foundation principally it was held, in the Caſe of (*b*) *Sands* and *The Eaſt-India Company*, that the King's Charter, which gave them an excluſive Right to trade to the *Eaſt-Indies*, was good; but this Doctrine ſeems now exploded, and that nothing can exclude the Subject from Trade, but an Act of Parliament.

(*c*) Skin. 335. 3 Lev. 352. 4 Mod. 176. *Sands* ver. *Child* and *Lynch*. Ld. Raym. 22, 152, 223, 235, 272, 442, 446, 578. 2 Ld. Raym. 806, 893, 932, 936, 982, 984, 1044, 1206, 1247, 1285, 1453. Vern. 21, 120, 307, 297, 465.

2 Vern. 643. 10 Mod. 78, 105, 131, 264. 11 Mod. 6. pl. 27, 30. pl. 1, 44. 12 Mod. 134, 405, 408, 440, 442, 511, 526. Ld. Raym. 576, 632. Salk. 33. pl. 4. Carth. 518. Gilb. Eq. Rep. 213, 227. Fitzgib. 197. Stra. 695. 2 Stra. 890, 936. (*d*) That this Writ is properly granted upon ſome Matter of State; and of late extended to confine a Perſon to abide the Juſtice of Courts here: not to reſtrain a Perſon from a lawful Act, ſuch as Merchandize; nor is it ever univerſal, but always particular, and granted upon Oath made concerning a particular Perſon. Skin. 136. 3 Mod. 127. 4 Mod. 179. Wil. Rep. 263. pl. 60. 3 Wil. Rep. 312. pl. 80. Caſ. Temp. Talb. 196. Pre. Chan. 171, 230. (*e*) For this *vide* Dyer 128. pl. 61. Lane 42. 3 Mod. 127. (*f*) In Sir *John Davis*'s Rep. 9. it is ſaid, that the Reaſon of the King's being intitled to Cuſtoms, was his permitting Merchants to go beyond Sea when he could prohibit them.——But in F. N. B. it is ſaid, that, by the Common Law, every Subject may go out of the Kingdom for Merchandize or Travel, or other Cauſe, as he pleaſes, without Leave. (*g*) In *Grotius de bello & pace*, lib. 2. c. 15. parag. 11. it is ſaid, that a Government ſhould take Care that there be no Infection by Correſpondence with Infidels; and in *Calvin*'s Caſe, 7 Co 6. 17. Infidels are called *Perpetui inimici Regis*; and in 2 Brownl. 296. it is ſaid by my Lord *Coke*, that no Subject of the King may trade with any Realm of Infidels, without the King's Licence, that he might not, ſays he, relinquiſh the Catholick Faith, and adhere to Infideliſm; and ſays, that he had ſeen ſuch a Licence in the Time of E. 3.—Others ſay, that Turks and Infidels are not *perpetui inimici*, nor is there any particular Enmity between them and us; for though there be a Difference between our Religion and theirs, that does not oblige us to be Enemies to their Perſons. Salk. 46. pl. 2.—That they cannot be converted, if Converſation with them is not lawful: *Holt* C. J. to which the reſt of the Court ſeemed to agree. Skin. 336.—And that it is a Diſparagement to the Chriſtian Religion, to think that they ſhould rather be converted by Infidels, than Infidels by them. 3 Lev. 354. (*b*) Raym. 488. Vern. 127. 2 Chan. Ca. 165. Skin. 91. pl. 9. 132. pl. 7. 197. pl. 1. 223. pl. 4.

2 Rol. Rep. 113. Yelv. 135. 3 Mod. 226-7. Show. 127. Carth. 83.

And as the Freedom of Trade and Merchandize is ſupported by the Common Law, ſo likewiſe are there certain Cuſtoms and Privileges annexed thereto by the Common Law, and of which the Judges will take Notice *ex Officio*. But theſe Privileges are not to be extended (*i*) to every one who buys and ſells; nor is he from thence, ſays *Molloy*, to be denominated a Merchant, which Appellation peculiarly belongs to him

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* who trafficks in the Way of Commerce by Importation or Exportation; or otherwiſe, in the Way of Emption, Vendition, Barter, Permutation or Exchange; and who makes it his Living to buy and ſell, and that by a continued Aſſiduity, or frequent Negotiation in the Myſtery of Merchandizing; but thoſe, who buy Goods to reduce them by their own Art or Induſtry into other Forms than formerly they were of, are properly called Artificers, not Merchants.

Ld. Raym. 175, 281, 759, 774, 1542. 10 Mod. 287. Molloy 416, 419.

(*i*) There are four Sorts of Merchants, *viz.* Merchants Adventurers, Merchants Dormants, Merchants Traveling, and Merchants Reſidents. 2 Brownl. 99. *per Coke*.—But it is ſaid, that a Merchant includes all Sorts of Traders, as well and as properly as Merchant Adventurers; and that a Merchant Taylor is a common Term. 2 Salk. 445. *per Holt*; & *vide* Head of *Bankrupts*.

It

It hath been adjudged, that a Gentleman being Abroad on his Travels, and drawing a Bill of Exchange, that this made him a Merchant within the Cuſtom as to a ſpecial Purpoſe, to make him reſponſible to the Party upon Non-payment; and this the rather from the Inconveniences that might enſue, and the Suſpicion that might increaſe amongſt foreign Merchants upon Bills of Exchange, if Perſons who took upon themſelves to draw ſuch Bills ſhould not be liable to the Payment thereof. Carth. 82. 2 Vent. 293. Show. 127. Comb. 45. *Sarfield* ver. *Witherly*.

But as the Laws and Cuſtoms of Merchants are of various kinds, and moſt of them chiefly known (*a*) to Merchants themſelves, we ſhall here only inſert what we find in our Law-Books relating to the following Heads.

(*a*) The Cuſtom of the Merchants is Part of the Common Law of this Kingdom, of which the Judges ought to take Notice; and if any Doubt ariſe to them about their Cuſtom, they may ſend to the Merchants to know their Cuſtom, as they may ſend for the Civilians to know their Law. Winch 24.——May direct an Iſſue for Trial of a Cuſtom among Merchants. Hard. 486 ‡.

‡ The Law of Merchants cannot be proved by Witneſs, for it is the Law of the Land. *Pillan* ver. *Van Mierop*. 3 Burr. 1663.——In Commercial Caſes among Merchants, want of Conſideration is no Objection. The *nudum pactum* does not exiſt in the Law of Merchants. *Ibid.* But *vide* the Caſe.

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(B) Of Principals and Factors. 587.
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And herein,

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And

And herein,

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8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein. 614.

(A) Of Alien Merchants.

Vide Tit. *Alien.*

ALTHOUGH, by the Policy of our Conſtitution, Aliens lie under ſeveral Diſabilities, and are denied in many Inſtances the Benefits of our Laws; yet are they (*a*) here, as in moſt other Countries, allowed to Trade and Merchandize, which Privilege is confirmed to them by (*b*) *Magna Charta*, and (*c*) divers other Acts of Parliament.

(*a*) The Law of *England* rather contracts than extends the Diſability of Aliens; becauſe the ſhutting out of Aliens tends to the Loſs of People, which, laboriouſly employed, are the true Riches of any Country. Vent. 427. *per Hale* C. J.—The King pardons his loving and obedient Subjects; this extends to Aliens, if here at the Time, though not made Denizens, *Per Hob* 271. (*b*) For this *vide ſupra*, and 2 Inſt. 57. Molloy 417. (*c*) By the 2 E. 3. c. 9. Merchant Strangers, and others, ſhall go and come with their Merchandize.—By 9 E. 3. c. 1. All Merchants Strangers, and others, may freely buy and ſell their Commodities from whenceſoever they came without Interruption, notwithſtanding Charters or Uſage to the contrary, which Charters or Uſage (if any be) the King, Lords and Commons hold to be of no Force, as being to the Damage of the King and his great Men, and to the Oppreſſion of the Commons, *&c.*

Co. Lit. 129. b. And. 25. Dyer 2. b.

And as Foreigners and Aliens are allowed to trade amongſt us, ſo are they allowed to maintain perſonal Actions; becauſe, otherwiſe they would be incapacitated to merchandize, but they cannot maintain any real Action, becauſe not neceſſary that they ſhould purchaſe Lands, or ſettle amongſt us.

11 E. 3. Rot. 87. Dyer 2. b. in Margine.

An Alien Merchant may upon a Statute extend Lands, and upon Office the King ſhall not have them; and upon Ouſter he ſhall have an Aſſiſe; for the main End and Deſign of both the Statute Staple and Merchant was to promote and encourage Trade, by providing a ſure and ſpeedy Remedy for Merchant Strangers, as well as Natives, to recover their Debts at the Day aſſigned for Payment.

Co. Lit. 2. b. (*d*) That he muſt be a Merchant.

So an Alien (*d*) Merchant may take a Leaſe of a (*e*) Houſe for his Habitation for Years only, and this alſo is for the Encouragement of Commerce:

Poph. 36. Rol. Abr. 194.——For Leaſes of any Dwelling-Houſe or Shop, made to Alien Artificer or Handicraſtman, are void by 32 H. 8. c. 16. ſ. 13. and the Perſon taking ſuch Leaſe forfeits 100 *l.* and the Perſon letting 100 *l.* for which *vide* Sid. 308, 309, 357. 2 Keb. 102, 116, 118. Sand. 6, 8. 2 Keb. 315. 3 Mod. 94. (*e*) But he cannot take a Leaſe for Years of Land, Meadow, &c. not being neceſſary for his Trade or Traffick. Co. Lit. 2. b. 7 Co. 17. Dyer 2. b. *cont.*

And.

merce: for if an Alien trade, he muſt have an Abode amongſt us; but if he (*f*) depart the Kingdom, or die, it goes to the King, not to his Executors or Adminiſtrators, becauſe it was only a perſonal Privilege annexed to the Alien as a Merchant, for the Encouragement of Merchandize, and conſequently muſt expire with him, without going to his Executors or Adminiſtrators. And. 25. Bendl. 36. By 27 E. 3. c. 2. it is enacted, that all Merchant Strangers and not Enemies, may ſafely dwell in the Realm, &c. upon which Statute, at a Reading in *Lincolns-Inn*, 35 Eliz. it was agreed a Merchant Alien might take a Leaſe of a Houſe with Gardens at Will, but not for Years; *per* Dyer 2. b. in Margine. (*f*) Not if he goes beyond Sea, and leaves Servants in his Houſe during his Abſence. Dyer 2. b.

* A Merchant Stranger ſhall have an Action for ſaying he is a Bankrupt, for by Law he may have Perſonal Actions; and theſe Words tend to impair his Credit in his Trade. *Page 587 Yelv. 198. Bulſ. 134. S. C.

Alſo by the 21 *Jac.* 1. *cap.* 19. it is provided, that that Act, and all other Acts heretofore made againſt Bankrupts, ſhall extend to Strangers born, as well Aliens as Denizens, as effectually as to natural-born Subjects, both to make them ſubject to the Laws as Bankrupts, as alſo to make them capable of the Benefit or Contribution as Creditors by theſe Laws.

The Sons of an Alien, though born here, being Merchants, for the firſt Generation ſhall pay Alien (*a*) Cuſtoms and Duties, ſaid to be the Practice of the Exchequer. Lit. Rep. 140. Hard. 335. S. P.

(*a*) For this *vide* Molloy 305, 322.

But though Alien Merchants, in the Payment of Cuſtoms and otherwiſe, lie under ſome Diſadvantages different from natural Subjects; yet in other Reſpects are they ſaid to have Advantages above them; in that by the Common Law an Action of Account lay for a Merchant Stranger againſt Executors; that a Defendant could not wage his Law to an Action of Debt brought by a Merchant Stranger, and that Merchant Strangers were not to be ſworn in Leets, &c. Palm. 14.

As to Merchant Strangers, whoſe Prince is in War with the Crown of *England*, if they are found within the Realm at the Beginning of the War, they ſhall be attached with a Privilege and Limitation without Harm of Body or Goods, until it be known to the King, how Merchants of *England* are uſed and intreated in their Country, and accordingly they ſhall be uſed in *England*, the ſame being *Jus belli*; but for Merchant Strangers that come into the Realm after War begun, they may be dealt withal as open Enemies. 7 E. 4. 13, 14. Bro. Tit. *Property* 38. 2 Inſt. 58. Molloy 417, 418. Skin. 204.

If an Alien Enemy comes here *ſub ſalvo conductu*, he may maintain an Action; ſo if an Alien Amy comes hither in Time of Peace, *per licentiam Domini Regis*, as the *French* Proteſtants did, and lives here *ſub protectione*, and a War afterwards happens between the two Nations, he may maintain an Action; for Suing is but a conſequential Right of Protection; and therefore an Alien Enemy, that is here in Peace under (*b*) Protection, may ſue upon a Bond; *aliter* of one commorant in his own Country ‡. Salk. 46. pl. 1. Ld. Raym. 282. *Wells* ver. *Williams*.

(*b*) But an Alien Enemy who has ſuch Protection, muſt plead it. 7 Mod. 150. *Sylveſter*'s Caſe. Ld. Raym. 283, 853. 2 Stra. 1082.——‡ By Stat. 14 Geo. 3. c. 84. Perſons naturalized ſhall not have *Britiſh* Privileges of Trade in Foreign Countries, unleſs they ſhall have reſided *ſeven* Years in *Britiſh* Dominions, without being above two Months abſent at a Time.

(B) Of Principals and Factors.

Molloy 421. AS no one Perſon, whoſe Trade is extenſive, can tranſact all his own Affairs; ſo it is neceſſary for him to depute another in his Place, on whoſe Ability and Honeſty he can rely; and ſuch Perſon ſo deputed is called a Factor, who is in Nature of a Servant, whoſe Acts ſhall bind his Maſter or Principal, ſo far as he acts purſuant to the Authority given him.

Molloy 422. Bulſ. 103. If the Commiſſion be general, as to *diſpoſe, do, and deal therein as if it were your own*, hereby the Factor is excuſed if a Loſs happens; but if the Commiſſion be to *ſell and diſpoſe*, hereby the Factor is not enabled to ſell upon Tick, nor can he ſell for an unreaſonable Time, as ten or twenty Years, though there be the Words *as if it were your own*, but muſt ſell according to the uſual Time, for which Credit is given for the Commodities he diſpoſes of.

2 Mod. 100. adjudged. *Page 588 See Eq. Caſ. Abr. 369. 2 Vern. 638. 3 Wil. Rep. 185. pl. 44. 187, 279. 10 Mod. 144. upon Credit.

If in Account the Defendant pleads before Auditors, that the Goods for which he is to account were *bona Peritura*, and notwithſtanding his Care in * keeping them grew worſe, and that they remained in his Hands for Want of Buyers, and were in Danger of growing worſe, and that therefore he ſold them upon Credit to a Man beyond Sea; this is no good Plea, for a Factor cannot ſell, even *bona Peritura*, upon (*a*) Credit, without a particular Commiſſion ſo to do.

2 Strs. 1178, 1182. Bulſ. 101.

(*a*) It is the common Practice to give Factors Power to ſell

2 H. 4. 12. b. Co. 90. b. 172. a. 11 Co. 90. a. F. N. B. 117.

In Favour of Trade and Merchandize, an Action of Account lies at Common Law againſt a Factor as againſt a Bailiff, in which he ſhall have all (*b*) reaſonable Allowances.

2 Rol Abr. 161.

(*b*) Therefore it is a good Diſcharge before Auditors for a Factor to ſay, that in a Tempeſt, becauſe the Ship was ſurcharged, the Goods were caſt over-board into the Sea. Rol. Abr. 124. Bro. Tit. *Account* 10.—So that he was robbed of the Goods without his Default or Negligence. Co. Lit. 89.—So that he durſt not buy for fear of Loſs. Rol. Abr. 124.

Rol. Abr. 118. Dyer 20. Cro. Eliz. 644.

Alſo if a Man by Obligation acknowledges that he has received Money *ad proficiendum & computandum*, the Obligee may either ſue the (*c*) Bond, or have an Action of Account at his Election.

(*c*) Where a Man covenanted to render a true Account, &c. and held that an Action of Covenant lay on the Deed. Rol. Rep. 52. 2 Bulſ. 256 ——So an *Aſſumpſit* will lie on a Promiſe to diſpoſe of Goods, and to give an Account thereof. Salk. 9. pl. 1. Carth. 89. Comb. 149.—But where the Demand is of Conſequence, and the Matter of an intricate Nature, it is moſt uſual to reſort to a Court of Equity, where Matters of Account are moſt commodiouſly adjuſted, and more advantageouſly determined for both Parties; the Plaintiff being in that Court intitled to a Diſcovery of Books, Papers, the Defendant's Oath, &c. *Vide* Tit. *Account*.

Molloy 423. Cro. Jac. 265. Lan. 65.

If Goods are conſigned to a Factor, and upon Arrival he makes a falſe Entry at the Cuſtom-Houſe, or land them without paying the Cuſtoms, whereby they become forfeited and are ſeized, whatever the Principal hereby ſuffers, the Factor muſt inevitably make good, although his Commiſſion was general; but if the Factor makes his Entry according to the Invoice, or his Letter of Advice, and it falls out the ſame are miſtaken, though the Goods are loſt, yet is the Factor excuſed.

Chan. Ca 25. *Smith* ver. *Oxenden*. Two Merchants, having certified the Cuſtoms to be ſo againſt two others, who held that the Benefit belonged to the Principal. Chan. Ca. 76. S. P. and Skin. 149. S. P. ſo held to have been determined by Lord *Clarendon* —

If a Factor beyond Sea be brought to Account in Equity, he ſhall be allowed the Cuſtoms payable beyond Sea, becauſe he runs the Venture; and if

But

if the Goods had been loſt by Non-payment of ſuch Cuſtoms, he muſt have anſwered the Value of them. But *North* L. K. ſaid he was not ſatisfied herewith, for that though in the ſaving the Cuſtoms the Factor ventured his own Life, yet the Principal's Goods were ventured alſo.

But if a Home Factor be brought to Account, he ſhall not be allowed the Cuſtoms, unleſs he ſwear that he hath paid them; becauſe it were a Matter of great Scandal, that any Thing ſhould paſs the Allowance of a Court of Juſtice, that is gotten by defrauding the Government. Chan.Ca.30. *Beer* ver. *Landall.*

The Principal ſhall anſwer for his Factor in all Caſes where he is privy to the Act of Wrong; and ſo in Contracts, if a Factor buy Goods on the Account of the Principal, eſpecially where he has been uſed ſo to do, the Contract of the Factor will oblige the Principal to a Performance of the Bargain. Molloy 423. & *vide* Tit. *Maſter and Servant.*

But if *A.* being poſſeſſed of certain artificial and counterfeit Jewels of the Value of 168 *l.* and knowing them to be ſuch delivers them to *B.* his Servant, commanding him to tranſport the ſaid Jewels to *Barbary*, and them to ſell to the King of *Barbary*, or to ſuch other Perſon as would buy them, but gives *B.* no Charge to conceal their being counterfeit, and thereupon *B.* goes into *Barbary*, and knowing theſe Jewels, to be counterfeit, ſhews them to *C.* for good and true Jewels, and affirming to * *C.* that they were worth 810 *l.* deſires *C.* to ſell them to the ſaid King; whereupon *C.* does ſell them to the ſaid King for 810 *l.* which Money *C.* pays *B.* and *B.* thereupon immediately returns to *England*, and pays the 810 *l.* to *A.* his Maſter; and after the Jewels being diſcovered to be counterfeit, *C.* is impriſoned by the ſaid King till he repays the 810 *l.* out of his own Effects; of all which Matter *C.* gives Notice to *A.* and demands Satisfaction, &c. yet no Action lies againſt *A.* for Jewels are in themſelves of an uncertain Value, and *B.* was not by *A.* particularly directed to *C.* and all that was done *quod C.* was the voluntary Act of the Servant, for which the Maſter is not bound to anſwer. Bridgm.125, 126. Cro. Jac.469. 2 Rol. Rep. 5, 26. Poph. 143. *Southern* ver. *Haw.* * Page 589

It hath been ruled in Equity, that if one employs a Factor, and intruſts him with the Diſpoſal of Merchandize, and the Factor receives the Money, and dies indebted, to Debts of a higher Nature, and it appears by Evidence, that this Money was veſted in other Goods, and remains unpaid, thoſe Goods ſhall be taken as Part of the Merchant's Eſtate, and not the Factor's; but if the Factor have the Money, it ſhall be looked upon as the Factor's Eſtate, and muſt firſt anſwer the Debts of ſuperior Creditors, &c. for as Money has no Ear-mark, Equity cannot follow that in Behalf of him who employed the Factor. Salk. 160. pl. 13 *Whitecomb* ver. *Jacob.*

If *A.* employs *B.* as his Factor to ſell Cloth, and *B.* ſells the Cloth on Credit, and, before the Money is paid, *B.* dies indebted by Specialty more than his Aſſets will pay; this Money ſhall be paid to *A.* and not to the Adminiſtrator of *B.* as Part of his Aſſets, but thereout muſt be deducted what was due to *B.* for Commiſſion; for a Factor is in Nature only of a Truſtee for his Principal. 2 Vern. 638. *Burdett* ver *Willett.*

The Plaintiff, being a Factor in *Blackwell-Hall*, advanced Money for his Principal, relying, as was ſurmiſed, on the Credit of Cloths reſting in his Hands to reimburſe himſelf: the Clothier died, his Adminiſtrator ſued at Law for the Cloth, and the Factor prayed that he might be allowed on Account the Monies he advanced, but was diſmiſſed; for if there are Debts of a higher Nature, it would be a *Devaſtavit* in the Adminiſtrator to pay or diſcount the Plaintiff's Debt †. 2 Vern. 117. *Chapman* ver. *Derby.*

(C) Of † A Factor has Power to ſell and thereby bind his Principal, but he cannot bind or affect the Property of the Goods, by pledging them as a Security for his own Debt, tho' there is a Bill of Parcels and a Receipt. Stra. 1178. *Paterſon* ver. *Taſh.*—Where the Cuſtom of the Trade is, that the Factor ſells Goods at his own Riſk, for which

(C) Of Partners and Joint Traders.

Vern. 217. & *vide* Tit. *Joint-tenants in Common.*

IF two or more ingage in a joint Undertaking in the Way of Trade, or enter into Copartnerſhip, it is not neceſſary to provide againſt Surviorſhip; for, by a Maxim of the Common Law, *Jus accreſcendi inter Mercatores locum non habet*; and this is for the Benefit of Trade and Commerce, that the Fruits of each Perſon's Labour and Induſtry ſhould deſcend to their Children and Families.

2 Salk. 444. pl. 3. Ld. Raym. 340. *Martin* ver. *Crump.*

But if two joint Merchants make *B.* their Factor, and one dies, leaving an Executor, this Executor and the Survivor cannot join in an Action (*a*) againſt the Factor; for though the Duty does not ſurvive, yet the Remedy does; and therefore on Recovery, he muſt be accountable to the Executor for that.

(*a*) Nor can an Executor and the ſurviving Merchant be jointly ſued, becauſe the firſt is to be charged *de bonis Teſtatoris*, and the other *de bonis Propriis*. Carth. 170, 171. 3 Lev. 290. 2 Lev. 228. Forteſc. Rep. 181.

Vern. 118. *Eſtwick* ver. *Conninſby.*

The Plaintiff's Huſband (to whom ſhe is Adminiſtratrix) and the Defendant were Copartners for many Years in the Trade of a Druggiſt; the Plaintiff brought her Bill for a Diſcovery of the Eſtate, and her Proportion and Dividend thereof, &c. the Defendant anſwered, and it appearing that many Debts owing to the joint Trade ſtood out, it was moved *Page 590* on Behalf of the Plaintiff, that an able Attorney might be appointed to ſue for and recover thoſe Debts; it being alledged in the Bill, that the Defendant carrying on a diſtinct Trade for himſelf, with the Perſons that were Debtors to the joint Trade, to oblige them, he forbore to call in their Debts; and it was ordered accordingly, unleſs the Defendant, within a Week, would give Security to the Plaintiff, to anſwer her Moiety of the Debts that were ſtanding out.

Salk. 126. pl. 3. *Pinkney* ver *Hall.* Ld. Raym. 175.

By the Cuſtom of *England*, where there are two joint Traders, and one accepts a Bill, drawn on both for him and Partner, it binds both if it concerns the Trade; otherwiſe, if it concerns the Acceptor only in a diſtinct Intereſt and Reſpect †.

† How is an Indorſee of the Bill to know this? See the next Caſe.

2 Vern. 277. *Lane* ver. *Williams.*

A. and *B.* were Partners as Woollen-Drapers, *A.* received Money in the Shop of *S. S.* and gave a Note for it ſigned by himſelf and Partner; *A.* and *B.* being both dead, and *A* not leaving ſufficient Aſſets, it was held on a Bill brought by *S. S.* againſt the Executors of both the Partners, that this Note being given by one of the Partners, it ſhould bind them both; and that though at Law it binds only the Executor of the ſurviving Partner, yet

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which he has an additional Allowance; no Credit is given as between Owner and Buyer, and the Buyer is not anſwerable to the Owner, tho' he gives him Notice before Payment, not to pay the Factor, who has failed. By the Jury, againſt the Direction of *Lee*, C. J. and by a Special Jury on new Trial, ſtill againſt C. J.'s Direction. *Scrimſhire* ver. *Alderton.* H. 16 Geo. 2. Stra. 1182.—If *A.* Merchant in *London*, orders *B.* Merchant abroad, to buy him Goods at a Price limited, *B* exceeds the Price, and ſends the Goods, *A.* refuſes the Contract, but diſpoſes of the Goods, as his own, and at a Riſk; he ſhall not be deemed the Factor of *B.* but to have accepted, notwithſtanding what he ſaid; and ſhall account with *B.* according to the Price *B.* paid. *Cornwall* ver. *Wilſon* T. 1750. 1 Vezey, 509.——If a Merchant directs his Factor or Correſpondent to inſure, and he charges him with it, as if done, and Loſs happens, he ſhall be charged as Inſurer; but if Factor employs an Agent, this Equity will not extend to that Agent. *Tickel* ver. *Short.* H. 1750. 2 Vezey, 239.—A Factor has a Lien on Goods conſigned to him, not only for incident Charges, but as an *Item* of mutual Account for the general Balance due to him, ſo long as he retains the Poſſeſſion, if he parts with Poſſeſſion, he parts with his Lien. R *per Hardwicke, C. Krutzer* ver. *Wilcox.* H. 1754. *Gardiner* ver. *Coleman.* T. 1755. cited by Ld. *Mansfield, Goodwin* ver. *London* Aſſurance. Co. H. 31 Geo. 2. 1 Bur. 489.

yet in Equity the Creditor may follow the Eſtate of the other, though no (*a*) Proof was made that this Money was brought into the Stock, or uſed in Trade.

(*a*) That the Act of one Partner ſhall be preſumed the Act of the other, and ſhall bind him, unleſs he can ſhew a Diſclaimer, and a Refuſal to be concerned. Salk. 292. pl. 33.

A. and *B.* are Copartners, and a Judgment is had againſt *A.* and the Goods of both taken in Execution; and it was held *per Cur'*, that the Sheriff muſt ſeize all, becauſe the Moieties are undivided; for if he ſeize but a Moiety and ſell that, the other will have a Right to a Moiety of that Moiety; therefore he muſt ſeize the Whole, and ſell a Moiety thereof undivided, and the Vendee will be Tenant in common with the other Partner. Salk. 392. pl. 1. *Heydon* ver. *Heydon*; & *vide* Show. 173-4. Comb. 217.

But though a Moiety of a joint Stock may be taken in Execution on a Judgment againſt one Partner; yet if Copartners become Bankrupts, the joint Eſtate is to diſcharge the joint Debts in the firſt Place, and the ſeparate Eſtate to pay the ſeparate Debts; and if there be no ſeparate Eſtate, then the Reſidue of the joint Eſtate, after the joint Creditors are ſatisfied, to be applied among the ſeparate Creditors, and ſo *vice verſa*; for the Commiſſioners of Bankrupts are intruſted both with a legal and equitable Juriſdiction, and may therefore marſhal (*b*) the different Effects, and apply them in Diſcharge of the different Creditors according to Equity and Juſtice ‡. 2 Chan. Rep. 228. 2 Vern. 293, 706. Paſch. 4 Geo. 2. *Grace* ver. *Hyam*. Barnard. K. B. 469.

(*b*) But not without an Order. Atk. Rep. 68. pl. 23.—‡ Articles of Partnerſhip in Trade do not ſubſiſt for the Benefit of Executors, (to intitle them to continue in the Partnerſhip) unleſs ſpecially provided. *Pierce* ver. *Chamberlain* M. 1750. 2 Vezey, 33.—If Judgment is obtained againſt a ſurviving Partner, for a Partnerſhip Debt, it is ſtill a Partnerſhip Debt. *Jacomb* ver. *Harwood*, P. 1751. 2 Vezey, 265.

(D) Of Owners and Maſters of Ships.

IF there are ſeveral Part-Owners of a Ship, and ſome of them refuſe to navigate the Ship, or to ſend her to Sea; thoſe, who are willing, may compel the others in a Court of Admiralty, on giving Security to anſwer for the Ship in caſe ſhe be loſt; alſo if a Partner diſlikes the Voyage, but does not expreſly prohibit it, and the Ship is loſt in the Voyage, he ſhall have no Recompence for his Part; but if the Ship return, he ſhall have an Account for what is earned, and it ſhall be intended a Voyage with his Conſent, without an expreſs Prohibition proved. Molloy 202, 203. Skin. 230. pl. 9. 2 Chan. Ca. 36.

But if the major Paat of the Owners refuſe to navigate the Ship, there, ſays *Molloy*, by Reaſon of the Inequality, they cannot be compelled; but then ſuch Veſſel is to be valued and ſold in like Manner, as where Part of the Owners became deficient, or unable to ſet out the Ship. Molloy 203.

* If there are ſeveral Part-Owners of a Ship, and the major Part of them are for ſending her a Voyage to Sea, to which the Reſt diſagree; whereupon, according to the common Uſage in ſuch Caſes, the greater Number ſuggeſt in the Admiralty Court the Diſagreement of their Partners; and then, according to their Uſage there, they order certain Perſons to appraiſe the Ship, who accordingly ſet a Value thereon; and then the major Part, who agreed to the Voyage, enter into a Recognizance, wherein they bind themſelves jointly and ſeverally, to the diſagreeing Parties, in a Sum proportionable to their Shares, according to the Value ſet by the Appraiſers, to ſecure the Shares in the Ship of thoſe who diſagree to the Voyage, againſt all Adventures; though there can be no Suit on this Agreement or Stipulation in the Admiralty Court, the Contract being made on Land, and therefore of Temporal Conuſance; yet a ſpecial Action on the Caſe lies for the Violation thereof at Common Law. *Page 591 Carth. 26. *Knight* ver. *Berry*. Hard. 473. S. P. 6 Mod. 162. S. P. See 6 Mod. 12, 26, 79.

A Maſter

Molloy 208. Hob. 11. A Maſter of a Ship is one, who for his Knowledge in Navigation, Fidelity and Diſcretion, hath the Government of the Ship committed to his Care and Management; but he hath no (*a*) Property either general or ſpecial by the conſtituting of him a Maſter; yet the Law looks upon him as an Officer, who muſt render and give an Account for the whole Charge, when once committed to his Care and Cuſtody, and upon Failure to render Satisfaction; and therefore if Misfortunes happen, if they be either through Negligence, Wilfulneſs or Ignorance of himſelf, or his Mariners, he muſt be reſponſible.

(*a*) But have uſually Shares or Parts in the Veſſel.

Molloy 203. He is eligible by the Part-Owners in Proportion to their Shares, and not according to the Majority. Molloy 203.

Salk. 10. pl. 4. *Pitts* ver. *Gaince*. Ld. Raym. 358. But where a Maſter of a Ship brought an Action on the Caſe, and declared, that the Ship was laden with Corn in ſuch a Harbour, ready to ſail for *Dantzick*, and that the Defendant entered and ſeized the Ship, and detained her, *per quod impeditus & obſtructus fuit in Viago*; and it was held that it well lay; for though the Maſter has not the Property of the Ship, but the Owners, and he is only a particular Officer, and can only recover for his particular Loſs; yet he may bring Treſpaſs, as a Bailiff of Goods may; and then as Bailiff he can only declare on his Poſſeſſion, which is ſufficient to maintain Treſpaſs.

Vent. 190, 238. Raym. 220. 3 Keb. 72, 112, 135. Mod. 85. 2 Lev. 69. S. C. *More* and *Sluce*. 3 Lev. 259. S. C. cited. 2 Ld. Raym. 918. If the Maſter of the Ship takes Goods on board for Hire, and is robbed in Port, he muſt anſwer the Damage; otherwiſe it is if he be robbed by Pirates on the High Sea, for then the Owner muſt be the Loſer; for if he undertakes for Hire to carry the Goods, the Common Law cannot look upon him in a different Aſpect from a common Carrier; for he cannot be looked upon as a mere Servant to the Owner, but rather as an Officer of the Ship, and to ſell the *bona peritura*, which is beyond the Condition of a Servant: But the Civil Law of the Admiralty excuſes the Maſters when robbed by Pirates, or on loſing the Goods by any inevitable Accident, for the Dangers of the Sea are ſo various and ſo formidable, that a Maſter ſhall not be underſtood to undertake againſt them, unleſs it had been included in the expreſs Words of the Contract; for where, in a well-ordered Society, a Man undertakes for the Cuſtody of another's Property, he ſecures him againſt all Loſs; but where a Man is bound to encounter Dangers, which Civil Society cannot guard againſt, he cannot be ſuppoſed to undertake farther than for his Care; and by the general Cuſtom of Commerce, the Merchant is the Perſon that runs the Venture, and not the Maſter of the Ship; and it is the Merchant that makes the Gain of the Venture.

Carth. 58. 2 Salk. 440. pl. 1. 3 Lev. 258. 3 Mod. 322. *Baſon* ver. *Sandford*. And as the Maſter himſelf is anſwerable in the Caſes *ſupra*; ſo likewiſe hath it been held, that the Owners are liable to the Freighters, in reſpect of the Freight, for the Embezilments, *&c.* of the Maſter and Mariners.

*Page 592 * But this proving a great Diſcouragement to Trade, by the 7 *Geo.* 2. *cap.* 15. reciting that, *Whereas it is of the greateſt Conſequence and Importance to this Kingdom, to promote the Increaſe of the Number of Ships and Veſſels, and to prevent any Diſcouragement to Merchants and others from being intereſted and concerned therein; and whereas it has been held, that in many Caſes Owners of Ships or Veſſels are anſwerable for Goods and Merchandize ſhipped, or put on board the ſame, altho' the ſaid Goods and Merchandize, after the ſame have been ſo put on board, ſhould be made away with by the Maſters or Mariners of the ſaid Ships or Veſſels, without the Knowledge or Privity of the Owner or Owners; by Means whereof, Merchants and others are greatly diſcouraged from adventuring their Fortunes, as Owners of Ships or Veſſels, which will neceſſarily tend to the Prejudice of the Trade and Navigation of this Kingdom; therefore for aſcertaining and ſettling how far Owners of Ships and Veſſels ſhall be anſwerable*

anſwerable for any Gold, Silver, Diamonds, Jewels, precious Stones, or other Goods or Merchandize which ſhall be made away with by the Maſter or Mariners, without the Privity of the Owners thereof; It is enacted, "That no Perſon or Perſons, who is, are, or ſhall be Owner or Owners of "any Ship or Veſſel, ſhall be ſubject or liable to anſwer for, or make good "to any one or more Perſon or Perſons, any Loſs or Damage by Reaſon "of any Imbezilment, Secreting or Making away with (by the Maſter or "Mariners, or any of them) of any Gold, Silver, Diamonds, Jewels, "precious Stones, or other Goods or Merchandize, which, from and after "the 24th of *June* 1734, ſhall be ſhipped, taken in, or put on board any "Ship or Veſſel, or for any Act, Matter or Thing, Damage or Forfeiture "done, occaſioned, or incurred from and after the ſaid 24th Day of *June* "1734, by the ſaid Maſter or Mariners, or any of them, without the Pri-"vity and Knowledge of ſuch Owner or Owners, further than the Value "of the Ship or Veſſel, with all her Appurtenances, and the full Amount "of the Freight, due or to grow due, for and during the Voyage wherein "ſuch Imbezilment, Secreting or Making away with, as aforeſaid, or other "Malverſation of the Maſter or Mariners, ſhall be made, committed or "done; any Law, *&c.*"

And, by *Sect.* 2. it is further enacted, "That if ſeveral Freighters or Pro-"prietors of any ſuch Gold, Silver, Diamonds, Jewels, precious Stones, or "other Goods or Merchandize, ſhall ſuffer any Loſs or Damage by any of "the Means aforeſaid, in the ſame Voyage, and the Value of the Ship or "Veſſel, with all her Appurtenances, and the Amount of the Freight, due "or to grow due, during ſuch Voyage, ſhall not be ſufficient to make full "Compenſation to all and every of them, then ſuch Freighters or Propriе-"tors ſhall receive their Satisfaction thereout in Average, in Proportion to "their reſpective Loſſes or Damages; and in every ſuch Caſe it ſhall and "may be lawful to and for ſuch Freighters or Proprietors, or any of them, "in Behalf of himſelf, and all other ſuch Freighters or Proprietors, or to "or for the Owners of ſuch Ship or Veſſel, or any of them, on Behalf of "himſelf, and all the other Part-Owners of ſuch Ship or Veſſel, to exhi-"bit a Bill in any Court of Equity for a Diſcovery of the total Amount "of ſuch Loſſes or Damages, and alſo of the Value of ſuch Ship or Veſſel, "Appurtenances and Freight, and for an equal Diſtribution and Payment "thereof amongſt ſuch Freighters or Proprietors, in Proportion to their "reſpective Loſſes or Damages, according to the Rules of Equity.

"Provided by *Sect.* 3. that if any ſuch Bill ſhall be exhibited by or on the "Behalf of the Part-Owners of ſuch Ship, the Plaintiff or Plaintiffs ſhall "annex an *Affidavit* to ſuch Bill or Bills, that he or they do not collude "with any of the Defendants thereto; and ſhall thereby offer to pay the "Value of ſuch Ship or Veſſel, Appurtenances and Freight, as ſuch "Court ſhall direct; and ſuch Court ſhall thereupon take ſuch Method "for aſcertaining ſuch Value, as to them ſhall ſeem juſt; and * ſhall di-*Page 593 "rect the Payment thereof in like Maner, as is now uſed and practiſed in "Caſes of Bills of Interpleader.

"Provided alſo by *Sect.* 3. that nothing in this preſent Act contained "ſhall extend, or be conſtrued to extend to impeach, leſſen or diſcharge "any Remedy, which any Perſon or Perſons now hath, or ſhall or may "hereafter have, againſt all, every or any the Maſter or Mariners of ſuch "Ship or Veſſel, for or in Reſpect of any Imbezilment, Secreting or "Making away with any Gold, Silver, Diamonds, Jewels, precious Stones "or Merchandize ſhipped, or loaded on board ſuch Ship or Veſſel, or on "Account of any Fraud, Abuſe or Malverſation of and in ſuch Maſters and "Mariners reſpectively, but that it ſhall and may be lawful to and for "every Perſon or Perſons, ſo injured or damaged, to purſue and take "ſuch Remedy for the ſame, againſt the ſaid Maſter and Mariners re-"ſpectively,

" ſpectively, as he or they might have done before the making of " this Act."

(E) Of Mariners.

Molloy 209. MAriners are Perſons choſen and appointed by the Maſter to navigate the Ship, for whoſe Faults and Miſcarriages he muſt anſwer; and, as they are his Servants, he may correct and puniſh them according as the Uſage is at Sea.

Rol. Abr. 530. & *vide* Rol. Rep. 285. But though the Maſter muſt anſwer for them, yet are the Owners likewiſe anſwerable for their Faults and Miſcarriages; as if the Owner of a Ship victuals it, and furniſhes it to Sea with Letters of Repriſal, and the Maſter and Mariners, when they are at Sea, commit Piracy upon a Friend of the King, without the Notice or Conſent of the Owner, the Owner ſhall loſe his Ship by the Admiral Law, of which our Law ought to take Notice.

Sid. 179. Mod. 93. Ld. Raym. 398, 576, 639, 650, 739. By the Civil Law and Cuſtom of Merchants, if the Ship be caſt away, or periſh through the Mariners Default, *(a)* they loſe their Wages; ſo if taken by Pirates, or if they run away; for, if it were not for this Policy, they would forſake the Ship in a Storm, and yield her up to Enemies in any Danger.

2 Ld. Raym. 933, 1044, 1206, 1211, 1247, 1253. 8 Mod. 179. 10 Mod. 78, 264. 11 Mod. 5. pl. 23, 31. pl. 1. 43. pl. 4. 2 Ld. Raym. 1204. 2 Salk. 424. pl. 12. Gilb. Eq. Rep. 226. Fitzgib. 197. Stra. 707. Vent. 146. (*a*) But whether the Executors of thoſe Mariners, who died before the Ship was caſt away, may recover the Wages due to their Teſtators, *Q. & vide* Sid. 179. Keb. 684.

And by the 22 & 23 *Car.* 2. *cap.* 11. *ſect.* 7. it is enacted, " That if " the Mariners or inferior Officers of an *Engliſh* Ship, laden with Goods " and Merchandize, ſhall decline or refuſe to fight and defend the Ship, " when they ſhall be thereunto commanded by the Maſter or Commander " thereof, or ſhall utter any Words to diſcourage the other Mariners from " defending the Ship, every Mariner, who ſhall be found guilty of declining or refuſing as aforeſaid, ſhall loſe all his Wages due to him, together with ſuch Goods as he hath in his Ship, and ſuffer Impriſonment, " not exceeding the Space of ſix Months; and ſhall, during ſuch Time, be " kept to hard Labour for his or their Maintenance."

And, by *Sect.* 9. of the ſaid Statute, " Every Mariner, who ſhall have " laid violent Hands on his Commander, whereby to hinder him from " fighting in Defence of his Ship and Goods committed to his Truſt, ſhall " ſuffer Death as a Felon."

Winch 8. 4 Inſt. 141. *Page 594 Vent. 146, 343. 3 Mod. 244. Salk. 33. pl. 4. Ld. Raym. 576. & *vide* 4 & 5 Ann. c. 16. The Mariners may ſue in the Admiralty Court for their Wages, altho' the Hiring was by the Maſter on Land; and this is allowed of in Favour of Navigation, for here they may all join in the ſame Libel: Alſo, by the Law of the Admiralty, they have Remedy againſt the Ship and Owners, as well as againſt the Maſter; and it would be a great Diſcouragement to Seafaring-men to oblige them to bring ſeparate Actions, and thoſe againſt a Maſter who may happen to be inſolvent.

Raym. 3. Salk 33. pl. 5. Ld. Raym. 632. So of the other Officers under the Maſters, as the Mate, Purſer, Boatſwain, &c. for though they contract with the Maſter, yet it is on the Credit of the Ship.

So a Shipwright may ſue in the Admiralty for (*a*) making a Ship. Rol. Abr. 533.

(*a*) So for mending a Ship. Cro. Car. 296.

And if a Contract be with Seamen to go on a Voyage, and they, in order thereunto, work in a Harbour, and after the Voyage is intercepted through the Owner's Fault, as if the Ship be arreſted for his Debt, &c. the Seamen ſhall ſue for their Wages for the Work done in the Harbour, in Purſuance of the Contract to go on a Voyage, in the Admiralty, as much as if they had gone the Voyage; *ſecus*, if the Retainer of them had been only to do the Work in the Harbour. 6 Mod 238. 2 Ld. Raym. 1044. Ld. Raym. 398, 576, 632, 639, 739. 2 Ld. Raym. 1206, 1211, 1247, 1453. Comyns 74. pl. 47, 137. pl. 91. 2 Ld. Raym. 934. 6 Mod. 25. 3 Salk. 227. pl. 2. 12 Mod. 405, 408, 440, 442, 526. Stra. 405, 707. 2 Stra. 858. Barnard. *K. B.* 297. 2 Stra. 937. 2 Barnard. *K. B.* 160. 2 Stra. 968.

But if there be any ſpecial Agreement, by which the Mariners are to receive their Wages in any other Manner than is uſual, or if the Agreement is under Seal, the Mariners cannot ſue in the Admiralty. Salk. 31. *Opy* ver. *Addiſon.*

Nor can the Maſter ſue in the Admiralty Court; for his Contract is on the Credit of the Owners, and not like that of the Mariners, which is on the Credit of the Ship. 4 Inſt. 141. Raym. 3. Salk. 33. pl. 4.

Carth. 518. S. P. although the Owner was beyond Sea, and the Ship lay here; & *vide* 2 Salk. 548. pl. 3.

(F) Of Average.

WHenever a Ship is in Streſs of Weather, or in Danger, or juſt Fear of (*b*) Enemies, and the Maſter, to ſave Part of the Cargo, throws over-board ſome of the Goods in the Ship, thoſe which are ſaved ſhall contribute in Proportion; and this common Calamity ſhall be equally borne by all the Parties intereſted, which is called Average; and is allowed by the Civil Law, the Cuſtoms of Merchants, and our Law. Molloy 246, &c. 2 Bulſt. 290.

(*b*) So likewiſe Goods coming from infected Towns or Places may be caſt over-board. Molloy 246.

In this Contribution, not only the Maſter, Owners and Freighters of the Ship ſhall bear a proportionable Share of the Loſs, but alſo Paſſengers for ſuch Wares as they have in the Ship; alſo Paſſengers who have no Wares or Goods in the Ship, yet, in Regard they are a Burthen to the Ship, Eſtimate is to be made of his and their Apparel, Rings and Jewels, towards a Contribution of the Loſs; and in general it is ſaid, that every Thing ſhall contribute, except the Proviſions of the Ship, and the Men who are neceſſary to work the Ship. Molloy 250.

The Maſter ought to be careful, that only thoſe Things of the leaſt Value and greateſt Weight he flung over-board; alſo he and the Crew (or moſt of them) muſt ſwear that the Goods were caſt over-board for no other Cauſe but purely for the Safety of the Ship and Lading. Molloy 247.

If, to avoid the Danger of a Storm, the Maſter cuts down the Maſts and Sails, and they falling into the Sea are loſt, this Damage is to be made good by Ship and Lading, *pro rata*; otherwiſe if the Caſe happens by Storm, or other Caſualties. Molloy 249.

* Alſo, if through the Rifling of the Ship, Caſting over-board, and Lightning the Ship, any of the remaining Goods are ſpoiled, either with Wet or otherwiſe, thoſe which are preſerved muſt contribute towards the Loſs of the Goods impaired, as well as to thoſe which were intirely loſt. *Page 595 Molloy 248.

Molloy 250, 251. The Goods ſaved and loſt are to be eſtimated according as the Goods ſaved were ſold for, Freight and other neceſſary Charges being firſt deducted, and in ſuch Proportion the Goods ſaved are to contribute.

Molloy 250. If a Maſter of a Ship lets out his Ship to Freight, and then receives his Compliment, and afterwards takes in Goods without Leave of the Freighters, and a Storm ariſes at Sea, and Part of the Freighters Goods are caſt over-board, the remaining Goods are not ſubject to the Average, but the Maſter muſt make good the Loſs out of his own Purſe.

Moor 297. Alſo Average is not due, unleſs the Goods are loſt in ſuch a Manner, that thereby the Reſidue in the Ship are ſaved; as if Goods are thrown over-board to lighten the Ship, or, by Compoſition, Part is given to a Pirate to ſave the reſt; but if a Pirate takes Part by Violence, Average ſhall not be paid for them.

Show. Par. Caſes, 18, 19. and affirmed in Parliament. So where *A.* being one of the Owners of a Ship, loaded on board her 210 Tons of Oil, and *B.* loaded on board her 80 Bales of Silk upon a Freight, by Contract, both to be delivered at *London*; the Ship was purſued by Enemies and forced into an Harbour, *&c.* and the Maſter ordered the Silk on Shore, being the moſt valuable Commodity, though they lay under the Oils, and took up a great deal of Time to get at them; the Ship and Oils were afterwards taken, and the Owner of the Oils brought his Bill in Equity to have Contribution from the Owner of the Silk; but in this Caſe, as the Loſs of the Oils did not ſave the Silks, nor the Saving the Silks loſe the Oils, the Bill was diſmiſſed.

Molloy 249. Hard. 183. If a Ship happens to be taken, and the Maſter, to redeem the Ship and Lading out of the Enemies or Pirates Hands, promiſes a certain Sum of Money, for Performance whereof himſelf becomes a Pledge or Captive in the Cuſtody of the Captor; in this Caſe he is to be redeemed at the Coſts and Charges of the Ship and Lading, and all are to be contributory for his (*a*) Ranſom according to each Man's Intereſt.

(*a*) And as he may ranſom the Ship and Goods, ſo may he retain the Goods for his Satisfaction, in the ſame Manner as he may detain the Goods for Freight; but if he once ſuffers them out of his Poſſeſſion, he cannot afterwards retake them. 6 Mod. 12, 13.

Moor 297. Molloy 249. So where a Pirate takes Part of the Goods to ſpare the Reſt, Contribution muſt be paid; but if a Pirate takes by Violence Part of the Goods, the Reſt are not ſubject to Average, unleſs the Merchant hath made an expreſs Agreement to pay it after the Ship is robbed.

Allen 93. 2 Bulſ. 280. 12 Co. 62. If *A.* and ſeveral others take their Paſſage in a Ferry-boat, and being upon the Water, a Tempeſt ariſes, ſo that they are in Danger of being drowned; upon which, to preſerve their Lives, ſeveral of the Goods are caſt over-board, among which a Pack of Goods of *A.*'s of great Value is thrown over; in this Caſe there ſhall be no Average, but the Ferryman muſt anſwer for the Goods; becauſe, for his Hire, he runs the Venture of the Voyage.

(G) Of Hypothecation.

Rol. Abr. 53. Hob. 11. IF a Ship be at Sea, and ſpring a Leak, or is otherwiſe in Danger of being loſt, or the Voyage defeated for want of Proviſions or other Neceſſaries; in theſe Caſes of Extremity, the Maſter may pledge or hypothecate the Ship and Goods, or (*b*) either of them, for ſuch Neceſſaries as are wanting, which

*Page 596 * Power is implicitly given him in (*c*) conſtituting him Maſter, and which he may exerciſe, rather than that the Ship ſhould be loſt, or the Voyage defeated. The

Moor 918. that it is ſo by the Laws of *Oleron*, of which our Law takes Notice. Molloy 213. (*b*) The Maſter may hypothecate either Ship or Goods, for the Maſter is intruſted with both, and repreſents the Traders as well as Owners of the Ship. Salk. 34. pl. 7. 2 Ld. Raym. 805. (*c*) That he who is reputed Maſter may do the ſame. Noy 95.

The Maſter cannot hypothecate the Ship or Goods for any Debt of his own, nor in any Caſe, but for the Preſervation of the Ship and compleating the Voyage. Molloy 213.

Alſo the Maſter cannot (*b*) ſell the Ship and broken Tackle, though there is no Probability of its being ſaved, partly in Reſpect of the Tempeſt, and partly in Reſpect of the Barbarity of the Inhabitants, who took away every Thing that was caſt on the Shore. Sid. 453. *per Hale.*

(*b*) But if he cannot hypothecate, he may ſell ſo much of the Lading as is neceſſary, *&c.* Molloy 214.

If the Veſſel happens to be wrecked or caſt away, and the Mariners, by their great Pains and Care, recover ſome of the Ruins and Lading, the Maſter, in that Caſe, may pledge the ſame, and diſtribute the Money among the Mariners, or ſo much as ſhall be neceſſary to the defraying of their Expences to their own Country; but if the Mariners no Way contributed to the Salvage, then their Reward is ſunk and loſt with the Veſſel; and if there be any conſiderable Part of the Lading preſerved, he ought not to diſmiſs his Mariners till Advice from the Laders or Freighters. Molloy 214.

But although Hypothecation of Ships be abſolutely neceſſary for Navigation, without which Maſters could not get Credit abroad; yet a Maſter cannot make the Owner (*c*) perſonably liable by any Contract of his, but (*d*) the Ship and Cargo ſhall be liable where he hypothecates for Neceſſaries, although ſuch Neceſſaries were not actually employed or laid out in the Service of the Ship or Voyage, and the Owners and Freighters muſt take their Remedy againſt the Maſter.

(*c*) 6 Mod. 79. Salk. 35. pl. 9. *cont.* 2 Sid. 161.

(*d*) Noy 25.

The Maſter can only hypothecate, where the Calamity of Want of Neceſſaries happened after the Ship had put to Sea; and therefore the Admiralty Court is allowed to have Juriſdiction herein, ſo far as to ſubject the Ship, but cannot proceed againſt the Perſon otherwiſe, than as it is neceſſary to make him Party towards the Condemnation of the Ship. Molloy 214. 6 Mod. 79. *& vide* 2 Vern. 643. Ld. Raym. 152, 577, 805, 933. 12 Mod. 406, 511. Stra. 695.

And therefore where *A.* contracted with *B.* for a Cable, which he delivered at *Ratcliff upon Thames*, and *B.* ſued in the Admiralty, a Prohibition was granted; though it was inſiſted, that the Want of the Cable was occaſioned by the Streſs of Weather at Sea; for here the Contract was at Land, and a Remedy for the Breach at Common Law; but had the Hypothecation been at *Rotterdam*, or any other Foreign Port, the Remedy had been proper in the Admiralty Court. Salk. 34. pl. 7. 3 Mod. 244. 6 Mod. 12, 25, 79. Sid. 453. Vern. 297, 465. 2 Vern. 643.

2 Stra. 761, 890. Fitzgib. 197. 2 Stra. 936. Gilb. Eq. Rep. 227. 10 Mod. 78, 263. 11 Mod. 6. pl. 27, 44. 12 Mod. 134, 405, 408, 440, 442, 511, 526. 8 Mod. 379. Ld. Raym. 22, 152, 272, 398, 576, 632, 639, 650, 739, 838, 982, 1285. Vern. 73, 256, 456. 2 Vern. 141, 235, 540, 694.

(H) Of Charter-Parties.

A Charter-Party is an Agreement by Indenture, whereby the Owners, Maſter and Freighters of a Ship covenant with each other, that ſuch a Ship ſhall be fit and ready to ſail, take in ſuch and ſuch Lading, carry and tranſport the ſame to ſuch Place or Places, in Conſideration whereof the Freighters or Merchants are to pay ſo much, *&c.* and ſuch Charter-Party, being only a Covenant or Agreement, ſhall be conſtrued * according to the Intention of the Parties, and the uſual Cuſtoms of Merchants. Molloy 227, *&c.* 2 Vent. 196. Style 133. 2 Show. 384. Palm. 399. 2 Rol. Abr. 248. pl. 10. Pop. 161.

2 Inſt. 673. 2 Lev. 74. S. C. cited, and admitted to be Law.

An Indenture of Charter-party was made between *Scudamore* and others, Owners of the good Ship called *B.* whereof *Robert Pitman* was Maſter, of the one Part, and *Vandeſtene* of the other Part; in which Indenture the Plaintiff covenanted with the ſaid *Vandeſtene* and *Robert Pitman*; and alſo *Vandeſtene* covenanted with the Plaintiff and *Robert Pitman*, and bound themſelves to the Plaintiff and *Robert Pitman* for Performance of Covenants in 600 *l.* and the Concluſion of the ſaid Indenture was, *In Witneſs whereof the Parties aboveſaid to theſe preſent Indentures have put their Seals*; and the ſaid *Robert Pitman* to the ſaid Indenture put his Hand and Seal, and delivered the ſame; the Defendant, in Bar of the ſaid Action, pleaded the Releaſe of *Pitman*, &c. whereupon the Plaintiff demurred; and it was adjudged, that the Releaſe of *Pitman* did not bar the Plaintiff, becauſe he was no (*a*) Party to the Indenture; and the Diverſity was taken and agreed between an Indenture reciprocal between Parties on the one Side, and Parties on the other Side, as this was; for there no Bond, Covenant or Grant, can be made to or with any that is not Party to the Deed; but where the Deed indented is not reciprocal, but is without a *between*, &c. as *omnibus Chriſti fidelibus*, &c. there a Bond, Covenant, or Grant may be made to divers ſeveral Perſons.

(*a*) Lev. 235.

1 Lev. 74. 3 Keb. 94, 115. *Cooker* ver. *Child*. 3 Lev. 139. S. C. cited.

So where an Action was brought on a Charter-party, which was in this Manner: *This indented Charter-party witneſſeth, that* Binley, *Maſter, and Part-Owner of the Ship, with Conſent of* Cooker, *the other Part-Owner, hath let the Ship to* Child *for ſuch a Voyage, and* Child *covenants with* Binley, nec non *with* Cooker *to pay* 300 *l. Cooker* brings the Action, and the Defendant *Child* pleads, that only he and *Binley* were the Parties to and ſealed the Indenture; whereupon the Plaintiff demurred; & *per totam Curiam*, though the Deed be indented, yet, not being *inter partes*, there may be a Covenant with a Stranger, as if it were a Deed Poll, or in the firſt Perſon, *Know ye that I*, &c. otherwiſe, where the Deed is between Parties, then no one, that is a Stranger, can take Advantage thereof by way of Action.

Vide Tit. *Covenants*, Letter (L) and 1 Jon. 216.

In an Action on a Charter-party a Breach muſt be aſſigned, which the Party may do in the very Words of the Agreement; and if there be any Thing to be done by the Plaintiff, which, in the Nature of the Thing, is *neceſſary to enable the Defendant to perform his Part* of the Agreement, if the Plaintiff hath not done his Part, this will excuſe the Defendant's Omiſſion.

2 Jon. 186. *Bellamy* ver. *Ruſſel*.

If, in an Action of Covenant, the Plaintiff declares upon a Charter-party, by which the Plaintiff, being Maſter of a Ship, was to pay two Parts of the Port-Charges, and the Factor of the Defendant the other Part; and the Plaintiff ſhews, that he ſailed from *L.* to *C.* and there paid all the Port-Charges, *viz.* two Parts for himſelf, and the other Part for the Defendant; and that the Defendant had not repaid him; this Breach is well aſſigned; for when the Plaintiff ſays he paid the third Part, it ſhall not be intended the Defendant did, but that the Plaintiff was neceſſitated to pay it, or otherwiſe his Ship would be ſtayed in the Port.

2 Lev. 124. Allen 9. S. P.

If *A.* covenants to pay 3 *l. per* Ton for Goods imported, and for Performance thereof binds himſelf in a Penalty, and in an Action thereupon, the Plaintiff aſſigns for Breach the Non-payment for ſo many Tons, and a Hogſhead, which came to ſo much; this is naught, (*b*) for the Covenant is only to pay by the Ton; though it was ſaid *per Cur'* to be otherwiſe, if the Covenant had been to pay, *ſecundum ratam*, 3 *l. per* Ton.

(*b*) If Goods are ſent aboard generally the Freight muſt be according to Freight for the like accuſtomed Voyage. Molloy 232 —And if a Ship be freighted for 200 Tons or thereabouts, the Addition of *thereabouts* is commonly reduced to be within 5 Tons, more or leſs, as the Moiety of the Number *ten*, whereof the whole Number is compounded. Molloy 232.

If

* If a Charter be ſo worded, that there can be no Remedy thereon at Law, yet the Party having a juſt Demand may be relieved in Equity; as where by the Agreement there was no Freight to be paid for the outward-bound Cargo, and when the Ship arrived beyond Sea, the Factor had no Goods at all to load the Ship with; and the Court decreed Payment of the Freight. * Page 598 2 Vern. 210, 212.

So where the *Eaſt-India* Company took Bonds from the Mariners and Officers of a Ship not to demand their Wages, unleſs the Ship returned to the Port in *London*; and the Ship arrived at a delivering Port, and was afterwards taken by the *French*; and it was held by my Lord Chief Juſtice *Holt*, in an Action tried by him, and likewiſe in Chancery, that the Seamen and Officers ſhould have their Wages, to the Time of the Arrival of the Ship at the delivering Port. 2 Vern. 727.

The Plaintiff, a Merchant in *London*, hired the Defendant's Ship to freight for a Voyage to *Bourdeaux*, at 3*l.* 10*s.* a Ton; it happened, that an Imbargo was laid on all Merchant Ships for ſix Weeks; the Ship afterwards proceeded on her Voyage to *Bourdeaux*; and the Defendant not diſcovering what Agreement he had made with the Plaintiff in *England*, the Plaintiff's Factors and Correſpondents there agreed to allow the Defendant 6*l.* 10*s. per* Ton, upon which latter Agreement, the Defendant recovered at Law. A Bill being exhibited for Relief againſt this ſecond and underhand Agreement, obtained, as was alledged, by Fraud, was diſmiſſed; for the Defendant was at Liberty to make a new Agreement, by Reaſon that the Performance of the firſt was obſtructed by the Imbargo after laid on all Merchant Ships. 2 Vern. 242. *Draddy* ver *Deacon.*

A Maſter of a Ship, without the Owner, treated with the Plaintiff, a Merchant, for the Freight of the Ship at 80 Tons, and accordingly entered into a Charter-party with him to ſail from *London* to *Falmouth*, and thence to *Barcelona*, without altering the Voyage, and there to unlade at a certain Rate *per* Ton; and for Performance, the Maſter binds the Ship, Tackle, *&c.* valued at 300*l.* the Maſter deviates, and commits Barratry, by which the Merchant in Effect loſeth his Voyage and Goods. The Merchant had a Sentence againſt the Maſter and Ship in *Barcelona*, which was confirmed in a higher Court in *Spain*; and the Owner having brought Trover for the Ship, the Merchant exhibited his Bill to be relieved againſt this Action, and likewiſe another Action brought for Freight; and it was held by my Lord Chancellor, that the Charter-party having valued the Ship at a certain Rate, the Owner is not liable further, and the Maſter is liable for Deviation and Barratry; for ſhould it be otherwiſe, Maſters would be Owners of all Mens Ships and Eſtates. 2 Chan. Ca. 238.

If a Charter-party be made in *England*, to do certain Things on ſeveral Places on the Sea, though no Act is to be done in *England*, but all upon the Sea; yet no Suit can be in the Admiralty Court for the Non-performance of the Agreement, for the Contract is the Original, without which no Cauſe of Suit can be; and this Contract is out of their Juriſdiction; for where Part is triable by the Common Law, and Part by the Admiral Law, the Common Law ſhall be preferred. Rol. Abr. 532. Rol. Rep. 486. S. C. 4 Inſt. 135. 139, 142. Hob. 212. Moor 450. like Point.

(I) Of Policies of Inſurance.

INſuring is, where a Man, for a certain Sum, takes upon him the Riſque that Goods are to run in Tranſportation from Place to Place; and this Cuſtom If the Loſs happens by the Variation of the

Chance, or Alteration of the Voyage, or other Fault of the Owner or Maſter of the Ship, the Inſurer ceaſes to be liable. Bur. Rep. 347. Otherwiſe, if the Thing be done in the uſual Courſe of the

the Voyage, or *ex juſtâ Cauſâ*, 340. the eſſential Means and neceſſary intermediate Steps muſt be taken to be inſured as well as the End, 348. *Page 599

Cuſtom or Uſage among Merchants, when they make any Adventures at Sea, to give a Premium or Conſideration to Corporations erected for that Purpoſe, or to particular Perſons, to have from ſuch Corporations or particular Perſons, Aſſurance of or upon Ships, Goods or Merchandize adventured, or ſome of them, at ſuch Rates or Prices as the Parties Aſſurers and the Parties aſſured can agree, hath prevailed Time out of Mind; and ſuch Kind of Contract, or Dealing, is commonly called (*a*) Policy of Aſſurance, or Inſurance; and was at firſt introduced, that a Merchant having a Loſs might not be undone, many bearing the Burthen together; and hath divers Times received the Countenance and Sanction of ſeveral (*b*) Acts of Parliament.

What muſt neceſſarily be underſtood makes a Part of the Policy, as much as what is expreſſed, 350. The Inſured have no Right to charge the Bottom, though to a better or ſtronger Ship, 351. For what is and what is not double Inſurance. See Bur. Rep. 490 to 495. (*a*) That tho' it be no Specialty, yet it is a ſacred Thing, being of great Credit, and much for the Support, Conveniency and Advantage of Trade. Skin. 54. pl. 7. 55. (*b*) As 43 Eliz. c. 12. and 14 & 15 Car. 2. c. 25. by which Commiſſioners were appointed for deciding of Differences ariſing upon Policies of Inſurance; for which *vide* 3 Inſt. 165. 4 Inſt. 250. Style 166. Show. 396.—4 & 5 *W. & M.* c. 15. Penalties are inflicted on Perſons undertaking, by way of Inſurance, to import prohibited Goods, without paying Cuſtoms.—10 Ann. c. 26. By which Policies muſt be ſtamped.—6 Geo. 1. c. 18. impowers his Majeſty to grant two Charters for Inſurance of Ships and Merchandize, under the Terms therein declared; by which the *Royal Exchange Aſſurance* and the *London Aſſurance* were created.—11 Geo. 1. c. 30. enables the Inſurance Companies to plead the General Iſſue to Actions brought againſt them; enacts, that the Policy ſhall iſſue, or be made out, within three Days after the Inſurance; that it ſhall be ſtamped, on Pain of 100*l.* and declares all promiſſory Notes for Inſurance void.——19 Geo. 2. c. 37. Inſurance on Effects of Subjects, Intereſt or no Intereſt, prohibited except from *Spain* and *Portugal*, &c. Reaſſurance, except in Caſes of Inſolvency, &c. prohibited; Regulation of Inſurance and Bonds for Money borrowed on Bottomree on *India* Ships; Inſured to declare in Writing on Demand, what Sums they have inſured; Inſurers permitted to bring Money into Court. See this Act diſcuſſed and explained in Bur. Rep. 492, 493 ‡.

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‡ By 5 Geo. 3. c. 46. ſ. 3. Policy of Inſurance not to ſecure the Property of more than one Perſon, &c. in a Ship or Cargo, to a greater Amount than 100*l.*—But a Policy ſtamped with five Stamps of five Shillings each, is excepted by ſ. 4.

Preced. Chan. 200. 2 Vern. 269.

As this Method of Inſuring was at firſt ſet up for the Benefit of Trade, ſo the Courts have been always careful that no ill Uſe has been made of it. Hence it hath been held, that if a Man has no Intereſt, and inſures, the Inſurance is void, although it be expreſſed in the Policy, *Intereſted or not Intereſted.* But it ſeems, that a Perſon, having ſome Intereſt in the Ship or Cargo, may inſure five Times as much; becauſe a Merchant cannot tell how much, or how little, his Factor may have in Readineſs to lade on board his Ship.

Abr Eq. 371. *Goddard* ver. *Garret.* 2 Vern. 269. S C. & *vide* 2 Vern. 717.

The Defendant had lent 300*l.* on a Bottomry-Bond, and afterwards inſured 450*l.* on that Ship with the Plaintiff for ſix Guineas *per Cent. Præmium*, as intereſted for Money lent, &c. the Ship out-lived the Time at which the Money was payable, and afterwards was loſt in the *Eaſt-Indies*; the Defendant recovered the Money on the Bottomry-Bond, and afterwards ſued the Inſurers on their Policy, who brought their Bill to be relieved; for that the Money, inſured by the Policy, was the Money lent on the Bottomry; and that the Defendant was no otherwiſe intereſted in the Ship; and that, the Money being paid, no Uſe ought to be made of the Policy; and the Court decreed the Policy to be delivered up.

Molloy 254.

So where a Policy is a perfect Cheat, as where a Perſon, having certain Intelligence that a Ship is loſt, inſures ſo much, this ſhall not bind the Inſurer.

Molloy 254.

So where an old Veſſel is painted, and Goods of little or no Value put on board, and a large Sum inſured, and the Ship is voluntarily ſunk, the Inſured cannot recover.

If

If in the Policy the Ship is warranted to depart with Convoy, this muſt be (*c*) underſtood not only departing the firſt Port with Convoy, but alſo a Continuance with ſuch Convoy during the Voyage, if poſſible; but if a Ship leaves the Port with Convoy, and is afterwards ſeparated by Streſs of Weather, and taken by the Enemy, the Inſurers are liable. Carth. 216, 217. 2 Salk. 443. pl. 1. Holt 465. pl. 2. 3 Lev. 320. 2 Vern. 176, 269, 716. Prec. Ch. 20. 8 Mod. 66, 230. 10 Mod. 77, 287. 12 Mod. 325. 2 Wil. Rep. 170. pl. 42. Comyns 360. pl. 180. 2 Stra. 1173, 1183, 1199, 1243, 1248, 1250. (*c*) That the Clauſe warranted to depart with Convoy, muſt be conſtrued according to the Uſage among Merchants. 2 Salk. 443. pl. 1. If a Ship warranted to depart with Convoy, goes out of the Way in order to have the Opportunity of Convoy, this is no Deviation. Bur. Rep. 347.

4 Mod. 58. S. C. *Jefferies* ver. *Legendra*. Show. 320. Ld. Raym. 724, 732, 840, 1349.

On a Policy of Inſurance, which was to inſure the *William-Galley* in a Voyage from *Bremen* to the Port of *London*, warranted to depart with Convoy: The Caſe was, The Galley ſet ſail from *Bremen* under Convoy of a *Dutch* Man of War to the *Elb*, where they were joined with two other *Dutch* Men of War, and ſeveral *Dutch* and *Engliſh* Merchant Ships; whence * they ſailed to the *Texel*, where they found a Squadron of *Engliſh* Men of War, and an Admiral; after a Stay of nine Weeks they ſet out from the *Texel*, and the Galley was ſeparated in a Storm, and taken by a *French* Privateer; taken again by a *Dutch* Privateer, and paid 80*l.* Salvage. And it was ruled by *Holt* C. J. that the Voyage ought to be according to Uſage; and that their going to the *Elb*, though in Fact out of the Way, was no Deviation; for, till after the Year 1703, there was no Convoy for Ships directly from *Bremen* to *London*; and the Plaintiff had a Verdict. 2 Salk. 445. pl. 7. *Bond* ver. *Gonſales*, *coram Holt*, C. J. at *Guildhall*. *Page 600

If after a Policy of Inſurance a Damage happens, and afterwards in the ſame Voyage a Deviation; yet the Aſſured ſhall recover for what happened before the Deviation, for the Policy is diſcharged from the Time of the Deviation only. 2 Salk. 444. pl. 4. 2 Ld. Raym. 840. *Green* ver. *Young*.

On a Policy of Inſurance on Goods by Agreement valued at 600*l.* and the Inſured not to be obliged to prove any Intereſt, the Lord Chancellor ordered the Defendant to diſcover what Goods he put on board; for although the Defendant offered to renounce all Intereſt to the Inſurers, yet he referred it to a Maſter to examine the Value of the Goods ſaved, and to deduct it out of the Value or Sum of 600*l.* at which the Goods were valued by the Agreement. 2 Vern. 716. *Le Pypre* ver. *Farr*.

A Ship inſured was in her Voyage ſeized by the Government, and turned into a Fireſhip; the Queſtion was, whether the Inſurers were liable; *Holt* C. J. thought it was within the Word *Detention*; but the Cauſe was referred. 2 Salk. 444. pl. 5.

Where a Policy of Inſurance is againſt Reſtraint of Princes, that extends not where the Inſured ſhall navigate againſt the Law of Countries, or where there ſhall be a Seizure for not paying Cuſtom, or the like. 2 Vern. 176. *per Hutchins* Lord Commiſſioner.

If a Man pay Money on a Policy of Inſurance, ſuppoſing a Loſs where there was not any Loſs; this ſhall be deemed Money received to the Uſe of the Inſurer, for which he may maintain an Action. Skin. 411. pl. 7. 412. *Tompkins* ver. *Barnet*.

Show. 156. S. P. and that an *Indebitatus Aſſumpſit* lies for ſuch Money paid on a void Policy; as where the Inſurer, not having any Intereſt, yet inſures ſo much, &c.

A Policy of Inſurance run, until the Ship ſhall have ended and be diſcharged of her Voyage; Arrival at the Port to which ſhe is bound is not a Diſcharge, until ſhe is unladed. Skin. 243. pl. 8. *Per Cur'*.

In an Action upon a Charter-party, the Caſe was, That *J. S.* inſured for him, and ſuch who ſhould have Goods upon ſuch Ship; and *A. B.* brought an Action on this Charter-party, and made Averment he had Goods upon the Ship; and held good. But *per Holt* Ch. J. If the Goods were aſſured, as the Goods of an *Hamburgher*, who was an Ally, and the Goods were the Skin. 327. pl. 5.

Goods

Goods of a *Frenchman*, who was an Enemy; this is a Fraud, and the Assurance is not good.

Skin. 404. pl. 41.

At *Guild-hall*, in an Action upon the Case upon a Policy, which warranted that the Ship should have four Passes, *viz.* a Pass from the King of *England*, from the King of *France*, from the King of *Poland*, and the States of *Holland*; and the Goods were to be the Goods of such a *Polish* Subject, on board the Ship *vocat' The City of Warsaw*; an Action on this Policy being brought, it appeared upon the Evidence, that the Passes bore Date in *April* or *May*, and that the Ship, to which they applied these Passes, then was *regnant*, and *vocat'* by (*a*) another Name, and that she was not named *The City of Warsaw* before *August* following; and therefore these were not good and effectual Passes for this Ship, according to the Guarranty of the Policy, which intended good Passes, and not elusory vain Passes; and they being a Fraud upon the Subscribers, the Policy will not bind them: Also another Objection was made, which was, that the Passes were for Goods which belonged to the Subjects of the King of *Poland*, and so restrained only to them; but the Goods on board were not of the Subjects of *Poland* but of *Holland*, and therefore not within the Intent of the Policy: It was also * insisted, that the Policy being for Goods of such a one, without Account, they ought to prove that they had Goods on Board, or had shipped Goods by Order of a third Person; though being without Account, they need not prove the Particulars; and that so was the Practice; which was not contradicted by *Holt* Ch. J. †.

(*a*) A Mistake in the Name of the Ship, and afterwards altered by Consent, the Insured recovered. 2 Salk. 444. pl. 6.

*Page 601 Whether the Property be changed by the Captor or not? See 2 Bur. Rep. 693.

(B) Of

† If the Salvage falls short of the Freight, it is to be considered as a total Loss. *Boyfield* v. *Brown*, M. 10 Geo. 2. Str. 1065.——The Expences of Salvage may be given in Evidence, though the only special Damage laid is, that the Goods were spoiled by the Ship's sinking, for it is within the Cause of Action. *Cary* v. *King*, T. 9 Geo. 2. Ca. *B. R.* Temp Hardw. 304.——To constitute Barratry in the Master, there must be something criminal, as well as Deviation or Breach of Contract, therefore if by Bill of Lading he undertakes to go straight to *Marseilles*, and afterwards giving Notice by Advertisement, and by his Owner's Orders, and for their Benefit, and without Benefit to himself, he passes *Marseilles*, and goes to *Leghorn* first, and in returning to *Marseilles* is lost, it is not Barratry. *Stamma* v. *Brown*, M. 16 Geo. 2. Str. 1173.——If a material Circumstance (as that Advice was come that the Ship was leaky, and suddenly disappeared) is concealed from the Insurer, the Policy is void, though the Ship is not lost but taken by the Enemy. *Seaman* v. *Fonereau*, H. 16 G. 2. Str. 1183.——If a Ship is insured except as to Captures and Seizures, and four Years afterwards has never been heard of, it shall be deemed sufficient Evidence that she foundered, and Plaintiff shall recover against Insurers. *Green* v. *Brown*. M. 17 Geo. 2. Str. 1199.——If Goods are lost after the Owner has taken them out of the Ship into a Lighter, and before they reach Land, it is no Charge on the Insurers; otherwise, if they had been sent by the Ship's Boat. *Sparrow* v. *Carruthers*, T. 18 Geo. 2. Str. 1236.——If a Ship insured to the Port of *London*, and till there moored twenty-four Hours in good Safety, arrives the 8th, is that Day served with Order to return to perform 14 Days Quarantine, the Crew desert, Captain petitions to be excused, Petition adjourned to 28th, and then ordered back; she returns, performs the Quarantine, applies to air the Goods, and before her Return is burnt, the Insurers are liable. *Waples* v. *Eames*, M. 19 Geo. 2. Str. 1243.——If a Man insures Interest or no Interest on any Ship he shall come in from *V.* to *L.* beginning from his Embarking, and the Money to be paid, though his Person escape, or the Ship be retaken, and he embarks on *S.* which springing a Leak, he goes on board *F.* he arrives in *L.* but Ship *S.* is taken, the Insurer is liable; and if *S.* had got safe, and *F.* been lost, he would not have been liable. *Dick* v. *Barrel*, H. 19 Geo. 2. Str. 1248.——If a Ship is insured from one Port to another, but takes in Goods to be delivered to a third, and is lost before she comes to the dividing Point of the two Voyages, the Insurer is liable, for the Intention to deviate does not discharge him. *Foster* v. *Wilmer*, H. 19 Geo. 2. Str. 1249.——On Interest or no Interest insured, a Recapture, after being in an Enemy's Port, avails not Insurer. *Dean* v. *Dicker*, H. 19 Geo. 2. Str. 1250.——Coming out of Harbour on a Signal and Orders from a Man of War, and sailing in the Fleet for some Time, and there taken, though unable to get sailing Orders from the Man of War, is sailing with Convoy. *Victoria* v. *Cleeve*, H. 19 Geo. 2. Str. 1250.——If Ship and Freight are insured, and the Ship is lost whilst careening, before the Cargo is put on board, the Insurer is liable for the Ship only, and not for the Freight she might have earned, if not lost. *Tonge* v. *Watts*, H. 19 Geo. 2. Str. 1251.——By

stat.

(K) Of Bottomry Bonds.

BOttomry, or *Fœnus nauticum*, is ſo called from the Bottom of the Ship, a Part being put for the Whole, and is in Nature of a Mortgage of a Ship; by which the Mortgagor, or Obligor, in Conſideration of a Sum of Money, Molloy 294. 5 Co. 70. Skin. 153.

Stat. 14 Geo. 3. c. 48. No Inſurance ſhall be made on Lives, or other Event, but by Perſon having Intereſt therein, whoſe Name muſt be inſerted; and he can recover no more than his Intereſt amounts to: This extends not to *bona fide* Inſurances on Ships or Goods.——If the Crew force the Maſter to go out of the Courſe of the Voyage, to carry a Prize taken into Port, it is not Barratry, nor ſuch a Deviation as will diſcharge the Inſurers. *Elton* v. *Brogden*, H. 20 Geo. 2. Str. 1264.——On Inſurance of Ship warranted to depart with Convoy, ſhe may go to the Place appointed for the general Convoy for that Trade (as from the *Downs* to *Spithead*) at the Hazard of the Inſurers. *Gordon* v. *Morley*, *Campbell* v. *Bordieu*, H. 20 Geo. 2. Str. 1265.—If a Policy of Inſurance differs from the *Label*, *i. e.* the Minute of the Agreement entered in a Book, and ſigned by the Inſurer and the Inſuree, it ſhall be made agreeable to it. *Metteaux* v. *London Aſſurance Company*, M. 1739. 1 Atkyns 545.——If a Ship at *Bengal* is inſured in *London from her Arrival at Fort Saint George*, it means her firſt Arrival there in her homeward-bound Voyage. *Ibid.*——If a Ship ſo inſured, being arrived at *Fort Saint George*, is found leaky, and is directed by the Governor to go to *Bengal* to refit, and is loſt in returning from *Bengal*, it is a Loſs during the Voyage, and according to the Adventure intended to be inſured. *Ibid.*——If a Ship is inſured *at and from* a Place, whilſt ſhe is there preparing for the Voyage, the Inſurer is liable; but if the Voyage is laid aſide, and the Ship lies there ſeveral Years, with the Owner's Privity, the Inſurer is not liable. *Chitty* v. *Selwin*, T. 1742. 2 Atkyns 359.——On Inſurances of Houſes againſt Fire, it is neceſſary the Party injured ſhould have an Intereſt in the Houſe, at the Time the Policy is made out, and at the Time the Fire happens; therefore after the Leaſe of a Houſe is expired, and after the Fire happens, the Inſured's aſſigning the Policy does not oblige the Inſurers to make good the Loſs to the Landlord, the Aſſignee. *Sadlers Company* v. *Badcock*, P. 1743. 2 Atkyns 554.——Policies of Aſſurance againſt Fire are not aſſignable in their Nature, nor intended to be aſſigned from one Perſon to another, without the Conſent of the Office. *Ibid.*—If a Ship inſured is taken, retaken, and, no Perſon appearing to give Security, condemned and ſold, the Moiety paid the Recaptors, and the other Moiety remains with the Officers of the Court, and the *Inſured* recovers on the Policy; Chancery will not reſtrain him from proceeding for the Whole, if he offers to relinquiſh the Salvage to the *Inſurer*. *Pringle* v. *Hartley*, M. 1744. 3 Atkyns 195.—The Inſurer, after Satisfaction made to the Aſſured, ſtands in his Place as to the Goods, Salvage, and Reſtitution, and is intitled to a Share of Prizes taken by virtue of Letters of Repriſal. *Randal* v. *Cockran*, T. 1748. 1 Vezey 98.——If a Privateer is inſured to cruiſe for three Months, and is taken by the Enemy, and retaken before ſhe is *infra præſidia hoſtis*, carried into a neutral Port, and ſentenced to be reſtored to the Owners on paying Salvage, yet it is a total Loſs to the Inſured. *Pond* v. *King*, H. 21 Geo. 2. 1 Wilſ. 191.——Policy of Aſſurance againſt Fire, with Proviſo not to be liable if burnt *by Invaſion by foreign Enemies, or any military or uſurped Power whatſoever*; a Mob riſes on Account of the Dearneſs of Proviſions, the Proclamation is read, Mob diſperſes, another ariſes and burns the Houſe; this is not an uſurped Power within the Proviſo. *Drinkwater* v. *London Aſſurance*, M. 8 Geo. 3. 2 Wilſ. 363.——If it is uſual, prudent, and for the Benefit of all concerned, to take out the Furniture, Tackle, &c. of a Ship, and put them in a Warehouſe on Land at a certain Place, (as on the Sand-banks in the River of *Canton*) while ſhe refits, and if they are there burnt, the Inſurers are liable. *Pelly* v. *Royal Exchange Aſſurance*, P. 30 Geo. 2. 1 Bur. 341.——*Double* Inſurance is where the ſame Man is to receive two Sums inſtead of one, or the ſame Sums twice over for the ſame Loſs, by reaſon of his having made two Inſurances on the ſame Goods or Ships; but every Caſe where there are *two* Inſurances is not a *double* Inſurance. *Godin* v. *London Aſſurance Company*, H. 31 Geo. 2. 1 Bur. 489.——*A.* at *Saint Peterſburg*, is indebted to *B.* in *London*, who ſends a Ship for Goods, and makes Inſurances; *A.* ſends Goods, but not Bill of Lading, directs Inſurances to be made, which are done accordingly; *A.* indorſes the Bills of Lading to *C.* of *Moſcow*, who orders Inſurance for the Whole, which is done with *D.* the Whole is loſt; *C.* ſhall recover the whole Sum of *D.* and if *C.* is any ways intitled under the Inſurances made by *A.* or *B. D.* ſhall ſtand in his Place. This is ſtill ſtronger, if *D.* was apprized that there might be another Inſurance. *Ibid.*——As between Inſured and Inſurer, a Ship is loſt by the Capture, and the Inſurer muſt indemnify the Inſured as to the Loſs actually ſuſtained; and he ſhall ſtand in the Place

Money, obliges himſelf to pay ſo much on the ſafe Return of the Ship; but in caſe the Ship be loſt, then the Obligee, or Mortgagee, to loſe the whole Money, according to the Condition of the Bond; and theſe Kind of Contracts are held lawful, and are not uſurious, though greater Intereſt be reſerved

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Place of the Inſured, in caſe of Recapture or Abandonment. *Goſs* v. *Withers*, M. 32 Geo. 2. 2 Bur. 683.——Generally, but not univerſally, on a Capture, the Inſured may demand as for a total Loſs, and abandon. *Ibid.*——So, on an Arreſt or Embargo by a Prince not an Enemy. *Ibid.*——But where the Capture is but ſmall Hindrance, as ſudden Eſcape, or immediate Ranſom, it is only an average Loſs. *Ibid.*——The Inſured in no Caſe is obliged to abandon. *Ibid.*——He cannot turn what in its Nature is an average Loſs, into total Loſs, by abandoning. *Ibid.*——A Ship inſured is taken, the Hands, except two, taken out and ſent to *France*, ſhe remains eight Days in the Enemy's Hands, is retaken, brought to *England*; ſhe could not proceed without coming to refit, immediate Notice to Inſurers, with Offer to abandon. This is total Loſs *Ibid.* ——If a Ship is taken, retaken, and arrived in *England* before the *Inſured* offers to abandon, and is afterwards brought to the Port of Delivery, and has ſuſtained no Damage from the Capture, he cannot recover for a *total* but only an *average* Loſs. *Hamilton* v. *Mendez*, T. 1 Geo. 3. 2 Bur. 1198.——In Action on the Caſe, on Policy of Inſurance, tho' the Declaration is for a total Loſs, and Damages laid for ſuch, and Plaintiff only proves an average Loſs, and does not attempt to prove a total Loſs, yet he may recover as for a partial Loſs. *Gardiner* v. *Croaſdale*, H. 33 Geo. 2. 2 Bur. 904. ——The Duty ariſes on the Ship's Arrival and landing her Cargo, the Inſured has *then* a Right to Satisfaction, to be paid ſuch Proportion of the prime Coſt, or Value in the Policy, as correſponds with the Proportion of the Diminution in Value occaſioned by the Damage; and the Adjuſtment muſt be according to the Value at that Time, and not depend on Speculations or future Events.——Thus *A.* inſures Sugars to *Hamburgh*, at 30*l. per* Hogſhead, it is damaged and therefore, only, muſt be immediately ſold; the Value of Sugar undamaged is then 23*l.* of this damaged Sugar 20*l. A.* ſhall pay the ſame Proportion of 3*l.* as 3*l.* (the Difference between 23*l.* and 20*l.*) is of 23*l.* that is, three twenty thirds of 30*l. Lewis* v. *Rucker*, P. 1 Geo. 3. 2 Bur. 1167.——In a Declaration on a Policy ſigned by an Agent, Plaintiff need not lay different Counts, one as ſigned by the Principal, and another as ſigned by the Agent, duly authorized; either is ſufficient. *Nickleſon* v. *Croft*, T. 1 Geo. 3. 2 Bur. 1188.——If a Ship is inſured from *London* to *Halifax*, warranted to depart with Convoy from *Portſmouth*, and before ſhe arrives at *Portſmouth* the Convoy is gone, (ſo that the Inſurer runs no Riſque for the remaining Part of the Voyage) he ſhall return Part of the Premium. *Stephenſon* v. *Snow*, M. 2 Geo. 3. 3 Bur. 1237.—An Agreement between the Inſured and the firſt Underwriter, "That he ſhall not be bound by his ſigning the Policy," renders the Policy fraudulent. *Wilſon* v. *Ducket*, M. 3 Geo. 3. 3 Bur. 1361.——A fraudulent Policy ſhall be delivered up, and the Premium returned, deducting Coſts. *Ibid.*——If a Man who has lent Money on *Bottomree or Reſpondentia* inſures on *Goods*, he cannot recover; for *Bottomree or Reſpondentia* muſt be ſpecified in the Policy. *Glover* v. *Black*, T. 3. Geo. 3. 3 Bur. 1394—If a Ship warranted neutral Property, is by ſtormy Weather wrecked, ſunk and loſt; and it appears ſhe was not neutral Property when loſt, the Inſured cannot recover. *Woolman* v. *Muilman*, T. 3 Geo. 3. 3 Bur. 1419.—If there are Articles of Agreement, that when any Ship wherein any Member has Property is loſt, the Reſt ſhall contribute to ſuch Loſs; and if any would ceaſe to be a Member, he muſt give ſix Months Notice. *A.* has Property, but parts with it before the Loſs, but agrees with the Purchaſor to pay 500*l.* if Loſs happens, and has not given Notice of ceaſing to be a Member, he ſhall recover on the Articles againſt the other Members. *Reed* v. *Cole*, T. 4 Geo. 3. 3 Bur. 1512.—Average ſignifies, a Contribution to a general Loſs: It alſo ſignifies a particular partial Loſs. *Wilſon* v. *Smith*, T. 4 Geo. 3. 3 Bur. 1550—If Corn is inſured *free from Average, unleſs general, or the Ship be ſtranded*, and the Ship is obliged in a Storm to cut away and leave her Cable and Anchor, and runs into Port to refit, then proceeds to the Port of Delivery, and delivers the Corn which is damaged by the Storm, the Inſured cannot recover. *Ibid.*—In Inſurances on *Eaſt-India* Ships, it is not neceſſary to diſcloſe that there has been a new Agreement to detain the Ship a Year longer in the *Indies*, than the enlarged Time provided for by the Charter-party; for this is the Courſe of that Trade, which the Under-writers are preſumed to know; and this Detention, and its Conſequences, are Part of the Riſque they inſure. *Salvadore* v. *Hopkins*, *Heaton* v. *Rucker*, and ſeven more Cauſes. T. 5 Geo. 3. 3 Bur. 1707.—— A warlike Fort may not be inſured by the Governor; but a nominal Fort, really a Factory, and only defenſible againſt black Natives, may be inſured by a Governor, who is a Merchant, and not a Military-man. *Carter* v. *Boehm*, P. 6 Geo. 3. 3 Bur. 1905. ——Such Inſurance is good, tho' the Inſured does not diſcloſe ſuch Conditions of the Place as do not affect the Riſque inſured againſt; nor his Speculations, that the Enemy might

reſerved than the Statutes allow, by Reaſon of the Hazard the Lender runs, and being found uſeful for Navigation and Commerce †.

† In Latch 252. it is ſaid Bottomry is ſo called, where the Maſter takes up Money by way of Loan, for the Uſe of the Ship, and pledges the Bottom or Keel of the Ship for Security of Payment.

As where *A.* lends *B.* 100*l.* to freight a Ship abroad, and they agree, that, if the Ship comes home ſafe, *A.* ſhall have 150*l.* and that if ſhe do not, that he ſhall loſe the 100*l.* this is not Uſury, but good by the Cuſtom of Merchants, becauſe of the great Perils at Sea, and both Principal and Intereſt run the ſame Hazard of being loſt; but if the Principal be ſecured, and the Intereſt only depend on an Hazard, if it be more than is lawful, it is Uſury ‡.

2 Rol. Rep. 48. 5 Co. 70, &c. Cro. Jac. 208, 508. 1 Keb. 539, 711.

‡ If a Contract be made, by Colour of Bottomry, to evade the Statute of Uſury, it will be uſurious. 4 Com. Dig. 193. (E. 4.)

So where the Condition of a Bottomry-Bond was, that if the Obligor, or the Ship, or the Goods, return ſafe, then to pay more than the legal Intereſt; this was adjudged good by the Cuſtom of Merchants, though it depends on many Contingencies; and though the Obligee may be ſaid to run little Hazard; and though any of the Contingencies become impoſſible; as if the Obligor die before his Return, &c. yet the Bond remains payable, contrary to the general Rule of Law in ſuch Caſes; for the Law ſupplies thoſe Words, *which ſhall firſt happen*, and foreclоſes the Election of the Obligor, and gives it to the Obligee to take his, on which the Contingencies ſhall firſt happen. Lev. 54. Sid. 27.

The Plaintiff entered into a penal Bond of Bottomry to pay 40*l.* *per* Month for 50*l.* the Ship was to go from *Holland* to the *Spaniſh* Iſlands, and ſo to return for *England*; but if ſhe periſhed, the Defendant was to loſe his 50*l.* She went accordingly to the *Spaniſh* Iſlands, took in Moors at *Africk*, and upon that Occaſion went to *Barbadoes*, and then periſhed at Sea; the Plaintiff, being ſued on the Bond and Penalty, ſought Relief in Equity, pretending that the (*a*) Deviation was of Neceſſity; but his Bill was diſmiſſed, ſaving as to the Penalty. 2 Chan. Ca. 130.

(*a*) If a Ship deviates in her Voyage, and is after loſt, the Plaintiff, who had lent Money on her Hull, ſhall recover. Skin. 262-3. [*vide* Skin. 152.]

J. S. entered into a Bottomry-Bond, whereby he bound himſelf in Conſideration of 400*l.* as well to perform the Voyage within ſix Months, as at the ſix Months End to pay the 400*l.* and 40*l.* *Præmium*, in caſe the Veſſel arrived ſafe, and was not loſt in the Voyage; and it fell out, that *J. S.* never went the Voyage, whereby his Bond became forfeited; and he preferred a Bill to be relieved, and in regard the Ship lay all along in the Port of *London*, ſo that the Defendant run no Hazard of loſing his Principal; the Lord Keeper decreed, that he ſhould loſe the *Præmium* of 40*l.* and be contented with his ordinary Intereſt. Vern. 263. *Deguilder* ver. *Depeiſter*.

* A Part-Owner of a Ship borrowed Money of the Plaintiff upon a Bottomry-Bond, payable on the Return of the Ship from the Voyage; ſhe was then *Turner*. *Page 602 Abr. Eq. 372. *Dandy* ver.

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might make them a Viſit, being unable to act elſewhere; nor that the Enemy deſigned to attack them the Year before. *Ibid.*——If the Inſured conceals from the Under-writer any Circumſtance that *increaſes* the Riſque, the Policy is void. *Ibid.*——If the Under-writer inſures a Ship as on her Voyage, which he privately knows is arrived, an Action lies to recover the Premium from him. *Ibid.*——Facts only, not Speculations, are to be diſcloſed. *Ibid.*——The Inſured need not tell the Under-writer what he *actually* knows, what he *ought* to know, what he takes upon himſelf the Knowledge of, or what he waives being informed of. *Ibid.*

then going in the Service of the *East-India* Company, and the *East-India* Company broke up the Ship in the *Indies*; the Owners brought their Action againſt the Company, and recovered Damages, but they did not amount to a full Satisfaction; and the Obligee brought his Bill to have his proportionable Satisfaction out of the Money recovered; but his Bill was diſmiſſed, and he left to recover as well as he could at Law; the Court declaring, that they would never aſſiſt a Bottomry-Bond, which carried an unreaſonable Intereſt.

19 Geo. 2. c. 37. Regulating Inſurance on Ships belonging to the Subjects of *Great Britain*, and on Merchandizes or Effects laden thereon.

(L) Of Bills of Exchange: And herein,

1. Of the Nature and different Kinds of Bills of Exchange and negotiable Notes.

1. *Of Foreign Bills.*

For the Antiquity of Exchange, *vide* Molloy 277. Malyne 269. —That the true Meaſure of Exchange is *par pro pari*, or Value for Value.

THE Cuſtom of Merchants, in Relation to Foreign Bills of Exchange, ſeems to have prevailed Time out of Mind; and was at firſt introduced for the Expedition of Trade and its Safety, and to prevent the Exportation of Money out of the Realm; and hath therefore been always countenanced and encouraged, as a Matter of great Eaſe and Advantage to Trade, and is now become Part of the Law of the Land; and as Bills of Exchange are eſtabliſhed merely by the Cuſtom of Merchants, and for their Benefit; ſo their Rules and Cuſtoms are allowed to preſcribe their Form and ſeveral Properties, as to their creating Engagements on the Parties that are concerned in them.

Molloy 274.—Where the King of *Portugal* lowered his Coin, this is not to prejudice the Drawer here. —That originally there could be no Exchange, without the King's Licence. Molloy 274.

Rol. Abr. 6. Cro. Jac. 306. Cro. Car. 301. By this Cuſtom, if a Merchant abroad draw a Bill on a Merchant here, or *vice verſa*, requeſting him to pay a certain Sum of Money, and the Drawer ſets his Name to it; this amounts to a Promiſe to pay, and ſubjects him, though but a collateral Engagement, to an Action on the Non-payment.

Cro Car. 301. And if the Drawee, or he on whom the Bill is drawn, refuſe to accept it, or, having accepted it, refuſe to pay it, the Payee, or he in whoſe Favour it is drawn, may proteſt it, and ſhall recover againſt the Drawer, not only the principal Sum, but likewiſe all Intereſt, Coſts and Damages, by Reaſon of the Proteſt or Refuſal of Acceptance, or Payment of the Money.

Carth. 3. *Renew* ver. *Axton.* Show. 341. Comb. 190. S. P. 4 Mod. 105. Holt 427. But though the Cuſtom of Merchants, in Relation to Bills of Exchange, be eſtabliſhed by the Common Law, and ſuch Bills, being Securities for Money, are of great Credit among them; yet are they not allowed to be Securities of as high a Nature as Bonds or Specialties; and therefore it hath been adjudged, that a Bill of Exchange is within the Statute of (*a*) Limitations, and muſt be ſued for within ſix Years after it becomes payable.

pl. 2. (*a*) Nor are Bills of Exchange, for Value received, ſuch Matters of Account, as are intended by the Exception in the Statute concerning Merchants Accounts. Carth. 226. But for this, *vide* Tit. *Limitations of Actions.* pla. 5th.

Vide Head of *Executors and Adminiſtrators.* Alſo a Bill of Exchange is to be conſidered as a ſimple Contract Debt in a Courſe of Adminiſtration, which an Executor or Adminiſtrator cannot diſcharge before Debts by Bond, without being guilty of a *Devaſtavit*.

So

* So if a Merchant in *London* draw a Bill of Exchange on his Correſpondent in *Newcaſtle*, in Favour of *J. S.* and the Bill is refuſed, and *J. S.* dies inteſtate, his Adminiſtrator, on Letters of Adminiſtration taken out in *Durham*, cannot bring an Action, on the Cuſtom of Merchants, againſt the Drawer, and lay the ſame in *London*; for that a Bill of Exchange is not equal to a Bond or Specialty, which are the Deceaſed's Goods, where they happen to be at his Death, but is a ſimple Contract, which follows the Perſon of the Debtor, and makes *bona notabilia* where the Debtor reſides; and therefore Adminiſtration ought to have been taken out in *London*. * Page 603 Carth. 373. *Yeomans* ver. *Bradſhaw*. Comb. 392. S. C.

Alſo this Cuſtom ſhall not prevail againſt the Privilege of Infants, ſo as to bind them; and accordingly it hath been adjudged, that if an Infant draw a Bill of Exchange, Infancy is a good Plea in Bar to an Action brought againſt him †. Carth. 160. *Williams* ver. *Harriſon*.

† Or it may be given in Evidence on the general Iſſue.

Bills of Exchange are uſually drawn payable on Sight, ſo many Days after Sight, or after Date, or on ſingle, double or treble (*a*) Uſances; and it is frequent to draw two or three for the ſame Sum, and of the ſame Date, for fear of Loſs or Miſcarriage, which carry a (*b*) Condition with them that only one ſhall be paid. Molloy 276.

(*a*) An Uſance is ſaid to be regularly a Month. Molloy 277.

Show. 317. Holt 113. pl. 4. 12 Mod. 15.——But yet varies according to the Cuſtom of particular Countries; and therefore, where the Plaintiff declared on a Bill of Exchange drawn at *Amſterdam*, payable at *London*, at two Uſances, and did not ſhew what the two Uſances were, Judgment was given for the Defendant; for the Court could not take Notice of foreign Uſances which varied, being longer in one Place than in another. Salk. 131. pl. 18. *Buckley* ver. *Cambell*. (*b*) Therefore, if there are three Bills for the ſame Sum, and an Action is brought on one of them, and the Plaintiff declare, that the Money *in Billa prædicta mentionat'* is not paid; this is ſufficient without averring ‡, that it was not paid on the other Bills, becauſe the Sum is the ſame in all the Bills. Carth. 510. Salk. 130. pl. 14. adjudged. See 2 Ld. Raym. 810. 3 Salk. 400. pl. 2. 7 Mod. 86.

‡ Tho' it is uſual to make ſuch Averment, if the Bill notices the others.

2. *Of Inland Bills.*

Inland Bills of Exchange are thoſe drawn by one Merchant reſiding in one Part of the Kingdom, on another reſiding in ſome City or Town within the ſame Kingdom; and theſe alſo, being found uſeful to Trade and Commerce, have been eſtabliſhed on the ſame Foot with foreign Bills; but at Common Law they differed from them in this, that there was no Cuſtom of proteſting them, ſo as to ſubject the Drawer to Intereſt and Damages in caſe of Non-payment, as there was on foreign Bills. 6 Mod. 29, 80. Salk. 131. pl. 17.

To remedy this Inconvenience, by the 9 & 10 *W.* 3. *cap.* 17. reciting, that great Damages and other Inconveniencies do frequently happen in the Courſe of Trade and Commerce, by Reaſon of Delays of Payment and other Neglects on Inland Bills of Exchange, it is enacted, "That all and "every Bill or Bills of Exchange, drawn in, or dated at and from any "trading City or Town, or any other Place in the Kingdom of *England*, "Dominion of *Wales*, or Town of *Berwick* upon *Tweed*, of the Sum of "5 *l.* or upwards, upon any Perſon or Perſons of or in *London*, or any "other trading City, Town, or any other Place (in which ſaid Bill or Bills "of Exchange, ſhall be acknowledged and expreſſed the ſaid Value to be "received,) and is and ſhall be drawn payable at a certain Number of "Days, Weeks, or Months after Date thereof; that from and after Preſen-"tation and Acceptance of the ſaid Bill or Bills of Exchange, (which Ac-"ceptance ſhall be by the underwriting the ſame under the Party's Hand "ſo accepting); and after the Expiration of three Days after the ſaid Bill

" or Bills ſhall become due, the Party to whom the ſaid Bill or Bills are " made payable, his Servant, Agent or Aſſigns, may and ſhall cauſe the " ſaid Bill or Bills to be proteſted by a Notary Public, and in Default of " ſuch Notary Public, by any other ſubſtantial Perſon of the City, Town " or Place, in the Preſence of two or more credible Witneſſes; Refuſal or " Neglect, being firſt made of due Payment of the ſame; which Proteſt " ſhall be made and written under a fair written Copy of the ſaid Bill of

*Page 604 " *Exchange, in the Words or Form following:——*Know all Men, that I A. B. on the Day of at the uſual Place of Abode of the ſaid have demanded Payment of the Bill, of which the above is the Copy, which the ſaid did not pay; wherefore I the ſaid do hereby proteſt the ſaid Bill, dated at this Day of*

" Which Proteſt, ſo made as aforeſaid, ſhall within 14 Days after making " thereof be ſent, or otherwiſe due Notice ſhall be given thereof to the " Party from whom the ſaid Bill or Bills were received, who is, upon pro- " ducing ſuch Proteſt, to pay the ſaid Bill or Bills, together with all In- " tereſt and Charges from the Day ſuch Bill or Bills were proteſted, for " which Proteſt ſhall be paid a Sum, not exceeding the Sum of Six-pence; " and in Default or Neglect of ſuch Proteſt made and ſent, or due Notice " given within the Days before limited, the Perſon ſo failing or neglecting " thereof, is and ſhall be liable to all Coſts, Damages and Intereſt, which " do and ſhall acrue thereby.

Bills loſt

" Provided nevertheleſs, that in caſe any ſuch Inland Bill or Bills of " Exchange ſhall happen to be loſt or miſcarried within the Time before " limited for Payment of the ſame, then the Drawer of the ſaid Bill or " Bills is and ſhall be obliged to give another Bill or Bills of the ſame " Tenor with thoſe firſt given, the Perſon or Perſons, to whom they are " and ſhall be ſo delivered, giving Security, if demanded, to the ſaid " Drawer, to indemnify him againſt all Perſons whatſoever, in caſe the " ſaid Bill or Bills of Exchange, ſo alledged to be loſt or miſcarried, ſhall " be found again."

But this Statute was deficient, in that it had no Effect, unleſs the Party, on whom the Bill was drawn, accepted it, by underwriting the ſame, which few or none cared to do.

To remedy which, by the 3 & 4 *Ann. cap.* 9. it is enacted, " That in " caſe, upon preſenting any ſuch Bill or Bills of Exchange, the Party or " Parties, on whom the ſaid Bills ſhall be drawn, ſhall refuſe to accept the " ſame by underwriting the ſame as aforeſaid, the Party to whom the ſaid " Bill or Bills are made payable, his Servant, Agent or Aſſigns, may and " ſhall cauſe the ſaid Bill or Bills to be proteſted for Non-acceptance, as " in Caſe of foreign Bills of Exchange; any Thing in the ſaid Act, or any " other Law to the contrary notwithſtanding, for which Proteſt there ſhall " be paid 2 *s.* and no more.

" Provided, that no Acceptance of any ſuch Inland Bill of Exchange " ſhall be ſufficient to charge any Perſon whatſoever, unleſs the ſame be " underwritten or indorſed in Writing thereupon; and if ſuch Bill be not " accepted by ſuch Underwriting or Indorſement in Writing, no Drawer " of any ſuch Inland Bill ſhall be liable to pay any Coſts, Damages or In- " tereſt thereupon, unleſs ſuch Proteſt be made for Non-acceptance there- " of, and within 14 Days after ſuch Proteſt the ſame be ſent, or other- " wiſe Notice thereof be given to the Party from whom the Bill was re- " ceived, or left in Writing at the Place of his or her uſual Abode; and if " ſuch Bill be accepted, and not paid before the Expiration of three Days " after the ſaid Bill ſhall become due and payable, then no Drawer of ſuch " Bill ſhall be compellable to pay any Coſts, Damages or Intereſt thereup- " on, unleſs a Proteſt be made and ſent, or Notice thereof be given in " Manner and Form above-mentioned; nevertheleſs, every Drawer of " ſuch Bill ſhall be liable to make Payment of Coſts, Damages and Intereſt

" upon

" upon such Inland Bill, if any one Protest be made for Non-acceptance or " Non-payment thereof, or Notice thereof be sent, given or left, as afore- " said.

" Provided, that no such Protest shall be necessary, either for Non- " acceptance or Non-payment of any Inland Bill of Exchange, unless the " Value be acknowledged and expressed on such Bill to be received; " and unless such Bill be drawn for the Payment of 20*l.* or upwards, " * and that the Protest, hereby required for Non-acceptance, shall be * Page 605 " made by such Persons as are appointed by the above Statute 9 & 10 " *W.* 3. *cap.* 17.

" And it is further enacted by the said Statute 3 & 4 *Ann. cap.* 9. That " if any Person doth accept any such Bill of Exchange, for and in Satis- " faction of any former Debt, or Sum of Money formerly due to him, the " same shall be accounted and esteemed a full and complete Payment of " such Debt; if such Person, accepting of any such Bill for his Debt, doth " not take his due Course to obtain Payment thereof, by endeavouring to " get the same accepted and paid, and make his Protest as aforesaid, either " for Non-acceptance or Non-payment thereof.

" Provided, that nothing herein contained shall extend to discharge any " Remedy that any Person may have against the Drawer, Acceptor or In- " dorsor of such Bill †." only discharges claim for Interest †

† Bills of Exchange how chargeable with Post Duties, see 6 Geo. 1. c. 21. s. 51, 52.

3. *Of promissory and negotiable Notes.*

The Increase of Trade, and Necessity of Paper Credit, put Bankers and others upon an Expedient of bringing promissory Notes within the Custom of Merchants, and making them negotiable, as Inland Bills of Exchange; but this the Judges would not admit of, promissory Notes being only considered, by the Common Law, as Evidences of a Debt, and not assignable or negotiable in their own Nature. Salk. 24. pl. 8. 129. pl. 12. 2 Ld. Raym. 757. 6 Made. 29.

But it being found necessary to make use of this Kind of Credit, by the *(a)* 3 & 4 *Ann. cap.* 9. reciting, that whereas it hath been held, that Notes in Writing signed by the Party who makes the same, whereby such Party promises to pay unto any other Person, or his Order, any Sum of Money therein mentioned, are not assignable or indorsible over within the Custom of Merchants to any other Person; and that such Person, to whom the Sum of Money mentioned in such Note is payable, cannot maintain an Action, by the Custom of Merchants, against the Person who first made and signed the same; and that any Person to whom such Note should be assigned, indorsed, or made payable, could not, within the said Custom of Merchants, maintain any Action upon such Note against the Person who first drew and signed the same; therefore to the Intent to encourage Trade and Commerce, which will be much advanced, if such Notes shall have the same Effect as Inland Bills of Exchange, and shall be negotiated in like Manner, it is enacted, " That all Notes in Writing, that shall be made " and signed by any Person or Persons, Body Politick or Corporate, or by

(a) Made perpetual by the 7 Ann. c. 25. s. 3.

A Promise to pay on an uncertain Contingency, is not within the Act. 2 Stra. 1151.

A Note to pay to *A.* for Value received, is within the Statute, tho' without the Word " Order." Sel. Cas. Evid. 18. So one payable two Months after a Ship paid off. Stra. 24. One to pay 300 *l.* to *B.* or Order in three good *East-India* Bonds on the 28th of *November* following, is not within the Statute. *East.* 1 Geo. 1. *Moore* ver. *Vanlute* in *C. B.* but a Note payable so many Days after the Death of the Drawer's Father is. 2 Stra. 1217. But *Note*, in the *Name* of *two*, *signed* by *one only*, to pay on the Death of *G. H.* " Provided he leaves either of us sufficient to pay the said Sum, or if we shall be otherwise able to pay," is not negotiable. Bur. Rep. 325, 326. A Note given to an Infant, payable when he shall come of Age, and specifying the particular Day, is a good one. Bur. Rep. 227, 228. But to deliver up Horses and Wharf, and to pay Money is not. 2 Stra. 1272. To pay for the Debt of another is. Stra. 264. So to pay Money, Value received of Premisses in *Rosemary-Lane*. 2 Ld. Raym. 1545.

" the Servant or Agent of any Corporation, Banker, Goldſmith, Merchant " or Trader, who is uſually intruſted by him, her or them, to ſign ſuch " promiſſory Notes for him, her or them, whereby ſuch Perſon or Perſons, " Body Politick and Corporate, his, her or their Servant or Agent as afore- " ſaid, doth or ſhall promiſe to pay to any other Perſon or Perſons, Body " Politick and Corporate, his, her or their Order, or unto Bearer, any " Sum of Money mentioned in ſuch Note, ſhall be taken and conſtrued " to be, by Virtue thereof, due and payable to any ſuch Perſon or Per- " ſons, Body Politick and Corporate, to whom the ſame is made payable; " and alſo every ſuch Note payable to any Perſon or Perſons, Body Poli- " tick and Corporate, his, her or their Order, ſhall be aſſignable or indor- " ſible over, in the ſame Manner as Inland Bills of Exchange are or may " be according to the Cuſtom of Merchants; and that the Perſon or Per- " ſons, Body Politick and Corporate, to whom ſuch Sum of Money is or " ſhall be by ſuch Note made payable, ſhall and may maintain an Action " for the ſame in ſuch Manner as he, ſhe or they might do upon an Inland " Bill of Exchange, made or drawn according to the Cuſtom of Merchants,
*Page 606 " * againſt the Perſon or Perſons, Body Politick and Corporate, who or " whoſe Servant or Agent, as aforeſaid, ſigned the ſame; and that any " Perſon or Perſons, Body Politick and Corporate, to whom ſuch Note " that is payable to any Perſon or Perſons, Body Politick and Corporate, " his, her or their Order, is indorſed or aſſigned, or the Money therein " mentioned, ordered to be paid by Indorſement thereon, ſhall and may " maintain his, her or their Action for ſuch Sum of Money, either againſt " the Perſon or Perſons, Body Politick and Corporate, who or whoſe " Servant or Agent as aforeſaid ſigned ſuch Note, or againſt any of the " Perſons that indorſed the ſame, in like Manner as in Caſe of Inland Bills " of Exchange; and in every ſuch Action, the Plaintiff or Plaintiffs ſhall " recover his, her or their Damages and Coſts of Suit; and if ſuch Plaintiff " or Plaintiff's ſhall be nonſuited, or a Verdict be given againſt him, her or " them, the Defendant or Defendants ſhall recover his, her or their Coſts " againſt the Plaintiff or Plaintiffs; and every ſuch Plaintiff or Plaintiffs, " Defendant or Defendants reſpectively recovering, may ſue out Execution " for ſuch Damages and Coſts by *Capias*, *Fieri facias*, or *Elegit*.

And it is further enacted by the ſaid Statute, " That all and every ſuch " Actions ſhall be commenced, ſued and brought within ſuch Time, as is " appointed for commencing or ſuing Actions upon the Caſe, by the Sta- " tute 21 *Jac.* 1. *cap.* 16. *ſect.* 3. of *Limitations*.

" Provided, that no Body Politick or Corporate ſhall have Power, by " Virtue of this Act, to Iſſue or give out any Notes by themſelves or their " Servants, other than ſuch as they might have iſſued, if this Act had " never been made."

Trin. 6 Ann. *Aſh* ver. *Baron*, in *B. R.* It hath been adjudged, that a Note wrote by the Plaintiff, and ſubſcribed by the Defendant, is a Note *made and ſigned* by the Defendant within this Act; for the Signing or Subſcribing is the Lien, and the Writing or Making is only the mechanical Part of it.

2. What ſhall be ſaid a Bill of Exchange, or negotiable Note, within the Cuſtom of Merchants.

Carth. 510. Salk. 128. pl. 10. Ld. Raym. 538. *Starky* ver. *Cheeſeman*. As the Cuſtom of Merchants hath eſtabliſhed theſe Bills and Notes, ſo hath it preſcribed their Form, and required that the ſame ſhould be in Writing, and drawn by the Party, or thoſe having legal Authority from him; and ſuch Drawing raiſes a Contract to pay the Money without any expreſs Promiſe.

As

As to the Form of the Bill, it is ſaid, that the ſame Strictneſs and Nicety are not required in penning of Bills current between Merchant and Merchant, as in Deeds, Wills, &c. on the other Hand, it may happen, that a Writing may have the Form of a Bill of Exchange, and yet be otherwiſe. 10 Mod. 287. See 2 Ld. Raym. 1397. Gilb. Caſ. 94.

As if *A.* draw a Bill upon *B.* in this Form, *Sir, you are to pay* S. S. *ſo much of the Money belonging to the Governors and Company of* Devonſhire Miners, &c. this is no ſuch Bill of Exchange as will intitle *S. S.* to an Action againſt the Drawer on the Cuſtom of Merchants; for it is only a Direction or Appointment to the Caſhier to pay the Money, and that out of a particular Fund, and doth not anſwer the Neceſſity of Trade, not being a negotiable Bill, or made indorſible over; and charging the Drawer on ſuch a Note, would be liable to this further Inconveniency, that hereby every one, who gives his Steward an Order or Authority to pay Money, might be charged for Non-payment. Paſch. 10 Geo. *Jenny* ver. *Hale*, in *B. R.* adjudged. Stra. 591. 2 Ld. Raym. 1361.

So a Bill drawn by *A.* upon *B.* requiring him to pay *C.* 7 *l.* every Month out of the Annuity, or growing Fund of the Drawer, is no Bill of Exchange, nor the Drawee liable, though he accepted ſuch Bill; for it concerns neither Trade nor Credit, but is to be paid out of the growing * Subſiſtence of the Drawer; ſo that if the Party die, or the Fund be taken away, the Payment is to ceaſe and determine. Paſch. 1 Geo. 1. *Joſſelyn* ver. *Lacier*, in *B. R.* adjudged. *Page 607 Forteſc. 281. 2 Ld. Raym. 2362.

Alſo it hath been reſolved, that if *A.* give a Note to *B.* for the Payment of a Sum of Money when he the ſaid *A.* ſhould marry ſuch a one; *B.* cannot bring an Action on ſuch Note, and declare as on a Bill of Exchange, ſetting forth the Cuſtom of Merchants, &c. for that in Truth there is no ſuch Cuſtom, being only an Agreement founded on a Marriage-Brokage, and to pay Money on a collateral Contingency; which Contingency cannot be called Trading, ſo as to come within the Cuſtom of Merchants. 4 Mod. 242. Comb. 227. S. C. *Pearſon* ver. *Garret*.

But it hath been held, that a Note drawn in theſe Words, *I promiſe to Account with* J. S. *or his Order, for* 50 l. *Value received by me*, &c. is a good negotiable Note, within the Statute (*a*) 3 & 4 *Ann. cap.* 9. and that the Word *Account* ſhall be conſtrued the ſame as to *pay*, and not to render an Account as Factor or Bailiff; and the rather, becauſe he is not only accountable to *J. S.* but likewiſe to his *Order*; which he cannot be as Factor or Bailiff, and therefore it muſt be to pay the Money to the Indorſee, or Order of *J. S.* Paſch. 11 Geo. 1. *Morris* ver. *Lea.* Stra. 629. 2 Ld. Raym. 1396.

(*a*) But it is ſaid to have been reſolved, in the Caſe of *Smith* ver. *Boheme*, 1 Geo. 1. that a Promiſe to pay *J. S.* 70 *l.* or ſurrender the Principal, is not a negotiable Note within this Statute. 2 Ld. Raym. 1362. Gilb. Caſ. 93. See 2 Ld. Raym. 1396.——So in the Caſe of *Appleby* ver. *Biddolph*, a Note in theſe Words, *I promiſe to pay* J. S. *ſo much Money, if my Brother does not pay it within ſuch a Time*, was held not to be a negotiable Note within the ſaid Statute; becauſe the Drawer's becoming a Debtor depended on a Contingency, and was not ſo originally. Stra. 629. 8 Mod. 362. 2 Ld Raym. 1396.

It hath been reſolved, that a Bill of Exchange drawn by a Gentleman, who is no Trader, ſhall notwithſtanding make him reſponſible within the Cuſtom of Merchants; for otherwiſe Perſons of Diſtinction travelling abroad would ſuffer in their Credit; and it might bring a general Inconveniency on Trade itſelf, when it came to be known to foreign Merchants, that there were ſome who, though they took upon themſelves to draw Bills of Exchange, yet were not liable to the Payment thereof. Carth. 82. Show. 125. *Witherly* ver. *Sarſfield*. Comb. 45, 152. S. C. ill reported.

3. Who ſhall be ſaid liable to the Payment thereof; and therein of ſuing the Drawer, Indorſor or Acceptor.

(a) That if ſeveral Drawers ſubſcribe, all are liable. Molloy 278.

It is clear, that (a) every Drawer of a Bill is liable to the Payment thereof, as is every (b) Acceptor and Indorſor; alſo, (c) if there are ſeveral Indorſors of the ſame Bill, the laſt Indorſee may bring his Action againſt the firſt Indorſor, or any of them: for the Indorſement is *quaſi* a new Bill, or at leaſt a Warranty, as ſome Books expreſs it, by the Indorſor, that the Bill ſhall be paid.

(b) And having once accepted it, cannot afterwards revoke it. Molloy 283. (c) Skin. 343. pl. 11. Ld. Raym. 181. Stra. 479.

Molloy 273. So if a Bill be drawn upon *A.* and he accepts it, and afterwards refuſes Payment, upon which the Bill is proteſted, the Perſon to whom it is payable may bring ſeveral Actions againſt the Acceptor and the Drawer; for the Proteſt is no Diſcharge of the Acceptor.

3 Mod. 86. Lutw. 880, 882. Skin. 255. pl. 3. Co. 4. 32. S.C. *Claxton* ver. *Swift.*

But though the Drawer, Acceptor and Indorſor, are all liable, yet the Party can have but one Satisfaction; yet until ſuch Satisfaction is actually had, he may ſue all, or any of them; and accordingly it was adjudged in the *Exchequer-Chamber*, where the Caſe was, An Indorſee ſued the Drawer, and had Judgment againſt him; and he alſo brought an Action againſt the Indorſor, to which the Indorſor pleaded the Judgment againſt the Drawer, but the Plea was held ill; for that the Judgment was no Satisfaction, without which the Party could not be barred of the Remedy which he had againſt the other.

*Page 608 Molloy 281, 285.

* And not only the Drawer, Acceptor and Indorſor are liable, but alſo by the Cuſtom of Merchants, if one Merchant draw a Bill which is proteſted, and another hearing thereof declare that he, for the Honour of the (d) Drawer, will pay the Contents; and thereupon ſubſcribes in theſe or the like Words, *I the under-written do bind myſelf as Principal, according to the Cuſtom of Merchants, for the Sum mentioned in the Bill of Exchange, whereupon this Proteſt is made*, &c. this ſhall as effectually bind him, as if he had been the original Drawer; and by this the Perſon to whom the Bill is payable hath his Remedy, both againſt ſuch Perſon, as Surety, and alſo againſt the Principal; but the Principal, or original Drawer is liable to him who thus ſubſcribes for his Honour.

(d) So if one ſubſcribe for the Honour of him who ſubſcribes for the Honour of the Drawer. Carth. 129, 130. Lut. 196.

10 Mod. 36, 37.

If *A.* draw a Bill on *B.* who has Effects of his in his Hands, and *B.* accepts the Bill, which is afterwards proteſted for Non-payment, and the Bill is afterwards indorſed to *A.* the Drawer, he may maintain an Action as Indorſor againſt *B.* but if there had been no Effects of *A.*'s in the Hands of *B.* ſo that the Acceptance was only for the Honour of *A.* the Drawer, he could have no Action; for thereby the Money would be recovered only to be repaid again.

Salk. 126. pl. 6. *cont'.* Salk. 133. pl. 10.

It hath been held by ſome Opinions, that though an Indorſor be liable, that yet, in an Action againſt him, it muſt be alledged in the Declaration, that the Money was demanded of the Drawer, he being the Principal Debtor, and the Indorſor only a Surety, warranting Payment in caſe the Drawer made Default; but the better Opinion ſeems to be, that this is not material, every Indorſor being to be conſidered as making a new Bill, or Note, on whoſe Credit alone perhaps the Money was given, and the Drawer not at all known to the Indorſee; but it ſeems to be more adviſable to give it in Evidence, that there was a Demand on the Drawer, or an Endeavour to find him out; but this alſo hath been thought by (e) ſome not to be neceſſary.

(e) The Chief Juſtice *Holt*, *Raymond* and *Eyre* held, that a Demand on the Drawer was requiſite to be given in Evidence, the Indorſor's Engagement being only conditional.—But *Parker*, *Prat*, and *King* held it not to be neceſſary; ſaid by Lord *Hardwicke*, Mich. 10 Geo. 2. to have been ſo ruled by them at the Sittings; and of the latter Opinion he ſeemed to be himſelf; and held it clearly, not to be neceſſary to alledge it in Pleading.

4. Who

4. Who ſhall be ſaid intitled to the Money.

The Money is to be paid to him in whoſe Favour the Bill is drawn, or to the Indorſee, in caſe it be indorſed over; of which Indorſement it ſeems the Drawer, Acceptor and Drawee muſt take Notice at their Peril; alſo, if there are ſeveral Indorſors and Indorſees, the laſt Indorſee is intitled to the Money. Carth. 130.

If a Bill of Exchange is made payable to *A.* who indorſes it to *B.* who indorſes it to *C.* which is proteſted for Non-payment; *B.* may bring an Action on this Bill, notwithſtanding his Indorſement. Show. 163. *Dekers* ver. *Hariat.*

If *A.* draw a Bill of Exchange, payable to *B.* for the Uſe of *C.* and *B.* for valuable Conſideration, indorſes it over to *D. D.* may bring an Action againſt *A.* the Drawer; and he cannot plead, that the Money was extended in his Hands at the Suit of the King, for a Debt due from *C.* for *C.* being only *Ceſtui que Truſt*, had only an equitable Inte-*reſt, and no (*a*) legal Remedy for the Money; and *B.* is only reſponſible in Equity to *C.* for the Breach of Truſt. Carth. 5. Skin. 264. pl. 2. *Page 609 Show. 5. S. C. *Evans* ver.

Cramlington, adjudged, and affirmed in the *Exchequer-Chamber*. 2 Vent. 309. S. C. adjudged; it appearing that the Bill was indorſed before any Seiſure, or Writ of Extent iſſued out, and that an Indorſement on ſuch Bill was good, by the Cuſtom of Merchants. (*a*) So in Debt on a ſingle Bill made to *A.* to the Uſe of him and *B.* the Defendant pleads a Releaſe made to him by *B.* and on Demurrer it was adjudged for the Plaintiff without Difficulty; for *B.* is no Party to the Deed, and therefore can neither ſue nor releaſe it; but it is an equitable Truſt for him, and ſuable in the Chancery, if *A.* will not let him have Part of the Money; and the Book of *E.* 4. cited, that he might releaſe in ſuch Caſe, was denied to be Law. Lev. 235. *Offly* ver. *Ward.*

5. Of the Indorſement.

Indorſement is a Term known in Law, which, by the Cuſtom of Merchants, transfers the Property of the Bill or Note to the Indorſee; and is uſually made on the Back of the Bill, and muſt be in Writing; but the Law hath not appropriated any ſet (*b*) Form of Words, as neceſſary to this Ceremony; and therefore it hath been held, that if a Man write on the Back of a Bill of Exchange, *this is to be paid to* J. S. or, *the Contents of this Bill is to be paid to* J. S. and ſets his Hand to it, this is a good Indorſement. Molloy 281. 7 Mod. 86, 87. 2 Ld. Raym. 810. 3 Salk. 400. pl. 2.

(*b*) An Indorſement ſet forth in theſe Words, *Indorſavit ſuper Billam illam content' billæ illius ſolvend'*, is ſufficient after Verdict, without ſhewing that it was ſubſcribed. Salk. 130. pl. 14. The bare Indorſement of a Name transfers no Property, and though it may be filled up at any Time *before* the Note is given in Evidence, yet that has been denied *after*. Theo. Evid. 84. See 2 Str. 1103. 2 Barnes 361. 2 Bur. Rep. 1225. Str. 557. Com. Rep. 311, 312.

So if *A.* having a Bill of Exchange, writes his Name on the Back of it, and ſends it to *J. S.* his Friend, to get it accepted, which is done accordingly; *A.* notwithſtanding his Name, may bring an Action againſt the Acceptor; although objected, that the Property was transferred to *J. S.* for *J. S.* had it in his Power, either to act as Servant or Aſſignee; and if he had filled up the Blank Space, making the Bill payable to him, that would have witneſſed his Election to have received it as Indorſee; but that being omitted, his Intention is preſumed to act only as Servant to *A.* whoſe Name he would uſe only in order to write the Acquittance over it. Salk. 126. pl. 4. *Clerk* ver. *Pigot.* Molloy 281. S. P. and ſaid to be an uſual Practice among Merchants.

A Bill payable to a Man's Order is payable to himſelf, and he may bring an Action thereon, averring that he made no Order, *&c.* Salk. 130. pl. 16. Comb. 401.

So

Carth. 403. *Fiſher* ver. *Pomfret.* So where a Bill of Exchange was indorſed in this Manner, *Pay the Contents of this Bill unto the Order of* J. S. who brought his Action as Indorſee, averring he had made no Order to any Body to receive the Money; and on Demurrer, becauſe that *J. S.* could not maintain an Action, becauſe the Indorſement was not to him, but to his Order, the Court held the Action well brought againſt the Indorſer; and that among Tradeſmen, this Form of Indorſement is commonly uſed, although it is intended to be made payable to the Perſon whoſe Order is mentioned.

Salk. 125. pl. 2. 3 Lev. 299. Salk. 133. Skin. 343. pl. 11. Comb. 204, 466. As to the Indorſing of Bills, a Difference has been taken between a Bill payable to *J. S.* or Bearer, and *J. S.* or Order; that the firſt is not aſſignable by the Contract, ſo as to enable the Indorſee to bring an Action, if the Drawer refuſe to pay; becauſe there is no ſuch Authority given to the Party by the firſt Contract, and the Effect of it is only to diſcharge the Drawee, if he pays it to the Bearer, though he comes to it by Trover, Theft, or otherwiſe; but when the Bill is payable to *J. S.* or Order, there an expreſs Power is given to the Party to aſſign, and the Indorſee may maintain an Action.

Salk. 125. pl. 2. 133. Skin. 343. pl. 11, 411. Alſo, though an Aſſignment of a Bill, payable to *J. S.* or Bearer, be no good Aſſignment to charge the Drawer with an Action on the Bill, yet it is a good Bill between the Indorſer and Indorſee, and the Indorſer is liable to an Action for the Money; for the Indorſement is in Nature of a new Bill.

Salk. 125. pl. 2. 3 Lev. 299. So it hath been adjudged, that an Indorſee of a Bill, payable to *J. S.* or Bearer, may maintain an Action againſt the Drawer; on alledging a ſpecial Cuſtom, that ſuch Bill ſhould bind him; which Cuſtom is ſo found or confeſſed by the Defendant.

*Page 610 Salk. 128. * Alſo in Caſes of Bills purchaſed at a Diſcount, there is ſaid to be this Difference, that if it be a Bill payable to *A.* or Bearer, it is an abſolute Purchaſe; but if to *A.* or Order, and it is indorſed Blank, and filled up with an Aſſignment, the Indorſer muſt warrant it as much as if there had been no Diſcount.

Salk. 126. pl. 5. A Bank-Bill payable to *A.* or Bearer, being given to *A.* and loſt, was found by a Stranger, who transferred it to *C.* for a valuable Conſideration; *C.* got a new Bill in his own Name; and *per Holt* Ch. J. *A.* may have Trover againſt the Stranger who found the Bill, for he had no Title; though Payment to him would have indemnified the Bank; but *A.* cannot maintain Trover againſt *C.* by Reaſon of the Courſe of Trade, which creates a Property in the Aſſignee, or Bearer.

10 Mod. 246. Str. 516. Theo. Evid. 81. A Note payable to a Feme-ſole, or Order, who afterwards marries, can only be indorſed by the Huſband. It may be indorſed by an (*a*) Adminiſtratrix.

(*a*) 2 Str. 1260. 2 Barnes 137. Theo. Evid. 81. 2 Bur. Rep. 1225.

Carth. 466. *Hawkins* ver. *Cardy.* Salk. 65. pl. 2. S. C. where it is ſaid, that the Plaintiff ſhould have acknowledged Satisfaction for the reſt. It hath been adjudged, that a Bill of Exchange, or promiſſory Note, cannot be indorſed over for Part, ſo as to ſubject the Party to ſeveral Actions; as if *A.* having a Bill of Exchange upon *B.* indorſes Part of it to *J. S.* *J. S.* cannot bring an Action for his Part; although he alledge a Cuſtom amongſt Merchants for ſuch Kind of Indorſements; for the Contract being intire, and ſubjecting him only to one Man's Action, no Cuſtom can make him liable to two or more Actions for the ſame Debt.

6. Of the Acceptance: *And herein,*

1. *What ſhall be ſaid a good Acceptance.*

It hath been already obſerved, that an Acceptance, by the Cuſtom of Merchants, as effectually binds the Acceptor, as if he had been the original Drawer; and that having once accepted it he cannot afterwards revoke it; ſo that herein only we are to ſee, what Act of his will amount to an Acceptance. Cro. Jac. 308. Hard. 487.

And herein it is ſaid, that a very ſmall Matter will amount to an Acceptance; and that any Words will be ſufficient for that Purpoſe, which ſhews the Party's Aſſent or Agreement to pay the Bill; as if, upon the Tender thereof to him, he ſubſcribes, *accepted*; or, *accepted by me* A. B. or, *I accept the Bill, and will pay it according to the Contents*; theſe clearly amount to an Acceptance. Molloy 278.

So if the Party under-writes the Bill preſented ſuch a Day, or only the Day of the Month; this is ſuch an Acknowledgment of the Bill as amounts to an Acceptance. Comb. 401.

So if the Party ſays, *Leave your Bill with me, and I will accept it*; or, *Call for it To-morrow, and it ſhall be accepted*; theſe Words, according to the Cuſtom of Merchants, as effectually bind, as if he had actually ſigned or ſubſcribed his Name according to the uſual Manner. Molloy 280.

But if a Man ſays, *Leave your Bill with me, I will look over my Accounts and Books between the Drawer and me, and call To-morrow, and accordingly the Bill ſhall be accepted*; this does not amount to a complete Acceptance; for the Mention of his Books and Accounts, ſhews plainly that he intended only to accept the Bill, in caſe he had Effects of the Drawer's in his Hands. Molloy 279, 280. ſaid to have been ſo ruled by *Hale* Ch. J.

But where the Drawer wrote a Letter to the Perſon, in whoſe Favour the Bill was drawn, to this Purport, *That if he would let him write to Ireland firſt, he would pay him*; this was held a good Acceptance. Mich. 12. Geo. 1. *Wilkinſon* ver. *Lutwich cor.* Raymond C. J. *Niſi Prius.* Ld. Raym. 444. Stra. 648.

So where a Foreign Bill was drawn on the Defendant, and being returned for Want of Acceptance, Defendant ſaid, That if the Bill came back again, he would pay it; this was ruled a good Acceptance. Mich. 6 Geo. 1. *Car.* ver. *Coleman* in *B. R.*

• It ſeems clear, that a Parol Acceptance is ſufficient at Common Law to charge the Acceptor; alſo it hath been adjudged, ſince the Statute 3 & 4 *Annæ, cap.* 9. *ſupra*, that an Indorſee of an Inland Bill of Exchange may maintain an Action againſt the Acceptor, on a Parol Acceptance, as to the principal Sum, though not as to Intereſt and Coſts; for the Act being made to give a further Remedy, for Intereſt, Damages and Coſts againſt the Drawer, cannot be ſuppoſed to take any Advantage from the Payee which he had before; and therefore the true Conſtruction of the (*a*) Act is, that to charge the Drawer with Intereſt and Coſts, the Drawee muſt refuſe to accept it in Writing; nevertheleſs, if he accepts the Bill by Parol, he is liable to the principal Sum in the Bill, as he would have been before the Act. *Page 611 Mich. 8 Geo. 2. *Lumley* ver. *Palmer* in *B. R.* 2 Stra. 1000. (*a*) So on the Statute of 9 & 10 W. 3. c. 17. which gives Damages and

Coſts, in caſe of a Proteſt, it hath been held, That that Statute did not take away the Party's Remedy againſt the Drawer, if there was no Proteſt, as to the Principal Sum, but only as to the Damages and Coſts. 6 Mod. 80, 81. Salk. 131. pl. 17. *Brough* ver. *Perkins.* 2 Ld. Raym. 992. 6 Mod. 80. 3 Salk. 69. pl 6.

2. *Whoſe*

2. *Whoſe Acceptance ſhall bind.*

Molloy 279, 284. Salk. 126. pl. 3. Ld. Raym. 175. *Pinkney* ver. *Hall.*

A Bill drawn on two, muſt regularly have a joint Acceptance; but if there are two joint Traders, and one accepts a Bill drawn on both, for him and Partner, this ſhall bind both, if it concerns the Trade; otherwiſe if it concerns the Acceptor only in a diſtinct Intereſt and Reſpect.

Molloy 282. But for this *vide* Tit. *Maſter and Servant.*

If a Book-keeper or Servant having Authority, or uſually tranſacting Buſineſs of this Nature for his Maſter, accept a Bill of Exchange, this ſhall bind his Maſter.

Mich. 7 Geo. 2. *Thomas* ver. *Biſhop* in *B. R.* 2 Stra. 955. 2 Kel. 136. pl. 116. 2 Barnard *K. B.* 320.

A Bill of Exchange was drawn by *A.* Agent to the *York-Buildings Company* in *Scotland*, on *B.* their Caſhier in *London*, in the Words following, *To Caſhier to the Honourable Governor and Aſſiſtants of the* York-Buildings Company, *at their Houſe in* Wincheſter-ſtreet: *Sir, Pray pay to* J. S. *or his Order*, 200l. *and place it to the Account of the Company, for Value received, as* per *Advice from your humble Servant.* The Letter of Advice, referred to, was directed to the Governor and Company, informing them of the Draught made upon *B.* in Favour of *J. S.* but it did not appear that this was the uſual Method of drawing Bills on the Company; *B.* accepted the Bill generally; and this Bill having been indorſed over, and an Action thereon brought by the Indorſee againſt *B.* the Queſtion was, whether this Acceptance ſhould charge him in his own Right, or not. And it was held that it ſhould; this being in every Reſpect a good Bill of Exchange, and only the Drawer, Payee and Accepter concerned in it, as far as appears on the Face of the Bill; for though it may be for the Advantage of the Company, yet they are not liable to the Payment of it; nor is the Perſon in whoſe Favour it was drawn, or the Indorſee, obliged to take Notice of ſuch Advantage, or of any Tranſactions between them and their Caſhier, or how they ſtand liable to each; for were it allowed, that an Indorſee muſt be put to ſeek a Pay-maſter that bears no viſible Part in the Tranſaction, this would be ſuch a Prejudice to Trade, and Paper-Credit made ſo blind and hazardous a Thing, that no Man in his Senſes would ever be engaged in it; and as to the Letter of Advice, this was held to be only a private Tranſaction between the Drawer and a Stranger; which it is not to be imagined the Payee or Indorſee could be privy to, and therefore cannot be any Prejudice to them; nor a Circumſtance fit for the Conſideration of a Jury, before whom nothing ought to be laid, in Caſes of this Kind, but what all Perſons concerned in the Tranſaction may be reaſonably ſuppoſed to know; and thoſe are all Things viſible on the Bill, but no Circumſtance extrinſick to it.

*Page 612

* 3. *Whether an Acceptance may be qualified.*

Comb. 452. *Petit* ver. *Benſon.*

It is held, that an Acceptance may be qualified, as thus; I accept this Bill, Half to be paid in Money, and Half in Bills; and this is good by the Cuſtom of Merchants; for he, who may refuſe the Bill totally, may accept it in Part; but he, to whom the Bill is due, may refuſe ſuch Acceptance, and proteſt it ſo as to charge the Drawer. Alſo it is ſaid, that after ſuch Acceptance and Refuſal of Payment, he hath the ſame Liberty of charging the Drawer, that he had in caſe the Bill had been accepted abſolutely and Payment refuſed.

So

So the Drawee may accept the Bill, to pay it at longer Day than that on which it is made payable, and this ſhall bind him; but herein Care muſt be taken, that the Drawee, by ſuch Acceptance or Agreement, be not a Sufferer. Molloy 283.

A Bill was drawn payable the firſt of *January*; the Perſon on whom the Bill was drawn accepts the Bill, to be paid the firſt of *March*; the Servant brings back the Bill; the Maſter, perceiving this enlarged Acceptance, ſtrikes out the firſt of *March*, and puts in the firſt of *January*, and then ſends the Bill to be paid; the Accepter then refuſes; whereupon the Perſon, to whom the Monies were to be paid, ſtrikes out the firſt of *January*, and puts in the firſt of *March* again. In an Action brought on this Bill, the Queſtion was, whether theſe Alterations did not deſtroy the Bill; and ruled it did not. Molloy 285. *per Pemberton*, Ch. J.

If *A.* draw a Bill payable ſuch a Day, and the Drawee accept it ſome Time after, he is liable; and in an Action againſt him the Plaintiff may declare, that *ſecundum tenorem & effectum Billæ* he did not pay, *&c.* for the Effect of the Bill is the Payment, and not the Day of Payment. Carth. 459, 460. Salk. 127. pl. 8. 129. pl. 11. Ld. Raym. 364. Lutw. 233. *Jackſon* ver. *Pigot.* See Comyns 75. pl. 49. 12 Mod. 212, 410.

7. Of the Proteſt: *And herein,*

1. *Of the Neceſſity and Validity of the Proteſt.*

A Proteſt does not raiſe any Debt, but only ſerves to give formal Notice, that the Bill is not accepted, or accepted, and not paid; and this by the Common Law was, and is ſtill neceſſary on every foreign Bill, before the Drawer can be charged; but it was not required on any Inland Bill, before the Statute of 9 & 10 *W.* 3. *cap.* 17. nor does the Want of it ſince that Statute deſtroy the Remedy, which the Party had before againſt the Drawer, but only deprives him of Intereſt and Coſts againſt the Drawer, unleſs there be Notice by Proteſt, as that Statute preſcribes. Molloy 279. 6 Mod. 80. Salk. 131. pl. 17. 2 Ld. Raym. 992.

He, to whom the Bill is payable, muſt regularly reſort to the Drawee, and deſire him to accept the Bill, before there can be a Proteſt; but if he be dead, or cannot be (*a*) found, theſe are good Cauſes for proteſting the Bill; alſo, if after Acceptance the Drawee dies, there is to be a Demand of his Executors or Adminiſtrators, and in Default of Payment, a Proteſt; and in caſe the Money becomes due before an Executor or Adminiſtrator can be appointed, yet this Delay is ſufficient Cauſe to proteſt the Bill. Molloy 285.

(*a*) Alledging in Pleading, that the Party, on whom the Bill was drawn, *non fuit inventus*, is ſufficient to intitle the Party to a Proteſt, without ſhewing that Enquiry was made after him; for this ſhall be intended, being according to the Cuſtom of Merchants, and is therefore the uſual Form of Pleading in thoſe Caſes. Carth. 510.

But if he, to whom the Money is to be paid, dies, there can be no Proteſt before Probate of his Will or Adminiſtration granted; for none but his Executors or Adminiſtrators can give a legal Diſcharge or Acquittance for the Money, and conſequently none others can ſue for or demand the ſame; and though Security be offered to indemnify the Drawee againſt the Executors or Adminiſtrators, yet is he not obliged to accept thereof, being a Matter left intirely to his own Diſcretion, to judge and determine on the Sufficiency of ſuch Security; and in this Caſe it is ſaid, that if a public Notary proteſt the Bill, an Action on the Caſe lies againſt him. Molloy 285. *Page 613

If a Bill be left with a Merchant to accept, which is (*a*) loſt or miſlaid, he, to whom it is payable, is to requeſt the Merchant to give him a Note Molloy 281.

(*a*) Where a Bill is caſually loſt, and no new one can be had, and the Party on whom it is drawn does not inſiſt on having the original Bill, but refuſes Payment for another Reaſon, a Proteſt made on a Copy is ſufficient. Show. 164.

for

for the Payment, according to the Time limited in the Bill; otherwiſe there muſt be two Proteſts, the one for Non-acceptance, and the other for Non-payment; and though ſuch Note be given, yet, if the Merchant happens to fail, there muſt be a Proteſt for the Non-payment, in order to charge the Drawer.

Molloy 281. Skin. 272. pl. 1. The Proteſt is uſually made by ſome Public Notary, and ſuch Proteſt is *prima facie*, good Evidence that the Bill was not accepted, or, if accepted, that it was not paid, and ſufficient to put the Proof on the other Side.

Comb. 153. And as, by the Cuſtom of Merchants, Public Notaries uſually proteſt Bills, it hath been held, that Pleading *Proteſtavit ſeu Proteſtari cauſavit* is ſufficient; and that the Party may plead *Proteſtavit*, and give in Evidence that the public Notary did it.

2. *At what Time to be made, and therein of giving Notice to the Drawer; of the Drawee's Refuſal, ſo as to intitle the Party to Principal, Intereſt, and Coſts.*

Molloy, lib. 2. c. 10. ſ. 15, 17 & 31. Vent. 45. Skin. 411. A Proteſt on a foreign Bill of Exchange is abſolutely neceſſary to intitle the Party to recover againſt the Drawer, not only Intereſt and Coſts, but likewiſe the principal Sum; and for this Purpoſe the Bill muſt be preſented in a reaſonable Time; and in caſe of Refuſal of Acceptance, or in caſe the Drawee cannot be found, it muſt be proteſted in reaſonable Time, and Notice of ſuch Proteſt, as alſo Notice of a Proteſt after Acceptance and Non-payment given to the Drawer in a reaſonable Time; for though the Drawer is bound to the Party to whom the Bill is payable, till Payment be actually made, yet it is with this Condition and Proviſo, ſays *Molloy*, that Proteſt be made in due Time, and a lawful and ingenuous Diligence uſed for the obtaining Payment of the Money; and the Reaſon hereof is, that the Drawer might have had Effects, or other Means of his, upon whom he drew, to reimburſe himſelf the Bill, which ſince, for want of timely Notice, he hath remitted or loſt, it were unreaſonable the Drawer ſhould ſuffer through his Neglect; but as to the exact Time herein, the Law hath not determined it, but the ſame is to be left to a Jury, who are to govern themſelves according to the Cuſtoms of Merchants in theſe Caſes, and the Uſages of particular (*a*) Countries.

(*a*) It is ſaid that in *France*, if a Bill be not preſented in two Months, the Drawer is not anſwerable, and in *Holland* in ſo many Poſts. Show. 165.

6 Mod. 80, 81. Salk. 131. pl. 17. 2 Ld. Raym. 992. Comb. 384. Carth. 510. Show. 318. *Page 614 As to Inland Bills, though a Proteſt was not neceſſary by the Common Law, in order to ſue the Drawer, and is only now neceſſary by the Statute 9 & 10 *W.* 3. *cap.* 17. and 3 & 4 *Ann cap.* 9. *ut ſupra*, to intitle the Party to Intereſt and Coſts; yet convenient Notice muſt be given by the Party, to whom the Bill is payable, to the Drawer, of the Drawee's Refuſal of Payment, and if any Damages accrue to the Drawer for want of ſuch Notice, it muſt be * born by the Perſon to whom the Bill is payable; but this alſo muſt be left to a Jury, who are to determine herein, according to the Circumſtances and the Cuſtom of Merchants.

Salk. 127. pl. 7. *Allen* ver. *Deckwra* at *Guildhall*. *A.* drew a Bill on *B.* payable in three Days, *B.* broke; the Perſon, to whom the Bill was payable, kept it by him four Years, and then brought *Aſſumpſit* againſt the Drawer; & *per Treby* Ch. J. When one draws a Bill of Exchange, he ſubjects himſelf to the Payment, if the Perſon on whom it was drawn refuſes either to accept or pay; yet that is with this Limitation, that if the Bill be not paid in convenient Time, the Perſon to whom it is payable ſhall give the Drawer Notice thereof; for otherwiſe the Law will imply

imply the Bill paid, becauſe there is a Truſt between the Parties; and it might be prejudicial to Commerce, if a Bill may riſe up to charge the Drawer at any Diſtance of Time, when in the mean Time all Reckonings and Accounts are adjuſted between the Drawer and the Drawee.

Merchants generally allow three Days after a Bill becomes due for the Payment, and for Non-payment within three Days Proteſt is made, but is not ſent away till the next Poſt after the Time of Payment is expired, and if *Saturday* be the third Day, no Proteſt is made till *Monday*. Molloy 284. Show. 164. S. P. that the third Day is the Day of Grace.

Intereſt upon a Bill of Exchange commences from the Demand made; and therefore if there was no Demand made till Action brought, Defendant may plead Tender and Refuſal, and *uncore Priſt*, and ſo diſcharge himſelf of Intereſt; but if it be the Defendant's Fault, that Demand could not be made, as if he were out of the Kingdom, there Want of Demand ought not to prejudice the Plaintiff.

8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.

It ſeems to be agreed, that againſt the Drawer an Action of Debt, or a general *Indebitatus Aſſumpſit* will lie, for he having received the Money, the Law raiſes a Contract, and lays him under an Obligation to pay it; but it hath been adjudged, that neither an Action of Debt, nor an *Indebitatus Aſſumpſit* will lie againſt the Acceptor of a Bill of Exchange, and that therefore the Remedy againſt him muſt be by a ſpecial Action on the Caſe, founded on the Cuſtom of Merchants; for the Acceptance is only a collateral Engagement to pay the Debt for another, in the ſame Manner as a Promiſe by a Stranger to pay, *&c.* if the Creditor will forbear his Debt. Hard. 485. Vent. 152. Lev. 298. 2 Keb. 695, 713, 758, 822. Salk. 125. pl. 2. 2 Lutw. 1594. Skin. 255. pl. 3. 6 Mod. 129.

But though a general *Indebitatus Aſſumpſit* will not lie againſt the Acceptor of a Bill of Exchange, yet if *A.* delivers Money to *B.* to pay over to *C.* and gives *C.* a Bill of Exchange drawn upon *B.* and *B.* accepts it, *C.* may have an *Indebitatus Aſſumpſit* againſt *B.* (*a*) as having received Money to his Uſe, but muſt not declare only upon the Bill of Exchange accepted. Vent. 153. (*a*) So if Goods delivered. Rol. Abr. 32.

As to the Manner of declaring on a Bill of Exchange, this is ſaid to have varied, the Declaration in ſome Caſes being general, ſometimes ſpecial, and laid with an expreſs Promiſe, and at other Times without; but it ſeems to be now ſettled, that the Cuſtom of Merchants, concerning Bills of Exchange, being Part of the Common Law, of which the Judges will take Notice *ex officio*, it is unneceſſary to ſet forth the Cuſtom ſpecially in the Declaration, and that it is ſufficient to ſay, that ſuch a Perſon, according to the Uſage and Cuſtom of Merchants, drew the Bill. Co. Lit. 182. 2 Inſt. 404. Yelv. 136. 4 Co. 76. Cro. Car. 301. Hard. 486. Salk. 125. pl. 2. 127. pl. 7.

Lutw. 233. Carth. 83, 269. 5 Mod. 367. Show. 127. 3 Mod. 226. Ld. Raym. 175, 281, 757, 759, 774. 10 Mod. 287. †——† See farther as to Bills of Exchange and Promiſſory Notes. 6 Com. Dig. 431, *&c.*

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* Misnomer and Addition.

THE Names of Men, at this Day, are only Sounds for Distinction Sake, though perhaps they originally imported something more, as some natural Qualities, Features, or Relations, but now there is no other Use of them, but to mark out the Families or Individuals, we speak of, and to difference them from all others; since therefore they are the only Marks and *Indicium* of Things that human Kind can understand each other by, we must see what Certainty the Law requires herein, and what the Effects and Consequences are of the Omission of the Name, or false Specification of the Party; and this we shall do under the following Heads.

(A) What Names are the same, and may or may not be mistaken. 616.

(B) What Names and Additions are required by Law, and must be truly inserted. 616.

And herein,

1. Of the Difference between the Christian Name and Surname. 616.
2. Of the Addition of the Estate or Degree. 617.
3. Of the Addition of the Mystery. 619.
4. Of the Addition of the Town, Hamlet, Place or County. 620.
5. Of Additions which are only Conveyances to the Action. 620.

(C) Where the Name is truly put at first, and afterwards varied from. 621.

(D) Of the Difference between a Mistake in Grants, Obligations, &c. and Judicial Proceedings. 622.

(E) At what Time the Mistake must be taken Advantage of, and how the same is salved. 623.

(F) Of the Manner of taking Advantage of, and Pleading a Misnomer or Want of Addition. 624.

(G) Who may take Advantage thereof. 625.

(A) What

*(A) What Names are the ſame, and may or may not be miſtaken.

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IF two Names are in an original Derivation the ſame, and are taken promiſcuouſly to be the ſame in common Uſe, though they differ in Sound, yet there is no Variance; and therefore where *Piers Griffith* brought an *Audita Querela*, to which an Outlawry was pleaded by the Name of *Peter Griffith*, the Plea was allowed; for it appears by Acts of Parliament, that *Piers* and *Peter* have been uſed promiſcuouſly, as ſignifying the ſame Perſon. Cro. Jac. 225. 2 Rol. Abr. 135. *Piers Griffith* ver. *Hugh Middleton.*

So *Saunders* and *Alexander*, *Jane* and *Joan*, *Jean* and *John*, *Garret*, *Gerat* and *Gerald*, are the ſame Names. 2 Rol. Abr. 135. Leon. 147.

But *Ralph* and *Randall*, *Randulphus* and *Randalphus*, *Sibel* and *Iſabella*, have been held to be diſtinct Names; and ſo of others, in which there is a ſubſtantial Variance in Sound, Original, and common Uſe. 2 Rol. Abr. 135. Palm. 71.

So *Agnes* and *Anne* are different Names; and therefore if one declare againſt *J. S.* and *Agnes* his Wife, and on the Record of *Niſi Prius* it is *Anne* his Wife, this is a material Variance, and not amendable. 2 Rol. Abr. 135. *Vide* Head of *Amendment and Jeofail.*

If there are two *Engliſh* Names that are diſtinct, and one *Latin Name* for them both, ſuch Name ſhall ſerve for both, as *Jacobus* for *James* and *Jacob*, although two diſtinct *Engliſh* Names. 2 Rol. Abr. 136. 3 Keb. 278. Mod. 107.

(B) What Names and Additions are required by Law, and muſt be truly inſerted: And herein,

1. Of the Difference between the Chriſtian Name and Surname.

IF the Chriſtian Name be wholly miſtaken, this is regularly fatal to all legal Inſtrument, as well Declarations and Pleadings, as Grants and Obligations; and the Reaſon is, becauſe it is repugnant to the Rules of the Chriſtian Religion, that there ſhould be a Chriſtian without a Name of Baptiſm, or that ſuch Perſon ſhould have two Chriſtian Names, ſince our Church allows of no Re-baptizing; and therefore if a Perſon enters into a Bond by a wrong Chriſtian Name, he cannot be declared againſt by the Name in the Obligation, and his true Name brought in an *Alias*, for that ſuppoſes the Poſſibility of two Chriſtian Names; and you cannot declare againſt the Party by his right Name, and aver he made the Deed by his wrong Name; for that is to ſet up an Averment contrary to the Deed; and there is this Sanction allowed to every ſolemn Contract, that it cannot be oppoſed but by a Thing of equal Validity; and if he be impleaded by the Name in the Deed, he may plead that he is another Perſon, and that it is not his Deed †. Cro. Jac. 558, 640. Owen 107. Dyer 279. 5 Co. 43. Poph. 57. Noy 135. Cro. Eliz. 57, 222.

† *Qu.* If Plaintiff ſues Defendant by the Name he ſubſcribed to the Bond, *&c.* and Defendant pleads a Miſnomer, if Plaintiff may not reply he is as well known by the one Name as the other, and give in Evidence the Defendant's actual Subſcription by that Name?

But

But though Perſons cannot have two Chriſtian Names at one and the ſame Time, yet they may, according to the Inſtitution of the Church, receive one Name at their Baptiſm, and another at their Confirmation; for though it allows no Re-baptizing to make double Names, yet it doth not force Men to (*a*) abide by the Names given them by their Godfathers, when they come themſelves to make Profeſſion of their Religion.

Co. Lit. 3. 2 Rol. Abr. 135. Judge *Gawdy*'s Caſe, who was chriſtened by the Name of *Thomas* and confirmed by the Name of *Francis*.

(*a*) But a Perſon, by taking a new Name of Confirmation, does not loſe his Name of Baptiſm. 6 Mod. 115, 116. Salk. 6. pl. 15. 2 Ld. Raym. 1015, 1016. See Ld. Raym. 118, 249, 509. Stra. 556. 2 Stra. 816. 2 Ld. Raym. 1541. 2 Stra. 18.

*Page 617 * The Miſtake of the Surname does not vitiate, becauſe there is no Repugnancy that a Perſon ſhould have different Surnames; and therefore if *John Gape* enters into an Obligation by the Name of *John Gate*, he may be impleaded by the Name in the Deed, and his real Name brought in by an *Alias*, and then the Name in the Deed he cannot deny, becauſe he is eſtopped to ſay any Thing contrary to his own Deed.

3 H. 6. 25. 2 Rol. Abr. 146.

The Declaration muſt be of the Name in the Obligation, with an *Alias* of the real Name; for the Declaration muſt ſhew the Cauſe of Complaint as it is; therefore it muſt in all Things follow the Obligation, and the Intent of the *Alias* is only to ſhew he has been differently called from the Name in the Obligation; and therefore if a Man oblige himſelf by the Name of *J. S.* Eſq; and afterwards he is made a Knight, the Plaintiff may declare againſt *J. S.* Knight, alias *J. S.* Eſquire.

Dyer 273. Bulſ. 216.

A Perſon cannot take Advantage of a miſtaken Surname in an Indictment, either by Plea in Abatement or otherwiſe, notwithſtanding ſuch Surname have no Affinity with his true one, and he was never known by it; and in this Reſpect an Indictment differs from an Appeal, whereof it is certain, that a Miſnomer of a Surname may be pleaded in Abatement, as well as any other Miſnomer whatſoever.

2 Hawk. P. C. 230.

2. Of the Addition of the Eſtate or Degree.

It ſeems that the Common Law in no Caſe required any other Deſcription of a Perſon, than by his Chriſtian Name and Surname, unleſs he were of the Degree of a Knight or ſome higher Dignity; but the Names of Dignity were always required, being Marks of Diſtinction impoſed by public Authority, and therefore make up the very Name of the Perſon to whom they are given, and they are of two Sorts; *1ſt*, Such Marks of Diſtinction as exclude the Surname, ſo that the Perſons may not ſeem to be of any common Family; and ſuch are the Names of Earls, Dukes, *&c.* *2dly*, Such Marks of Diſtinction as are alſo impoſed by the ſupreme Power, and Parcel of the Name itſelf, but do not exclude the Surname, ſuch as Knight, Baronet, *&c.* and theſe Marks of Diſtinction were always to be made uſe of as Part of the Name in all legal Proceedings; and ſo curious was the Law herein, that if a Plaintiff in any Action gained a new Name of Dignity, pending a Writ, he made it abateable; but this Inconvenience is remedied by *1 E. 6. cap. 7. ſect. 3.* by which it is enacted, "That if "any Plaintiff, in any Manner of Action, ſhall be made a Duke, Arch-"biſhop, Marquis, Earl, Viſcount, Baron, Biſhop, (*b*) Knight, Juſtice "of either Bench, or Serjeant of Law, depending the ſame Action, that "ſuch Action for ſuch Cauſe ſhall not be abateable or abated."

2 Inſt. 665. 2 Rol. Abr. 469. Show. 392. Comb. 189.

(*b*) But it hath been holden that the Dignity of a Baronet is not within the Statute, becauſe there was no ſuch Dignity at the Time of the making of it. Sid. 40. Lit. Rep. 81. Cro. Car. 104.

But

But Names of Worſhip, ſuch as Eſquire, Gentlemen and Yeomen, ſince they are only Names of Diſtinction in popular Uſe, and not given by the public Authority of the ſupreme Power, the Law doth not count them Parcel of the Name, and therefore were not neceſſary at Common Law. 2 Inſt. 666.

In the Time of *H.* 5. it was perceived, that the Chriſtian and Surname were not ſufficient Denominations of Perſons, and did not ſufficiently avoid the Confuſion that might happen by the Miſtake of Perſons; and that an innocent Perſon might, upon a Proceſs of Execution, be diſtrained upon having the ſame Name with the real Defendant; and therefore by the 1 *H.* 5. *cap.* 5. it is enacted, "That in every original Writ of Actions, "perſonal Appeals and Indictments, and in which the Exigent ſhall be "awarded, to the Names of the Defendants in ſuch Writs Original, Appeals "* and Indictments, Additions ſhall be made for their Eſtate or Degree, or "Myſtery, and of the Towns or Hamlets, or Places and Counties of the "which they were or be, or in which they be and were converſant; and if "by Proceſs upon the ſaid original Writs, Appeals or Indictments, in the "which the ſaid Additions be omitted, any Outlawries be pronounced, "that they be void, fruſtrate and holden for none; and that before the "Outlawries pronounced, the ſaid Writs and Indictments ſhall be abated by "the Exception of the Party, wherein the ſaid Additions be omitted." 2 Inſt. 670. 2 Rol. Rep. 225. * Page 618

By this Law the Name of (*a*) Worſhip was made equally neceſſary on theſe Actions, as the Name of Dignity was before.

(*a*) But it is ſaid to be no Fault to give an Eſq; the Addition of Gentleman, & *ſic e converſo*. Bro. *Addition* 44. Eſquire and Gentleman no Variance. Forteſc. Rep. 354.

This Law doth not extend to the Names of Plaintiffs, for they were in no Miſchief or Danger to be miſtaken, nor does it extend to real or mixt Actions; becauſe here the Poſſeſſors were impleaded who were ſufficiently ſpecified, and ſo no other Mark of Diſtinction is needful; beſides, no Man can in the Proceſs poſſibly be grieved, becauſe there is no Proceſs but of Diſtreſs upon the Land, and no (*b*) Impriſonment at all in theſe Actions, 2 Inſt. 665. 6 Mod. 85.

(*b*) In an Aſſiſe, if the Diſſeiſin be found with Force, ſo that a *Capias pro Fine* and *Exigent* lies for the King; yet becauſe the Original is in the Realty, the Defendant ſhall have no Addition within this Act. 2 Inſt. 665.—So there needs none in an inferior Court where Proceſs of Outlawry does not lie. Moor 354. pl. 478 ‡.—Nor needs there any in any Action where Outlawry does not lie. Bro. *Addition*. 2.

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‡ As in an Information in the Nature of a *quo warranto*, there is not any Proceſs of Outlawry on it, as there is on a *quo warranto* by original Writ. *Rex* v. *Brough*. H. 22 Geo. 2. 1 Will. 244.

As to the Eſtate and Degree required by the Statute to be added, we muſt obſerve, that State is defined by the Civilians the Capacity of moral Perſons; for, as natural Perſons have a certain Space in which their natural Exiſtence is placed, and in which they perform their natural Actions; ſo have Perſons in a Community a certain State or Capacity, in which they are ſuppoſed to exiſt, to perform their moral Acts, and exerciſe all civil Relations; and therefore where one, who is neither by Birth, Office, Creation or Reputation, an Eſq; or Gentleman, is named, without either of theſe Additions; or where a Gentleman, by Birth, who follows a Trade or Huſbandry, is named with the Addition of the Trade or Huſbandry, and not of Gentleman †; or where a Peer who has more than one Name of Dignity, is not named by the moſt noble; or where a Gentlewoman is named Spinſter, or a Yeoman is named Gentleman; and ſuch Matter is pleaded in Abatement, and found for the Perſon who pleads it, the Writ ſhall abate. 2 Inſt. 669. 2 Hawk. P. C. 185.

† *Sed qu.* If ſuch Exception would not be allowed?—A Trader may be ſued by his Degree, or by his Trade; and if by his Degree, the Writ ſhall not abate unleſs he ſhews he has a higher Degree. Stra. 556, 816. Ld. Raym. 1541.

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Cro. Car. 371. Jon. 346. *Vide* 6 Mod. 105. 2 Ld. Raym. 1014. See Ld. Raym. 303, 509. 10 Mod. 284. Stra. 316. 2 Stra. 850. Barnard. K. B. 209. Fitzgib. 175.

It hath been adjudged to be a good Plea in Abatement to a Writ or Indictment againſt one by the Name of *J. S.* Knight, that he is a Baronet and no Knight.

Carth. 14. *Jefferies* ver. *Snow.* Comb. 65. S. C.

So in Treſpaſs againſt the Defendant by the Name of *William Snow*, Baronet, who pleaded in Abatement, that at the Time of the Bill purchaſed he was, and yet is a Knight and Baronet; and becauſe he is not called Knight as well as Baronet, he prayed Judgment, *&c.* and upon Demurrer to this Plea, the Court were of Opinion that it was good.

Leon. 249. Cro. Eliz. 542. *Vide* Stra. 850.

So if a Man be impleaded by the Name of *J. S.* where he is Garter King at Arms; this is not good, becauſe it is not only a Name of Office, but of Dignity and Grant, made to him by the Words, *Creamus*, *Coronamus*, and *Nomen imponimus*, *&c.*

2 Inſt. 666.

A Biſhop may be deſcribed by the Name of his Biſhoprick, without the Addition of his Surname; but a Parſon muſt be impleaded by Chriſtian and Surname, and not *John*, Parſon of *D.* becauſe Bodies Politick are founded by Publick Authority to Political Ends; therefore the Biſhop, the Superintendant of the Dioceſe, is made a Body Politick to ſubſerve all the

*Page 619

* Purpoſes of Government in the Care of Religion, and it is not thought neceſſary to give every Perſon ſuch a Capacity.

2 Inſt. 668. Theol. lib. 6. c. 15. ſ. 12, 13.

A Biſhop of an *Iriſh* Dioceſe may be as well deſcribed by the Addition of his Biſhoprick, as an *Engliſh* Biſhop may by the Addition of an *Engliſh* one; but it ſeems clear, that no one can be well deſcribed by the Addition of a Temporal Dignity in *Ireland*, or any other Nation, beſides our own; becauſe no ſuch Dignity can give a Man a higher Title here than that of Eſquire.

2 Inſt. 667. 2 Hawk. P. C. 187.

The Degree of a Serjeant at Law is certainly a good Addition; and ſo, as is generally holden, is a Degree in either Univerſity; yet a Doctor in Divinity may be deſcribed by the Addition of Clerk, as well as by that of Doctor. *Armiger*, *Generoſus*, Yeoman, Labourer, are good Additions of the Eſtate and Degree of a Man, but not for that of a Woman. *Generoſa*, Widow, ſingle Woman, Wife of *J. S.* Spinſter, are good Additions of the Eſtate and Degree of a Woman; and, as ſome ſay, Spinſter ‡, is a good Addition for the Eſtate and Degree of a Man; but neither Burgeſs, Citizen nor Servant, are good Additions, as being too general.

‡ *Sed qu.?*

Salk. 7. pl. 16. 2 Hawk. P. C. 187.

If ſeveral Defendants, of different Names, have the ſame Addition, it is ſafeſt to repeat the Addition after each Name; and if a Father have the ſame Name and Addition with his Son, the Writ againſt the Son is abatable, unleſs the Addition of *Puiſne* be added to the other Additions: But if a Father alone be a Defendant, there is no need of the Addition of *Eigne:* Alſo if the Son be declared againſt *in Cuſtodia Mareſchalli*, there is no need of the Addition of *Puiſne*, unleſs the Father be alſo in the Cuſtody of the Marſhal.

2 Leon. 183. Cro. Eliz. 583. Dyer 88.

It hath been held a fatal Fault, to apply the Addition to the Name which comes under the *Alias dictus* only, and not to the firſt Name; but it is ſaid not to be material, whether any Addition be put to the Name which comes under the *Alias dictus*, or not; becauſe what is ſo expreſſed is not material.

2 Hawk. P. C. 187.

The Additions of the Eſtate, Degree and Myſtery of the Party are not ſufficient, unleſs they be the ſame which he had at the Time of the Writ; and in this Reſpect ſuch Additions differ from that of Place, which is ſufficiently ſhewn, by naming the Defendant late of ſuch a Place.

2 Inſt. 670. 2 Hawk. P. C. 187. 2 Hal. Hiſt. P. C. 177.

Alſo, it muſt plainly appear that the Addition is referred to the Party; and therefore it is not well expreſſed by the Addition of his Myſtery, naming him *B. A.* Son of *A.* of *C.* Butcher; becauſe Butcher refers to *A.* rather than to the Son.

3. Of the Addition of the Myſtery.

It ſeems agreed, that the Word *Myſtery* includes all lawful Arts, Trades and Occupations; and that if one, under the Degree of a Gentleman, have divers of ſuch Arts, Trades or Occupations, he may be named by any of them. 2 Inſt. 668.

The Additions of this Kind, which are ſaid to be clearly good are thoſe of Huſbandman, Merchant, Broker, Taylor, Point-maker, Smith, Miller, Carpenter, Cook, Brewer, Baker, Butcher, Pariſh-Clerk, Mercer, Fiſhmonger, Dyer, School-maſter, Scrivener, and ſuch like. 2 Hawk. P. C. 188. 2 Hal. Hiſt. P. C. 176.

The Additions of this Kind, which are ſaid to be clearly inſufficient, are thoſe of Maintainer, Extortioner, Thief, Vagabond, Heretick, Common Informer, and ſuch like. 2 Hawk. P. C. 188.

But the following Additions of this Kind are ſaid to be queſtionable: 2 Hawk. P. C. 188.

1*ſt*, Farmer ‡; which by the better Opinion ſeems to be an inſufficient Addition; becauſe if any Myſtery be implied in the Notion of it, it is that of Huſbandry, of which Huſbandman is the proper Addition.

‡ *Sed qu.* If this Addition is not now frequently uſed, and, as being well underſtood, not objected to?

* 2*dly*, Chamberlain, Butler and Pantler; which are holden to be inſufficient Additions, becauſe they denote only a ſpecial Kind of Officer or Servant, and imply nothing which, in the common Underſtanding of the Words, comes under the Notion of a Myſtery; and from this Ground it ſeems to follow, that neither Groom nor Page are good Additions; and yet in ſome of the old Books they ſeem to have been ſo admitted. *Page 620 2 Hawk. P. C. 188. and ſeveral Authorities there cited

3*dly*, Hoſtler; which hath been holden to be a good Addition, and ſeems properly enough to come under the Notion of a Myſtery; and though it hath been reſolved, that any one who keeps an Inn, may be ſued by the Addition of a Labourer, upon the Cuſtom of the Realm, for want of due Care of the Goods of his Gueſts; becauſe whoever keeps a common Inn, is in that Reſpect liable to anſwer for ſuch Defects, by whatſoever Addition he may be ſtiled; yet this does by no Means prove that ſuch Perſon may not as well be ſued by the Addition of Hoſtler, but only that he may be ſued as well under any other Addition. 2 Hawk. P. C. 188-9.

4. Of the Addition of the Town, Hamlet, Place or County.

It is a good Addition of this Kind to name the Party late † of ſuch a Town; in which Reſpect this Addition differs from that of the Eſtate, Degree or Myſtery; and it is ſaid, that if a Defendant be named of *A.* and late of *B.* it is ſufficient to prove either Addition. 2 Hawk. P. C. 189. 2 Hal. Hiſt. P. C. 175.

† On ſpecial Original againſt *A. nuper de London*, Merchant, he pleaded he had for four Years been commorant at *B.* and traverſed that at the Time of the Writ, *vel nuper tunc, vel unquam poſtea*, he was of *London*, and made Affidavit; but the Plea was ſet aſide. *Certiſes* ver. *Mienez.* H. 5 Geo. 2. Stra. 924.

The Addition of Place is ſufficiently ſhewn by naming the Defendant *de Londino*, or *de Norwico*; but not by naming him *Londini* or *Briſtoliæ*, for that imports only that he belongs to ſuch Town, but not that he lives there; nor by naming him of a Town which is not a County of itſelf, without ſhewing the County. If it name him of a Pariſh which contains ſeveral Towns, he may plead ſuch Matter in Abatement; for the Statute ſays, that the Addition ſhall be of the Town or Hamlet; but a Pariſh ſhall be intended to contain no more than one Town, unleſs the contrary be ſhewn. 2 Inſt. 669. Dyer 213. Cro. Jac. 167. 2 Hawk. P. C. 189.

2 Hawk. P. C. 189. If there be two Towns in a County, the one called *Great Dale*, the other *Little Dale*, and the Defendant be named only of *Dale*; he may plead, that there are two *Dales* in the County, called *Great Dale* and *Little Dale*, and none without an Addition; and as ſome ſay, he may plead that there is no ſuch Town as *Dale*, either in this Caſe, or where there is but one Town called *Little Dale*, and he is named of *Dale*.

2 Hawk. P. C. 189. If a Defendant live in a Hamlet, which is ſo far Part of a Town, that thoſe who live in it are indifferently ſtiled ſometimes of the Hamlet, and ſometimes of the Town; it ſeems to be in the Election of the Plaintiff, to name him either of the Hamlet or of the Town.

2 Hawk. P. C. 189. If a Defendant live in a Place known by a ſpecial Name, out of a Town or Hamlet, he may be named of ſuch Place.

2 Hawk. P. C. 189. The Habitation of the Wife is ſufficiently ſhewn by ſhewing that of the Huſband ‡.

‡ The Place where Defendant is *converſant* is ſufficient, though not *commorant* nor *inhabitant*. Barnes 162.—Plea as to *Commorancy* may be demurred to, but not ſet aſide. Barnes 338.

5. Of Additions which are only Conveyances to the Action.

Vide Tit. *Executors and Adminiſtrators.* When any particular Character or Relation gives any Perſon Rights and Privileges, or make him ſubject to any Burthen; to demand the one, or be liable to the other, the particular Character or Relation ought to be ſet forth; for ſince it is the Cauſe of the Action, it muſt certainly be material; and therefore when Perſons ſue or are ſued, as Heirs, Executors or Adminiſtrators, they muſt be named as ſuch, for theſe are neceſ-
*Page 621 * ſary Conveyances or Inducements to the Action, which if miſtaken is fatal.

Vide Tit. *Heir and Anceſtor.* Cro. Eliz. 333. But where the Inducement is not neceſſary, but Surpluſage only, as if an Action of Detinue of Charters be brought againſt *J. C.* and the Writ is *Præcipe* J. C. *filio & hæredi* of *R. C.* and he counts of a Bailment to the Defendant himſelf; the Defendant pleads, that he was Son and Heir to *W. C.* and not to *R. C.* this is no good Plea, becauſe he is charged with an Injury done by himſelf; but if he had been charged upon any Covenant of his Anceſtors, as their Repreſentative, there the Periphraſis, or Inducement, muſt have been rightly formed; for otherwiſe the Plaintiff doth not intitle himſelf to his Action; and there this had been a good Plea.

Saund. 111. *Dean* ver. *Guire.* If this Inducement be not at firſt in a Declaration, yet if it afterwards appears, that the Party is charged as Executor, this is ſufficient; as if an Action of Covenant be brought againſt *J. S.* Executor, and he be not named at firſt *J. S.* Executor of the Laſt Will and Teſtament; but afterwards it is ſhewn, that the Teſtator did covenant and bind himſelf his Executor, *&c.* and made *J. S.* his Executor, and died; and aſſigns a Breach; this is ſufficient, without a formal Nomination.

2 Inſt. 666. If an Action of Account be brought againſt a Parſon, they need not call him Parſon of *Dale*; but if an Aſſize be brought againſt a Parſon or Prebend, for Land that he hath in Right of his Church, he muſt be named Parſon or Prebend of the ſaid Church.

Vide Head of *Privilege.* So if an Attorney of the Common Pleas brings a Writ of Debt, he need not name himſelf Attorney; but if he brings a Writ of Privilege, he ought.

(C) Where the Name is truly put at firſt, and afterwards varied from.

THE Name muſt be truly put at firſt; for if that be omitted, there is a Complaint againſt no Perſon; therefore, where, in an *Aſſumpſit*, *J. Law* declares thus; J. L. *queritur de* Thom' Saunders, *&c. cum in conſideratione quod idem J. L.* would marry the Daughter of the ſaid *Thomas Saunders, ſuper ſe aſſumpſit* to pay him 100 *l.* the Declaration is bad, though after a Verdict; becauſe it does not ſay *Prædict'* Thom. Saunders *ſuper ſe, &c.* for no Body is expreſly charged with aſſuming; and when it is indifferent whether there can be an Injury, or no, it is not by the Court to be ſuppoſed †. Cro. Eliz. 913. *Law* ver. *Saunders*.

† But as the Pleadings are now in *Engliſh*, the Pronoun *he* would have been uſed, and, referring to the laſt Antecedent, would have been ſufficient.

But if the Plaintiff counts againſt *J. S. quod præd' J. S.* was ſeiſed of the Manor of *Dale*, without ſaying *prædict' J. S.* or *de manerio prædict'*; this, after a Verdict, ſhall be taken to be ſo; for he being named to be ſeiſed, and this by Verdict being found, it is neceſſary it ſhould be intended *J. S.* mentioned, for here it cannot poſſibly be taken indifferently either Way. Cro. Eliz. 192. *Watts's* Caſe.

If *J. W.* declares againſt *T. W.* and the Judgment is *Quod prædict' T. recuperet*, *T.* ſhall be amended and made *John*; and *Note*, that by the Statute 16 & 17 *Car.* 2. *cap.* 18. it is expreſly provided, that Judgment ſhall not be reverſed for any Miſtake in Chriſtian Name, or Surname, in any Declaration, Plaint or Pleading. Hob. 327. Cro. Jac. 662. Cro Eliz. 865. *Vide* Tit. *Amendment* and *Jeofail*.

But this muſt be underſtood where the Record is before them, for otherwiſe it may be very fatal to a juſt Cauſe; as if *A.* brings an *Aſſumpſit* againſt *B.* and declares he was Bail for him at the Suit of *W. Adderley*; and the Defendant aſſumed to ſave him harmleſs, and that the Plaintiff was taken in Execution, and paid the Debt; upon *Non Aſſumpſit* pleaded it was found, * that the Defendant was arreſted by the ſame *William Adderly*, but they declared againſt him by the Name of *William Adderby*, and the Plaintiff became Bail for him, *&c.* In this Caſe the Opinion of the Court was, that the Defendant was not chargeable; for *Adderby* and *Adderly* ſhall not be intended the ſame Perſon, at whoſe Suit the Plaintiff became Bail; for the Verdict hath no Credit againſt a Record, and therefore it cannot reconcile the Difference that appeared to be between the Records; but in this Caſe, if it had been before the Court, it might have been amended. Cro. Eliz. 459. *Franſon* ver. *Delamere*. * Page 622

If the Surname in the Judgment differs from the Surname in the Declaration, yet it ſhall be amended; for in the Judgment the Chriſtian Name need only be mentioned, and the Surname is redundant, and then *utile per inutile non vitiatur*; as if a Declaration be againſt *John Morgan Wolf*, and the Judgment be againſt *John Morgan*, this is well enough; ſo if a Declaration be *Henry Skinner*, and Judgment be entered *quod Henricus Soiner recuperet* 10 *l.* aſſeſſed by the Jury, and 5 *l. eidem Henrico Skinner de Incremento*, this is well enough. Cro. Eliz. 865. Hob. 327. Cro. Jac. 632.

The Variance of the Surname in the Proceſs to the Sheriff deſtroys not the Verdict, otherwiſe it is in the Variance of the Chriſtian Name; for, when any Man is named by two different Surnames on Record, it ſhall be intended he has two different Surnames, as by Law he may have; therefore if a *Venire facias* be to one by the Name of *George Thompſon*, and in the *Diſtringas* he be named *Gregory Thompſon*, and he appears and is ſworn, the Verdict is not good; but if there be two different Surnames in the Record, they ſhall be intended his real Names, and then the Verdict ſhall not be Cro. Eliz. 57. *Deply* ver. *Sprat*.

avoided; as if a Man be named in the *Venire facias*, *Thomas Barker* of *B.* and in the *Diſtringas*, *Thomas Carter* of *B.* and he appears and is ſworn, and tries the Iſſue, the Verdict is good notwithſtanding.

Rol. Abr. 196. 3 Bulſ. 18. Hob. 64. Brownl. 174. So if the Chriſtian Name be wrong in the *Diſtringas*, or in the Panel returned, or in the Panel of the Jury ſworn, if it can be proved to be the ſame Man that was intended to be returned in the *Venire*, having there his right Chriſtian Name, it may be amended.

(D) Of the Difference between a Miſtake in Grants, Obligations, &c. and Judicial Proceedings.

Co. Lit. 3. Dyer 279. pl. 9. Cro Jac. 558. Owen 107. IF the Chriſtian Name be wholly miſtaken, this, as hath already been obſerved, is not only fatal in Judicial Proceedings, but alſo in Grants, Obligations, *&c.* and therefore if *Edward* obliges himſelf by the Name of *Edmund*, it is ill.

Co. Lit. 3. 2 Rol. Abr. 43. But in Grants, *&c.* if there be ſuch ſufficient Marks of Diſtinction, that the Grant would be good without any Name at all, there a Miſtake of the Chriſtian Name or Surname, being only Surpluſage, will not vitiate, according to the Rule *Utile per inutile non vitiatur*; and therefore a Grant to *George* Biſhop of *Norwich*, where his Name is *John*; or to *Henry* Earl of *Pembroke*, where his Name is *Robert*, is good.

2 Rol. Abr. 43. Co. Lit. 3. So a Grant to a Man and his Wife is good, without naming her by the Name of Baptiſm; ſo if a Grant be made to *T.* and *Elen* his Wife, where, in Truth, her Name is *Emlyn*, yet the Grant is good; for being called the Wife of *T.* reduces it to a ſufficient Certainty.

*Page 623 Leon. 18. *Vide* Tit. *Deviſe*. *So in a Deviſe, though the Chriſtian Name be miſtaken, yet if there be a ſufficient Specification of the Party, the Deviſe is good; becauſe it muſt be conſtrued according to the Intent of the Deviſor; and therefore if a Deviſe be made to *Abraham*, the eldeſt Son of *B.* where his Name is *William*, this is a good Deviſe.

Co. Lit. 3. But in Pleading, in theſe Caſes, the Chriſtian Name ought to be ſhewn; for the Death of the Individual is a good Plea in Abatement, which often falls out where the ſame Office, Dignity, or Relation continues in another.

Perk. ſ. 37. If there be Father and Son of the ſame Name, and the Father grants an Annuity by his Name, without any Addition, it ſhall be intended the Grant of the Father; and if the Son, being of the ſame Name with his Father, grant an Annuity, without any Addition, yet the Grant is good, for he cannot deny his own Deed.

2 Rol. Abr. 44. If *A.* be created an Herald, and in the Patent he is called *Cheſter*, a Grant or Obligation made to him by the Name of *Cheſter*, is good; for this ſufficiently diſtinguiſhes him from other Men.

Cro. Jac. 374. If a Grant be made to a Father and his Son, he having but one Son, the Grant is good for the apparent Certainty of it; but if the Father has ſeveral Sons, or if a Grant be made to a Man's Couſin, or Friend, theſe are void for Uncertainty.

Perk. ſ. 40. If *J. S.* reciting by his Deed, that his Name is *J. S.* by the ſame Deed grants an Annuity by the Name of *Tho. S.* this is a good Grant; for the Writ ſhall be brought upon the whole Deed.

Perk. ſ. 40. So if *J. S.* Knight, reciting by his Deed, that he is a Yeoman, grants an Annuity, the Grant is good.

Carth. 400. A Grant to a Duke's eldeſt Son by the Name of a Marquiſs, or to the eldeſt Son of a Marquiſs by the Name of an Earl, *&c.* is good, becauſe of the common Curteſy of *England*, and their Places in Heraldry.

So

So where a Conveyance was made of a Reverſion to *Ralph Evers*, Knight, Lord *Evers*, and he brought an Action of Covenant, to which the Defendant pleaded, and at the Time of the Grant he was not *Cognitus & reputatus per nomen Mil*,' and it was held to be no good Plea; for the Perſon is ſufficiently expreſſed by Lord *Evers*, and the Addition of Knight, though falſe, doth not take away the Deſcription of the true Perſon. Bulſ. 21. Cro. Car. 240. *Lord Evers* ver. *Strickland.*

But it was adjudged in *C. B.* and affirmed by three Judges in *B. R.* where the Party ſet forth his Title to an Advowſon, by Virtue of Letters Patent granted to *A. tunc Armigero & poſtea Militi*, and upon Oyer of the Letters Patent it appeared, that the Grant was made to *A.* Knight, that it could not be intended the ſame Perſon, becauſe Knight is a Name of Dignity, but *Armiger*, or Eſquire, a Name of Worſhip; and if he is afterwards made a Knight, the Name of Eſquire is thereby extinguiſhed, and conſequently that a Grant made by the King to *A.* Knight, when there was no ſuch Man a Knight, was a void Grant. Carth. 440. 5 Mod. 297. 2 Salk. 560. pl. 3. *The King* ver. *Biſhop of Cheſter.* But *Rokeby* Juſtice held, that he might take by a Grant made unto him by the Name of *Knight*, *& ſic vice verſa*, *ſi conſtat de Perſona*, *ut res magis valeat*, *&c.* —— And *Note*; this Judgment was reverſed in Parliament, becauſe it was only a Miſtake in the Pleader, the Party being in Truth a Knight at the Time of the Grant. Carth. 440.

(E) At what Time the Miſtake muſt be taken Advantage of, and how the ſame is ſolved.

IT ſeems agreed, that he who would take Advantage of a Miſnomer, or the Want of a proper Addition, muſt do it before he pleads to Iſſue; for the Addition is ordained by the Statute, that the Party who happens * to be outlawed may have Notice; but if he appears and takes no Exception, *conſtat de Perſona*, and he thereby waives any Benefit he may have by the Miſnomer or Want of Addition. Rol. Abr. 780. Cro. Jac. 609. *Page 624 2 Rol. Rep. 225. *Johnſon's* Comb. 188.

Caſe. Hawk. P. C. 190. 2 Hal. Hiſt. P. C. 175. Sid. 247. Keb. 885. Show. 394. Carth. 207. Lil. Ent. 509.

The Defendant was ſerved with Proceſs by the Name of *Dubois*, Plaintiff entered an Appearance for him, and obtained Judgment by Default; and on Motion to ſet aſide the Judgment, upon an Affidavit that his Name was *Davois*, the Court refuſed it and ſaid, that ſuch Kind of Motions would deſtroy all Pleas in Abatement; ſince the late Act enabling the Plaintiff to appear for the Defendant, his Appearance by the Name of *Dubois* is the ſame, as if entered by the Defendant himſelf †. Paſch. 7 Geo. 2. in *B. R. Halcock* ver. *Dubois.*

† If Defendant is ſerved by a wrong Name, appears by his true Name, and Plaintiff declares againſt him by that Name, the Court will not, on Motion, ſtay Proceedings for Irregularity, but leave Defendant to plead Variance. So if it is in the Addition of his Degree or Miſtery. 2 Will. 293.

(F) Of the Manner of taking Advantage of, and pleading a Miſnomer or Want of Addition.

ALthough a Defendant may, by pleading in Abatement, take Advantage of a Miſnomer when there is a Miſtake in the Writ or Declaration, Finch 363. 9 H. 5. 1. pl. 3.

tion, as to the Name of Baptiſm or (*a*) Surname, yet in ſuch a Plea he muſt ſet forth his right Name, ſo as to give the Plaintiff a better Writ.

(*a*) That the ſafeſt Way in Criminal Caſes, is to allow the Party's Plea of Miſnomer, both as to his Surname and as to his Chriſtian Name; for he that pleads Miſnomer for either, muſt in the ſame Plea ſet forth what his true Name is, and then he concludes himſelf; and if the Grand Jury be not diſcharged, the Indictment may preſently be amended by the Grand Jury, and returned according to the Name he gives himſelf. 2 Hal. Hiſt. P. C. 176.——That the Party accuſed may take Advantage of the Miſnomer, or Want of Addition, but yet he muſt plead over to the Felony; but though ſuch Plea be found for him, he is not to be diſcharged, but muſt be indicted over again; neither ſhall ſuch Plea, if found againſt him, be peremptory, but he ſhall be tried on his Plea in chief. 2 Hawk. P. C. 367.

Alſo he who pleads in Abatement, muſt not only ſet forth his right Name, but muſt alſo alledge, that by ſuch Name he was known and called at the Time of the Purchaſe of the Writ.

Gouldſb. 86. Skin. 620. pl 4, Salk. 6. pl. 15. 4 Mod. 347. Ld. Raym. 118, 249, 301, 304, 509, 562. 2 Ld. Raym, 1015, 1177, 1308. 10 Mod. 284. Comyns 260. pl. 143, 371. pl. 185, 541. pl. 223. Stra. 156, 316, 614. 2 Stra. 787. 2 Ld. Raym. 1515. 2 Stra. 850. Barnard. K. B. 209. Fitzgib. 1, 75. 2 Stra. 1218.

Hal Hiſt. P. C. 175. He who will take Advantage of the Miſnomer of his Chriſtian Name, Addition, or Surname, muſt do it upon his Arraignment, and the Entry muſt be ſpecial, *viz. Super quo venit* Robertus Williams, *qui indictatus eſt per nomen* Johannis Williams, *& dicit quod ubi in indictamento ſupponitur quod quidam* Johannes Williams *vi & armis, &c. Ipſius nomen eſt* Robertus *& non* Johannes; for if he ſhould ſay, *venit prædictus Johannes Williams*, he concludes himſelf, and cannot plead that his Name is *Robert*.

Carth. 207. *Tallant* ver. *Germyn.* So where the Defendant pleaded Miſnomer in Abatement in this Form, *& prædict' J. Germyn* (with an *n* at the End) *venit & defend', & dicit*, that his Name is *Germy* (without an *n*) and not *Germyn prout, &c.* and upon Demurrer to this Plea it was adjudged againſt him; for that he had admitted his Name to be *Germyn*, by his appearing and making Defence by that Name; but that if he would have taken Advantage of the Miſnomer he ſhould have pleaded in this Manner, & Johannes Germy, *qui per nomen* J. Germyn *ſuperius implacitatur, venit & aicit quod*, and for this Default a *Reſpondeas Ouſter* was awarded.

Mich. 9. Geo. 2. in *B. R. Humberſton* ver. *Cotteral.* So where the Defendant was ſued by the Name of *Edward Cotteral*, and pleaded in Abatement that his Name was *John*, but introduced his Plea, and the aforeſaid ——— *Cotteral* (leaving out his Chriſtian Name) comes and defends the Force and Injury, when and ſo forth; and it was *held, that the Defendant ſaying *& prædict'——Cotteral*, muſt be underſtood *& prædict' Edwardus Cotteral*, by which he confeſſes his Name to be *Edward*; and if he would have taken Advantage of the Miſnomer, he ſhould have ſaid *& Johannes*, who was ſued by the Name of *Edward*.

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Trin. 10 Geo. 2. in *B. R Read* ver. *Mature.* Caſes *temp.* Hardw. 286. If there be a Miſtake in the Chriſtian Name and Surname, the Defendant may take Advantage of both, and his Plea on that Account ſhall not be held to be double; as where Trover was brought againſt the Defendant by the Name of *Chriſtopher Mature*, and he pleaded in Abatement, that his Name was *John Metter*, and that he was known by that Name; *abſque hoc*, that he was named by the Name of *Chriſtopher Mature*; and on Demurrer to this Plea, becauſe of Duplicity, and becauſe no *Venue* was laid where he was baptized, it was held, 1*ſt*, That there being a Miſtake in both Names, the Defendant could not take Advantage thereof, in a better Manner than he has done; for he is not bound to admit one of the Names right, which if he did, he would not then give the Plaintiff a better Writ, the *Prænomen* and *Cognomen* being only one Deſcription of the ſame Perſon; and though there is no Precedent, where Miſnomer has been pleaded both in the Chriſtian Name and Surname, yet that may be becauſe it is a Matter that has rarely happened; and for this were cited 1 *Lutw.* 10. *Thom. Ent.* 1.

1 *Salk.*

1 *Salk.* 6. 2*dly*, That there was no Neceſſity of laying a *Venue*, this being a Matter relating to the Perſon, which muſt be tried where the Action is laid; and for this were cited *Raſt. Ent.* 29. *Hern's Plead.* 9. 1 *Salk.* 6. 6 *Mod.* 115.

(G) Who may take Advantage thereof.

THE Defendant, though his Name is miſtaken, is not obliged to take (*a*) Advantage of it; and therefore if he be impleaded by a wrong Name, and afterwards impleaded by his right Name, he may plead in Bar the former Judgment, and aver, that he is *una & eadem perſona.*

(*a*) *J. Villars*, who pretended himſelf to be Earl of *Buckingham*, was arreſted by the Name of *J. Villars Armiger*; and, on Motion, the Court gave him Leave to put in Bail, without joining in the Recognizance, and thereby not eſtop himſelf. Salk. 3. pl. 7. pl. 17. 7 Mod. 38.

So if a Perſon be indicted and acquitted of a Crime, and afterwards he is indicted for the ſame Offence, in which ſecond Indictment the Crime is deſcribed to be the ſame in Subſtance, with ſome Variation of the Name, Addition, *&c.* he may make good the Variance, by averring, that he was the ſame Perſon meant in both. 2 Hawk. P. C. 369.

If a Perſon killed be deſcribed by his proper Name and Surname in the firſt Indictment, and by a different Surname in the ſecond, ſuch Variance may alſo be helped by an Averment, that the Perſon ſo differently named was one and the ſame Perſon; to which it is adviſable to add, that he was known as well by the Name in the firſt, as by that in the ſecond Indictment. 2 Hawk. P. C. 369.

If a Defendant appear *gratis*, and by Attorney, to an Information, he may plead a Miſnomer in Abatement, as well as if he had appeared in Perſon; for if he be not the Perſon intended, his Plea may be rejected, and Judgment ſigned by *Nihil dicit*; but the Attorney General, by accepting his Plea, admits him to be the Defendant, and ſhall not afterwards ſay, that it doth not appear but that the Plea might be put in by a Stranger. 2 Hawk. P. C. 367. *Page 626

One Defendant cannot plead Miſnomer of his Companion; for the other Defendant may admit himſelf to be the Perſon in the Writ. Lutw. 36.

So if ſeveral Perſons be indicted for one Offence, Miſnomer, or Want of Addition of one, quaſheth the Indictment only againſt him, and the Reſt ſhall be put to anſwer; for they are in Law as ſeveral Indictments. 2 Hal. Hiſt. P. C. 177.

MONO-

MONOPOLY.

(A) Monopoly, what it is, and how reſtrained by the Common Law. 626.
(B) How reſtrained by Statute. 627.

(A) Monopoly, what it is, and how reſtrained by the Common Law.

A Monopoly is deſcribed by my Lord *Coke* to be an Inſtitution or Allowance by the King by his (*a*) Grant, Commiſſion or otherwiſe, to any Perſon or Perſons, Bodies Politick or Corporate, of or for the ſole Buying, Selling, Making, Working or Uſing of any Thing, whereby any Perſon or Perſons, Bodies Politick or Corporate are ſought to be reſtrained of any Freedom or Liberty they had before, or hindred in their lawful Trade.

3 Inſt. 181. Noy 182. (*a*) Monopoly and Ingroſſing differ only in this, that the firſt is by Patent from the King, the other by Act of the Subject, between Party and Party; but are both equally injurious to Trade, and the Freedom of the Subject, and therefore are equally reſtrained by the Common Law. Skin. 169.

Hawk. P.C. 231. *Townſend's Collection of Proceedings in Parliament* 244, 245.

And therefore all Grants of this Kind, relating to any known Trade, are made (*b*) void by the Common Law, as being againſt the Freedom of Trade, and diſcouraging of Labour and Induſtry, and reſtraining Perſons from getting an honeſt Livelihood by a lawful Employment, and putting it in the Power of particular Perſons to ſet what Prices they pleaſe on a Commodity; all which are manifeſt Inconveniencies to the Public.

(*b*) And it is held to be further reſtrained by the Common Law, by ſubjecting thoſe who are guilty thereof to a Fine and Impriſonment for the Offence, as being *Malum in ſe*, and contrary to the antient and fundamental Laws of the Kingdom; and it is ſaid, that there are Precedents of Proſecutions of this Kind in former Days. 3 Inſt. 181. 2 Inſt. 47, 61.

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2 Rol. Abr. 214. 3 Inſt. 182. 2 Inſt. 61.

* And upon this Ground it hath been reſolved, that the King's Grant to any particular Corporation, of the ſole Importation of any Merchandize, is void, whether ſuch Merchandize be prohibited by Statute or not.

Raym. 489. 2 Chan. Ca. 165. Vern 127. *Sands* ver. *Eaſt-India Company.*

Hence alſo it ſeems, that the King's Charter, impowering particular Perſons to trade to and from ſuch a Place, is void, ſo far as it gives ſuch Perſons an excluſive Right of trading, and debarring all others; and it ſeems now agreed, that nothing can exclude a Subject from Trade, but an Act of Parliament.

Skin. 165. pl. 2. 226, 234. 3 Mod. 126.

Alſo it hath been adjudged, that the King's Grant of the ſole Making, Importing and Selling of playing Cards, is void; notwithſtanding the Pretence, that the Playing with them is a Matter merely of Pleaſure and Recreation, and often much abuſed, and therefore proper to be reſtrained; for ſince the Playing with them is, in itſelf, lawful and innocent, and the Making of them an honeſt and laborious Trade, there is no more Reaſon why any Subject ſhould be hindred from getting his Livelihood by this than any other Employment. 11 Co. 84. Moor 671. Noy 173. 2 Inſt. 47.

And for the like Reaſons alſo it hath been reſolved, that the Grant of the ſole Ingroſſing of Wills and Inventories in a Spiritual Court, or of the ſole Making of Bills, Pleas and Writs in a Court of Law, to any particular Perſon, is void. 2 Rol. Abr. 212. Jon. 231. 3 Mod. 75. Vern 120, 130. 10 Mod. 107, 131, 133.

But it ſeemeth clear, that the King may, for a reaſonable Time, make a good Grant to any one of the ſole Uſe of any Art invented, or firſt brought into the Realm, by the Grantee. Noy 182. Hawk. P. C. 231.

Alſo it ſeems to be the better Opinion, that the King may grant to particular Perſons the ſole Uſe of ſome particular Employments; (as of *(a)* Printing the Holy Scriptures, and Law-Books, *&c.*) whereof an unreſtrained Liberty might be of dangerous Conſequence to the Public. Mod. 256. 3 Keb. 792. 3 Mod. 75. and the Authorities to the laſt Paragraph but one.

(a) The Reaſons hereof given are, that the Invention of Printing was new; that it concerned the State, and was Matter of Public Care; that it was in the Nature of a Proclamation, and none could make Proclamations but the King; that as to Law-Books, the King has the Making of Judges, Serjeants and Officers of Law; that they are printed in a particular Language and Character, with Abbreviations, *&c.* *Vide* 2 Chan. Ca. 67. Skin. 234.——[See the Caſe of *Baſket* and others, and the *Univerſity* of *Cambridge* and others. 1. Burn's *Eccl. Law*. 347. Tit. *College*.]

(B) How reſtrained by Statute.

BY the 21 *Jac.* 1. *cap.* 3. it is declared and enacted, "That all Monopolies, and all Commiſſions, Grants, Licences, Charters and Letters "Patents to any Perſon or Perſons, Bodies Politick or Corporate whatſoever, of or for the ſole Buying, Selling, Making, Working or Uſing of "any Thing within this Realm, or *Wales*, or of any other Monopolies, "and all Proclamations, Inhibitions, Reſtraints, Warrants of Aſſiſtance, "and all other Matters whatſoever, any Way tending to the Inſtituting, "Strengthening, Furthering or Countenancing of the ſame, or any of "them, are altogether contrary to the Laws of this Realm, and ſo are and "ſhall be utterly void, and of none Effect, and in no wiſe to be put in Ure "and Execution.

And *Sect.* 2. "That all Perſons, Bodies Politick and Corporate whatſoever, ſhall be diſabled and uncapable to have, uſe, exerciſe or put in Ure "any Monopoly, or any ſuch Commiſſion, Grant or Licence, *&c.* or other "* Thing tending as aforeſaid, or any Liberty, Power or Faculty, ground- *Page 628
"ed or pretended to be grounded upon them, or any of them.

And it is further declared and enacted, by *Sect.* 3. "That all Monopolies, "and all ſuch Commiſſions, Grants and Licences, *&c.* and all other "Things tending as aforeſaid, and the Force and Validity of them ought to "be, and ſhall be examined, heard, tried and determined by and according to the *(b)* Common Laws of this Realm, and not otherwiſe.

(b) In the Conſtruction hereof it is held by my Lord *Coke*, that all Matters of this Kind ought to be tried in the Courts of Common Law only, and not at the Council-Table, or in the Court of Chancery, or any other Court of like Nature. 3 Inſt. 182. But for this *vide* Juriſdiction of the Court of Chancery, Tit. *Courts and their Juriſdiction*.

And

And it is further enacted, by *Sect.* 4. " That if any Perſon ſhall be hin-
" dered, grieved, diſturbed or diſquieted, or his Goods or Chattels any way
" ſeized, attached, diſtrained, taken, carried away or detained by Occaſion
" or Pretext of any Monopoly, or of any ſuch Commiſſion, Grant or Li-
" cence, *&c.* or other Matter or Thing tending as aforeſaid, and will ſue
" to be relieved in any of the Premiſſes, he ſhall have his Remedy for the
" ſame at the Common Law, by Action grounded on the ſaid Statute, to
" be heard and determined in the King's Bench, Common Pleas, or Ex-
" chequer, againſt the Party by whom he ſhall be ſo hindered or grieved,
" *&c.* or by whom his Goods ſhall be ſo ſeized or attached, *&c.* wherein
" every ſuch Perſon, which ſhall be ſo hindered or grieved, *&c.* or whoſe
" Goods ſhall be ſo ſeized or attached, *&c.* ſhall recover three Times ſo
" much as the Damages which he ſuſtained by Means of ſuch Hindrance,
" *&c.* and double Coſts; and in ſuch Suits, or for the Staying or Delaying
" thereof, no Eſſoin, Protection, Wager of Law, Aid Prayer, Privilege,
" Injunction, or Order of Reſtraint, ſhall be in any wiſe prayed, granted,
" admitted or allowed, nor any more than one Imparlance; and if any
" Perſon ſhall, after Notice that the Action depending is grounded upon
" the ſaid Statute, cauſe or procure any Action at the Common Law
" grounded thereon to be ſtayed or delayed before Judgment, by Colour
" or Means of any Order, Warrant, Power or Authority, ſave only of the
" Court wherein ſuch Action ſhall be depending; or after Judgment ſhall
" cauſe or procure the Execution to be ſtayed or delayed by Colour or
" Means of any Order, Warrant, Prayer or Authority, ſave only by Writ
" of Error or Attaint, that then the ſaid Perſon or Perſons ſo offending
" ſhall incur a *Præmunire*."

3 Inſt. 183. It is ſaid, that the firſt Branch of this laſt Clauſe, relating to the Delay of Cauſes of this Kind before Judgment, not only extendeth to the Privy Council, Chancery, Exchequer Chamber, and the like, but alſo to thoſe who ſhall procure any Warrant from the King for ſuch Purpoſe; and it is ſaid, that the latter Branch, relating to the Delaying of Execution after Judgment, extendeth even to the Judges of the Court where the Cauſe is depending.

But it is provided, by *Sect.* 6. " That no Declaration, in the Statute men-
" tioned, ſhall extend to any Letters Patents, and Grants of Privilege
" for the Term of fourteen Years, or under, of the ſole Working or
" Making of any Manner of *(b)* new Manufactures within this Realm,
" to the true and firſt Inventor and Inventors of ſuch Manufactures,
" which others, at the Time of making ſuch Letters Patents and Grants,
" ſhall not uſe; ſo as alſo they be not contrary to the Law, nor miſ-
" chievous to the State, by raiſing Prices of Commodities at home, or
" Hurt of Trade, or generally inconvenient; the ſaid fourteen Years to
" be accounted from the Date of the firſt Letters Patent, or Grant of
*Page 629 " * ſuch Privilege, but that the ſame ſhould be of ſuch Force, as they
(b) Manu- " ſhould be if the ſaid Act had never been made, and of none other."
factures
newly
brought into the Realm from beyond Sea are included, tho' they had been long practiſed there before; for the Statute ſpeaks of new Manufactures within this Realm, and was made to encourage new Devices uſeful to the Kingdom; and whether learned by Travel or Study, it is the ſame Thing. 2 Salk. 447.

3 Inſt. 184. It hath been reſolved, that no new Invention, concerning the Working of any Manufacture, is within the Meaning of this Exception, unleſs it be ſubſtantially new, and not barely an additional Improvement of an old one.

3 Inſt. 184. Alſo it hath been holden, that a new Invention to do as much Work in a Day by an Engine, as formerly uſed to employ many Hands, is not within the ſaid Exception; becauſe it is inconvenient, in turning ſo many labouring Men to Idleneſs.

Alſo

Alſo it ſeems clear, that no old Manufacture, in Uſe before, can be pro- 3 Inſt. 184.
hibited in any Grant of the ſole Uſe of any ſuch new Invention.

And it is farther provided, *Sect* 7. "That nothing in the ſaid Act con-
"tained ſhall extend to any Grant or Privilege, Power or Authority what-
"ſoever, before the ſaid Act made, granted, allowed or confirmed by any
"Act of Parliament, ſo long as the ſame ſhall continue in Force.

Provided alſo, *Sect.* 9. "That nothing in the ſaid Act contained ſhall be
"in any wiſe prejudicial to any City, Borough or Town Corporate within
"this Realm, concerning any Grants, Charters or Letters Patents to them
"made, or concerning any Cuſtom uſed by or within them, or unto any
"Corporations, Companies or Fellowſhips of any Art, Trade, Occupation
"or Myſtery, or to any Companies or Societies of Merchants within this
"Realm, erected for the Maintenance, Enlargement or Ordering of any
"Trade or Merchandize, but that the ſame Charters, Cuſtoms, Corpora-
"tions, *&c.* and their Liberties and Immunities ſhall be of ſuch Force and
"Effect, as they were before the making of the ſaid Act, and of none
"other; any Thing before in the ſaid Act contained to the contrary in any
"wiſe notwithſtanding.

And it is further provided, *Sect.* 10. "That nothing in the ſaid Act
"contained ſhall extend to any Letters Patents, or Grants of Privilege
"concerning Printing, nor to any Commiſſion, Grants or Letters Patents
"concerning the Digging, Making or compounding of Salt-Petre, or Gun-
"powder, or the Caſting or Making of Ordnance, or Shot for Ordnance;
"nor to any Grant or Letters Patents of any Office, erected before the
"Making of the ſaid Statute, and then in Being and put in Execution,
"other than ſuch Offices as had been decried by Proclamation; but that
"all ſuch Grants, *&c.* ſhall be of the like Force and Effect, and no other,
"as if the ſaid Act had never been made.

But it is enacted by 16 *Car.* 1. *cap.* 21. "That it ſhall be lawful for
"all Perſons, as well Strangers as natural-born Subjects, to import any
"Quantities of Gunpowder whatſoever, paying ſuch Cuſtoms and Duties
"for the ſame as by Parliament ſhall be limited; and that it ſhall be lawful
"for all his Majeſty's Subjects of this his Realm of *England*, to make and
"ſell any Quantities of Gunpowder at his Pleaſure, and alſo to bring into
"this Kingdom any Quantities of Salt-Petre, Brimſtone, or any other
"Materials for the Making of Gunpowder; and that if any Perſon ſhall
"put in Execution any Letters Patents, Proclamations, Edict, Act, Order,
"Warrant, Reſtraint, or other Inhibition whatſoever, whereby the Im-
"portation of Gunpowder, Salt-Petre, Brimſtone, or other the Materials
"aforementioned, ſhall be any ways prohibited or reſtrained, ſhall incur a
"*Præmunire.*"

And it is further provided by the ſaid Statute of 21 *Jac.* 1. *cap.* 3.
Sect. 11, 12. "That nothing in the ſaid Act contained ſhall extend to
"any Commiſſion or Grant concerning the Digging, Compounding or
"Making of Allum or Allum Mines, *&c.* not concerning the Licenſing
"of the Keeping of any Tavern or Selling of Wines, to be ſpent in the
"Manſion-Houſe, or other Place in the Tenure or Occupation of the
"Party ſelling the ſame; and a further Proviſion is made in the latter
"* Part of the Statute, for ſome particular Grants to particular Corpora- *Page 630
"tions and Perſons, as *Newcaſtle upon Tine*, *&c.*

But it is ſaid, that the ſaid Clauſe relating to Allum was needleſs, becauſe 3 Inſt. 185.
all ſuch Mines belong of Courſe to the Perſons in whoſe Grounds they are, and therefore no Privilege concerning them can be granted but in the King's own Ground.

MORTGAGE.

MORTGAGE.

(A) Of the Original and ſeveral Kinds of Mortgages. 631.
(B) What ſhall be deemed a Mortgage, or an Eſtate redeemable. 634.
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Page 631 (A) Of the Original and ſeveral Kinds of Mortgages.

Camæus 11, 12. THE Notion of Mortgaging and Redemption ſeems to be of *Jewiſh* Extraction, and from them derived to the *Greeks* and *Romans*; the Plan of the *Moſaic* Law conſtitutes a juſt and equal Agrarian, that the Lands may continue in the ſame Tribes and Families, and the People might not be diverted by any exotick Acts and Inventions

Inventions from the Exerciſe of Agriculture, in which innocent Employment they were to be continually educated; and therefore whoever were compelled by Want to ſell, could transfer no Eſtate in the Lands, farther than to the next general Jubile, which returned once in fifty Years; wherefore they computed till the Jubile, and according to the Diſtance from thence, ſuch was the Intereſt that could be transferred to the Buyer; but the Vendor had Power at any Time to redeem, paying the Value of the Lands to the Jubile; but though he did not redeem at the Year of Jubile, yet the Lands came back again free to the Vendor and his Heirs.

But our Notion of Mortgaging and Redemption ſeems to have come more immediately from the Civil Law, and therefore it will be neceſſary herein to conſider the Diſtinctions in that Law between Pledges and Things hypothecated. *Juſtin.* 592.

The *Pignus* or Pledge was, when any Thing was obliged for Money lent, and the Poſſeſſion paſſed to the Creditor.

The *Hypotheca* was, when the Thing was obliged for Money lent, and the Poſſeſſion remained with the Debtor. Now in Caſe of Goods pignorated, the Creditor was obliged to the ſame Diligence in keeping them, as he uſed about his own; ſo that if the Goods were loſt by the Negligence of the Creditor, an Action lay as for a Depoſit; for the Property being transferred to the Creditor for a particular Purpoſe, he was to keep them as his own. *Vide* Tit. *Bailment.*

If the Debtor did not redeem the Thing pledged, the Creditor was to foreclose the Redemption of the Debtor; and if the Money was not paid, the Creditor had his *Actio Pignoritia* or *Hypothecaria*, which, when he had purſued, and obtained Sentence thereon, he might ſell as his own Property; but there was this Difference between the *Actio Pignoritia* and *Hypothecaria*; that the *Actio Pignoritia* was only on the Perſon of the Debtor to foreclose him, becauſe the *Pignus* was already in the Poſſeſſion of the Creditor; but the *Actio Hypothecaria* was *tam in Rem, quam in Perſonam*, and was given *ad Pignus Proſequendum contra quemcunque Poſſeſſorem*; becauſe herein the Creditor had not the Poſſeſſion of the Pledge, but it remained to the Debtor; and till Sentence was obtained in theſe Actions, the Creditor could not obtain the Property of the Pledge; and if the Money was paid before Sentence, the Pledge was ſubject to Redemption; and where the ſame Thing was pledged to ſeveral, thoſe were ſaid to be *Potiores in Pignore*, to whom the Things were firſt hypothecated. *Digeſt. Lib.* 20. Tit. 6. *Corvin.* 269, 270, 271.

If the Money was tendered or paid to the Creditor, the Contract of Pignoration was diſſolved, and the Debtor might have the Pledge back, as a Thing lent; ſo that ſeems to have introduced the Notion among us of the Debtor's Right to Redemption, and with them the Uſucaption, or the Right of Preſcription, did not extinguiſh the Pledge, unleſs a Stranger had held it for thirty Years, or the Debtor had held it for forty Years. *Digeſt. Lib.* 20. Tit. 6.

In the Feudal Law the Rule was, *Feudalia, invito Domino, aut Agnatis, non recte ſubjiciuntur Hypothecæ, quamvis fructus poſſe eſſe receptum eſt*, and the Reaſon of this Rule was, becauſe the Feud was filled with a Tenant * from the Lord's original Bounty, on whom he depended for his perſonal Service in War and Peace: and therefore the Feudiary could not obtrude a Tenant on him without his Leave, who might be leſs capable of thoſe Services; and therefore as the Tenant could not originally alien without Licence, ſo he could not mortgage. *Corvin.* 268. *Page 632

But when a Licence of Alienation was given about the Time of *H.* 3. and it became a Maxim in Law, that the Purity of a Fee-ſimple imported a Power of diſpoſing of it as the Owner pleaſed; there were two Ways of mortgaging Lands introduced, which *Littleton* diſtinguiſhes by the Names of *Vadium Vivum* and *Vadium Mortuum*.

The

Co.Lit. 205. *Vide Madd. Formulare* 136. The *Vadium Vivum* is, where a Man borrows 100*l.* of another, and makes an Eſtate of Lands to him, till he hath received the ſaid Sum of the Iſſues and Profits of the Lands; and it is called *Vadium Vivum*, becauſe neither the Money nor the Land dieth; for the Lands are conſtantly paying off the Money, and the Lands are not left as a dead Pledge, in caſe the Money be not paid. This ſeems to have been the antient Way of pledging Lands; for they held, that Lands could not be hypothecated; and therefore they uſed to ſubject the *Uſufructus*, which continued originally during the Life of the Feudiary; but when there was a free Liberty given of Alienation, then the Feudiary could pledge the *Uſufructus* of the Land at Pleaſure; but becauſe, in this Way of Pledging, the Lender received his Money by Degrees, and in ſmall Parcels, which was very troubleſome; and thoſe that put Money to Uſury, are generally willing to receive the Whole in a groſs Sum; therefore this Way of Pledging is now out of Uſe.

Lit. ſ. 332. Co.Lit. 205. The *Vadium Mortuum* is ſo called by *Littleton*, becauſe it is doubtful, whether the Feoffor will pay the Money at the Day limited or not; and if he do not pay, then the Land, which is but in Pledge upon Condition, for the Payment of the Money, is taken from him for ever, and ſo dead to him; and if he do pay it, then the Pledge is dead to the Tenant of the Land.

Maddox 318, 319. Of theſe Mortgages there are again two Sorts; 1*ſt*, Of the Freehold and Inheritance; and 2*dly*, Of Terms for Years.

1*ſt*, Of the Freehold and Inheritance; and here the antient Way was to make a Charter of Feoffment, on Condition, that if the Feoffor, or his Heirs, paid the Sum to the Feoffee, or his Heirs, he ſhould re-enter and re-poſſeſs; and ſometimes the Condition was contained in the Charter of Feoffment, and ſometimes it was defeazanced by another Charter, as may be ſeen in the old Forms.

Co. Lit. 226, 227. For as a Man might annex a Condition to his Feoffment, for *cujus eſt dare, ejus eſt diſponere*, ſo he might annex a Condition by another Deed, bearing Date and executed at the ſame Time; for, being executed at the ſame Time, it is really but one and the ſame Diſpoſition, *quæ incontinenti fiunt ineſſe videntur*; but a Defeazance or Condition annexed after the Feoffment executed comes too late, becauſe the Livery *Coram Paribus* atteſting the Infeudation, in which there is no Condition, the Tenant muſt hold the Land according to the Tenure of the Inveſtiture; but Rents, Annuities or Warranties, that are Things executory, may be defeated by Defeazances made at the Time of their Creation, or any Time after; becauſe there is not any Neceſſity of the Notoriety of Livery to make an Inveſtiture; and therefore, being created by Deed only, they may be defeated or deſtroyed by Deed alone.

Co. Lit. 221, 222. Theſe Sorts of Conveyances were ſubject to theſe Inconveniencies; that if the Money were not paid at the Day, ſo that the Eſtate became abſolute, the Eſtate was thenceforth ſubject to the Dower of the Feoffee, and all other his real Charges and Incumbrances; for though if the Feoffor performed the Condition, then he might re-enter, and re-poſſeſs himſelf in his former Eſtate, and conſequently was in above all the Charges and *Page 633 *Incumbrances of the Feoffee; yet, if he did not literally perform the Condition, by Payment of the Money at the Day, then the Eſtate was legally ſubject to the Charges and Incumbrances of the Feoffee, though the Money were afterwards paid, and the Eſtate re-conveyed to the Feoffor.

Hardr. 465. But the Courts of Equity, as they grew in Power, have ſet this Matter right, and have maintained the Right of Redemption, not only againſt Tenant in Dower, and the Perſons who come in under the Feoffee, but even againſt the Tenant by the Curteſy, and Lord by Eſcheat, that are in the *Poſt*; becauſe the Payment of the Money doth, in the Conſideration of Equity, put the Feoffor *in ſtatu quo*, ſince the Lands were originally only a Pledge for the Money lent.

As

As to Mortgages by Way of creating Terms, this was formerly by Way of Demiſe and Re-demiſe. As for Example; *A.* borrowed Money of *B.* thereupon *A.* would demiſe the Land to *B.* for a Term of 500, *&c.* Years abſolutely, with Common Covenants againſt Incumbrances, and for farther Aſſurance, and then *B.* would the Day after re-demiſe to *A.* for 499 Years, with Condition, to be void on Non-payment of the Money at the Day to come; this Manner of mortgaging came in after the 21 *H.* 8. *cap.* 15. for falſifying Recoveries, where there was a fixed Intereſt ſettled in Terms for Years; and was eſteemed beſt for the Mortgagor, to avoid all Manner of Pretenſion from the Incumbrances and Dower of the Feoffee in Mortgage; and was reputed beſt for the Mortgagee, to avoid the Wardſhip and Feudal Duties of the Tenure, and was only inconvenient in this; that if the ſecond Deed were loſt, there appeared to be an abſolute Term in the Mortgagee.

And this is now the common Method, *viz.* By a Demiſe of the Land for a Term, under a Condition to be void on the Payment of the Mortgage-Money and Intereſt; and a Covenant is inſerted at the End of ſuch Deeds, that, till the Default ſhall be made in the Payment of the Money, the Mortgagor ſhall receive the Rents, Iſſues and Profits, without Account.

This has been ruled to create a Tenancy at Will to the Mortgagee; but if the Mortgagor dies, the Tenancy at Will is determined, till there is a Receipt of Intereſt from the Heir, which ſeems to make him alſo Tenant at Will to the Mortgagee. Raym. 147.

But now the laſt and beſt Improvement of Mortgages ſeems to be, that in the Mortgage Deed of a Term for Years, or the Aſſignment thereof, the Mortgagor ſhall covenant for himſelf and his Heirs, that, if Default be made in the Payment of the Money at the Day, then he and his Heirs will, at the Coſts of the Mortgagee and his Heirs, convey the Freehold and Inheritance of the Mortgaged Lands to the Mortgagee and his Heirs, or to ſuch Perſon or Perſons (to prevent Merger of the Term) as he or they ſhall direct or appoint; for the Reverſion, after a Term of 50 or 100 Years, being little worth, and yet the Mortgagee, for Want thereof, continuing but a Termor, and ſubject to Forfeiture, *&c.* and not capable of the Privileges of a Freeholder; therefore, where the Mortgagor cannot redeem the Land, it is but reaſonable the Mortgagee ſhould have the whole Intereſt and Inheritance of it, to diſpoſe of as abſolute Owner.

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* (B) What ſhall be deemed a Mortgage, or an Eſtate redeemable. * Page 634

HEREIN we may obſerve in general, that whatever Clauſes or Covenants there are in a Conveyance, though they ſeem to import an abſolute Diſpoſition or conditional Purchaſe; yet, if, upon the Whole, it appears to have been the Intention of the Parties, that ſuch Conveyance ſhould only be a Mortgage, or paſs an Eſtate redeemable, a Court of Equity will always conſtrue it ſo. Vern. 183, 268, 394. Preced. Chan. 95.

As where the Condition of a Mortgage is, that the Mortgagor ſhall redeem during his Life, or that the Mortgagor and the Heirs of his Body ſhould redeem, yet Equity will admit the General Heir of ſuch Mortgagor to a Redemption; becauſe this can be no Purchaſe, ſince there is a Clauſe of Redemption; and when the Land was originally only a Pledge for Money, if the Principal and Intereſt be offered, the Land is free; and it would Vern. 33, 150. 2 Chan. Ca. 147. S. C. *Howard* ver. *Harris.*

be

be very hard, that it ſhould be in the Power of the Scrivener, or griping Uſurer, by ſuch impertinent Reſtrictions, to elude the Juſtice of the Court.

Vern. 193. *per North*, L. K. But if a Man borrows Money of his Brother, and agrees to make him a Mortgage, and that, if he has no Iſſue Male, his Brother ſhall have the Land; ſuch an Agreement, made out by Proof, will be decreed in Equity.

Vern. 7, 214, 232. *Newcomb.* ver. *Bonham.* 2 Vent. 364. S. C. where it is ſaid, that Lord *North's* Decree was affirmed in the Houſe of Lords. *A.* in Conſideration of 1000 *l.* made an abſolute Conveyance to *B.* of the Reverſion of certain Lands after two Lives, which, at that Time, were worth little more; and by another Deed, of the ſame Date, the Lands are made redeemable any Time during the Life of the Grantor only, on Payment of 1000 l. and Intereſt; *A.* died, not having paid the Money; and it was held by my Lord *Nottingham*, that his Heir might redeem, notwithſtanding this reſtrictive Clauſe; and that it was a Rule, *Once a Mortgage and always a Mortgage*, and that *B.* might have compelled *A.* to redeem in his Life-time, or have foreclоſed him; but on a Re-hearing, Lord K. *North* reverſed the Decree on the Circumſtances of this Caſe; for it appeared by Proof, that *A.* had a Kindneſs for *B.* and that he had married his Kinſwoman, which made it in the Nature of a Marriage Settlement; he likewiſe held, that *B.* could not have compelled *A.* to redeem during his Life, which made it the more ſtrong.

Vern. 488. *Willet* ver. *Winnel.* If *A.* mortgage Lands to *B.* worth 15 *l. per Annum*, for ſecuring 200 *l.* and at the ſame Time *B.* enters into a Bond conditioned, that if the 200 *l.* and Intereſt is not paid within a Year, then he to pay to *A.* his Executors or Adminiſtrators, the further Sum of 78 *l.* in full for the Purchaſe of the Premiſſes, *&c.* and *A.* dies within the Year, and the 200 *l.* with Intereſt not being paid at the Day, the Heir of *B.* paid the 78 *l.* the next Day after the Mortgage was forfeited to the Adminiſtrator of *A.* yet *A.*'s Heir may redeem, paying the 200 *l.* and likewiſe the 78 *l.* that was paid the Adminiſtrator.

2 Vern. 84. *Manlove* ver. *Ball.* So where *A.* for 550 *l.* made an abſolute Aſſignment of a Church Leaſe for three Lives to *B.* and *B.* by Writing under his Hand agreed, that if *A.* paid 600 *l.* at the End of the Year, *B.* would re-convey; *B.* died, leaving *C.* his Son and Heir; two of the Lives died, and the Leaſe was twice renewed by *C.* and his Father; and though it was near twenty Years ſince the Conveyance was made, yet the Maſter of the Rolls decreed a Redemption on Payment of the 550 *l.* and the two Fines.

2 Vern. 520. *Jennings* ver. *Ward.* *A.* lends Money to *B.* to carry on certain Buildings, and takes a Mortgage from him to ſecure 1600 *l.* with Intereſt; and, by another Deed executed at the ſame Time, takes a Covenant from *B.* that he ſhould convey to him, if he thought fit, Ground-rents to the Value of 1600 *l.* at the Rate of twenty Years Purchaſe; and, on a Bill brought to redeem, the Maſter of *Page 635 * the Rolls decreed a Redemption on Payment of Principal, Intereſt and Coſts, without Regard to that Agreement, but ſet aſide the ſame as unconſcionable; for a Man ſhall not have Intereſt for his Money and a collateral Advantage beſides for the Loan of it, or clog the Redemption with any bye Agreement.

Preced. Chan. 160. *Jory* ver. *Cox.* But though theſe and ſuch like Reſtrictions are relieved againſt, to make them anſwer the primary Intention of the Parties; yet if *A.* on a Mortgage lends Money at 5 *l. per Cent.* but agrees in the Deed, that, if the Money were paid within three Months after it became due, he would accept of 4 *l. per Cent.* and the Mortgagor neglects to pay the Intereſt within the Time, Equity will not relieve him, but he muſt pay 5 *l. per Cent.* for though the Court relieves againſt unreaſonable Penalties, yet this is not ſo, for the Mortgagee might have refuſed to lend his Money under 5 *l. per Cent.*

Chan. Rep. 52. So if the Mortgagee deviſes, that the Mortgagor ſhould be remitted Part of his Mortgage-Money, provided he pays the Principal and Intereſt within three Days after his Deceaſe; if the Condition be not performed, the Remittance is loſt; becauſe this being a voluntary Bounty, and not *ex debito Juſtitiæ*,

Juſtitiæ, the Party muſt take it as it is limited, for *cujus eſt dare, ejus eſt diſponere*; and the Court cannot relieve in this Caſe after the Day.

But where in a Mortgage there was a Proviſo, that, if the Intereſt was behind ſix Months, then the Intereſt ſhould be accounted Principal, and carry Intereſt; this, by my Lord *Cowper*, was decreed to be a vain Clauſe, and of no Uſe; and he ſaid, that no Precedent had ever carried the Advance of Intereſt ſo far: and that an Agreement, made at the Time of the Mortgage, will not be ſufficient to make future Intereſt Principal; but, to make Intereſt Principal, it is requiſite that Intereſt be firſt grown due, and then an Agreement concerning it may make it Principal. 2 Salk. 449. pl. 1. *Lord Oſſulſton* ver. *Lord Yarmouth.*

(C) Of the Nature of a Mortgage, as to the diſtinct Intereſts of a Mortgagor and Mortgagee.

THE Mortgagor before Forfeiture, and whilſt it remains uncertain whether he will perform the Condition at the Time limited, or not, hath the legal Eſtate in him; alſo after Forfeiture he hath an Equity of Redemption; ſo that he is ſtill conſidered as Owner and Proprietor of the Eſtate, until the Equity of Redemption be foreclоſed, and therefore may make Leaſes, or (*a*) any Settlement thereof, which will bind his Equity of Redemption.

(*a*) It is ſaid, that a Tenant in Tail of an Equity of Redemption, may deviſe it for Payment of Debts. Vern. 41. *Turner* ver. *Gwinn.*

Therefore if a Man mortgages his Land, and, as is uſual, ſtill continues in Poſſeſſion, and levies a Fine, and five Years paſs, yet the Mortgagee is not barred; for though the Mortgagee be, in Reality, out of Poſſeſſion, yet when that is done by the Conſent of both Parties, and the Nature of the Contract requires it ſhould be ſo while the Intereſt is paid, it is againſt the original Deſign of the Contract, that any Act of the Mortgagor, except the Payment of the Money, ſhould deprive the Mortgagee of his Security, and is no leſs than a Fraud, which the Law will not countenance. Sid. 460. Vent. 82. Lev. 274. Carth. 101, 414.

And as the Mortgagor, being conſidered only as Tenant at Will to the Mortgagee, cannot, by his Act, deſeat the Intereſt of the Mortgagee, otherwiſe than by Payment of the Mortgage-Money; ſo neither can the Mortgagee defeat the Mortgagor of his Equity of Redemption; therefore if a Mortgagee in Fee ſuffers a Recovery, this, even at Law, ſhall not bind the Mortgagor's Right of Entry, upon Performance of the Condition; but if the Mortgagor had been a Party to the Recovery, then his Right had been bound, not only on Account of the Recompence in Value, but becauſe he is eſtopped by the Recovery to claim the Land againſt the Recoverer, or his Heirs, when he was called in before the Judgment given to defeat his Title, and could not do it. Palm. 135. Cro. Jac. 593. *Page 636

So if a Mortgagee be diſſeiſed, and the Diſſeiſor levies a Fine, and five Years paſs after the Proclamations, though the Mortgagee is hereby barred, yet if the Mortgagor pays, or tenders his Money, he has five Years to proſecute his Right, by the ſecond Saving in the Statute of 4 *H.* 7. *cap.* 24. becauſe his Title did not accrue till Payment of the Money. Plow. 373. a.

And as the Mortgagor, till the Equity of the Redemption be foreclоſed, is conſidered as Owner of the Land, it was ruled, where a Bill for a Redemption was brought againſt a Mortgagee in Poſſeſſion, and a Decree accordingly, Preced. Chan. 71

cordingly, that the Mortgagee, before the Account taken, having preſented to a Church that became void, ſhould revoke his Preſentation, and preſent ſuch a Perſon as the Mortgagor, or his Vendee (he having contracted to ſell) ſhould appoint.

By the 7 *W. & M. cap.* 25. it is enacted, "That no Perſon or Perſons "ſhall be allowed to have any Vote in Election of Members to ſerve in "Parliament, for or by Reaſon of any Truſt Eſtate or Mortgage; unleſs "ſuch Truſtee or Mortgagee be in actual Poſſeſſion, or Receipt of the "Rents and Profits of the ſame Eſtate, but that the Mortgagor, or *Ceſtui* "*que Truſt* in Poſſeſſion, ſhall and may vote for the ſame, notwithſtanding "ſuch Mortgage or Truſt."

And by the 9 *Ann. cap.* 5. which requires, that Knights of the Shire ſhould have 600 *l. per Annum*; and every other Member 300 *l. per Annum*, it is enacted, "That no Perſon ſhall be qualified to ſit in the Houſe of "Commons, within the Meaning of the Act, by Virtue of any Mortgage, "whereof the Equity of Redemption is in any other Perſon, unleſs the "Mortgagee ſhall have been in Poſſeſſion of the mortgaged Premiſſes for "ſeven Years before the Time of his Election." †

† A Mortgagor concealing a former Incumbrance, ſhall loſe his Equity of Redemption; the Under-Mortgagees may redeem the former Mortgages. 4 W. & M. c. 16. *poſt* 648.——A Court at Law may relieve the Mortgagor, on Payment of Principal, Intereſt, and Coſts. 7 Geo. 2. c. 20. *poſt* 656.——On a Bill of Foreclosure, Mortgagors permitted to tender the Money before hearing. *Id.* ſ. 2. *poſt* 657.

(D) Of the legal Performance of the Condition.

7 E. 4. 3.
9 H. 6. 12.
22 H. 6. 37.
47 E. 3. 26.
Plow. 173.
5 Co. 114.
Co. Lit. 209.

THE Condition muſt at Law be ſtrictly performed, otherwiſe the Mortgagor loſes all Benefit of Redemption; but if upon a Mortgage a Tender be made of the Money, at the Place, at any Time of the Day ſpecified in the Condition, and the Mortgagee refuſes, the Condition is ſaved for ever ‡.

‡ *Vide ſupra*, n. and *poſt*, 654, 5, & 6. n.

Co. Lit. 209. And upon ſuch Refuſal the Land is diſcharged, becauſe upon the Tender the Demiſe is void; and if it be upon a Feoffment, the Condition is performed, and the Feoffor may re-enter; but the Money lent doth yet remain a Debt or Duty, becauſe it was a Debt by the original Lending of the Money, whether it had been ſo ſecured or not; and becauſe the Security fails, according to the Words of the Agreement, yet there is the ſame natural Juſtice that the Money ſhould continue: But if a Feoffment were made, on Condition of Payment of a Sum gratuitouſly, to re-enter, if it were refuſed, there is no Remedy.

The legal Tender, or Payment, muſt be made to the Parties mentioned in the Condition; becauſe, to make ſuch a Tender as will be a
*Page 637 * legal Performance, it muſt be made according to what the Parties have expreſly agreed on in the Condition ‖.

‖ *Vide ante* 636. n. and *poſt* 654. 6. n.

Dyer 180, 181.
Co. Lit. 110.

Therefore if a Man bargains and ſells Lands, with Proviſo, that if the Vendor, before ſuch a Day, pay ſo much Money to the Vendee, his Heirs or Aſſigns, that the Sale ſhall be void; the Vendee before the Day makes his Executors and dies, and the Vendor tenders the Money to the Executors, this is not good, becauſe the Word *Aſſigns* muſt be underſtood to be Aſſigns of the Land, in its primary and original Signification; and where there is

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an expreſs Proviſion to whom the Tender and Payment is to be made, the Executor is excluded; for *Expreſſum facit ceſſare Tacitum.*

But if a Man make a Feoffment in Fee, upon Condition, that the Feoffee ſhall pay 20 *l.* to the Feoffor, his Heirs or Aſſigns; here the primary Signification of the Word *Aſſigns* fails, becauſe there can be no Aſſignment of the Land of which he hath enfeoffed another; and ſince the original Senſe of the Word fails, leſt it ſhould be wholly inſignificant, the ſecondary Senſe of the Word is to be taken, *viz.* the Aſſignees in Law, which the Executors are *quoad* the perſonal Eſtate; and therefore the Payment is good either to the Executor or to the Heir. Co. Lit. 210. 5 Co. 96.

If the Condition be to pay the Money to the Feoffee, in Mortgage, his Heirs or Aſſigns, and he makes a Feoffment over; it is in the Election of the Feoffor to pay the Money to the firſt or ſecond Feoffee, becauſe by the Words he may pay it either to him or the Aſſignee. So if the firſt Feoffee dies, in this Caſe he may pay it to his Heir or the Aſſignee, for the ſame Reaſon; nor is he obliged to take Notice of the Validity of the ſecond Feoffment, to which he is a Stranger. Co. Lit. 210.

But if the Condition was, that the Feoffor ſhould pay it to the Feoffee at ſuch a Day, and the Feoffee die before the Day, it ſhall be paid to the Executor, and not to the Heir, though the Land deſcend to the Heir; for during the Suſpenſion of the Condition, which is till the whole Time is elapſed, the Land is wholly taken to be a Pledge for the Money, and the Money to be a perſonal Duty to the Feoffee, and conſequently is to be paid to ſuch Perſon as repreſents him; but then this Payment, muſt be to the Executor of the whole Sum; for a partial and fraudulent Payment, though accepted by the Executor, is really no Performance of the Condition, and therefore the Intereſt remains in the Heir at Law. Lit. ſ. 339. Co. Lit. 209. 5 Co. 96.

If the Condition were, that the Feoffor ſhould pay ſo much Money to the Feoffee, without Limitation of Time, the Feoffor hath Time during Life to pay the Money to the Feoffee during his Life; but if either die before the Time is elapſed, which is ſet by the Parties for the Performance of the Condition, the Feoffment is abſolute; but if the Payment were to be made to the Feoffee, his Heirs or Executors, then the Feoffor hath Time during Life. Lit. ſ. 337.

If a Man make a Feoffment in Fee, upon Condition, that the Feoffor, within a Year after the Death of the Feoffee, pay to his Heirs, Executors or Adminiſtrators, 100 *l.* that then the Feoffor ſhould re-enter; the Feoffee makes a Feoffment over and dies; the Feoffor paid the 100 *l.* within the Year, and the Heir paid back 30 *l.* this is a partial and fraudulent Payment, and no good Performance of the Condition to defeat the Eſtate of the Feoffee; but if the whole Money had been paid, it had been good, becauſe the Payment is to be made to the Perſons mentioned in the Condition, and not to the Aſſignee of the Land, who is not named therein. 5 Co. 96.

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* (E) Of the Equity of Redemption and Foreclo-ſure: And herein, * Page 638

1. Who may redeem, and by whom the Mortgage Money ſhall be paid.

ALTHOUGH, after Breach of the Condition, an abſolute Fee-ſimple is veſted at Common Law in the Mortgagee; yet a Right of Redemption being ſtill inherent in the Land, till the Equity of Redemption Hard. 465.

be foreclosed, the same Right shall descend to and is vested in such Persons as have a Right to the Land, in case there had been no Mortgage or Incumbrance whatsoever; and as an equitable Performance as effectually defeats the Interest of the Mortgagee, as the legal Performance doth at Common Law, the Condition still † hanging over the Estate, till the Equity is totally foreclosed; on this Foundation it hath been held, that a (*a*) Person, who comes in under a voluntary Conveyance, may redeem a Mortgage; and though such Right of Redemption be inherent in the Land, (*b*) yet the Party claiming the Benefit of it, must not only set forth such Right, but also shew that he is the Person intitled to it.

† *Vide ante* 636. n. and *post* 654-6. n.

(*a*) Vern. 193.

(*b*) Vern. 182. Chan Ca. 74. 2 Chan. Ca. 5.

As the Heir at Law is regularly intitled to the Benefit of Redemption, he is also intitled to the Assistance of the personal Estate of the Mortgagor for that Purpose; according to the Doctrine established in the Courts of Equity, that the personal Estate, in the Hands of the Executor, shall be imployed in Ease of the Heir, by whatever Means the Heir becomes indebted as Heir; for the personal Estate having received the Benefit by contracting the Debt, and the Real considered only as a Pledge for it, it is but reasonable that Satisfaction should be made out of it; according to the common Rule, *Qui sentit commodum sentire debet & onus.*

Vide Tit. *Heir and Ancestor.*

2 Salk. 449. pl. 3.

And on this Foundation it hath been frequently held, that if a Man mortgage Lands, and covenants to pay the Money, and dies, the personal Estate of the Mortgagor shall, in Favour of the Heir, be applied in Exoneration of the Mortgage.

(*c*) 2 Chan. Ca. 84.

(*d*) Vern. 36.

(*e*) Chan. Ca. 271.

Also it is held by some Opinions, that this Benefit shall not only extend to the Heir at Law, or *Hæres natus*, but also to an (*c*) *Hæres factus*, from a Presumption, that it is the Intention of the Testator, that he should have all the Privileges of the *Hæres natus*: And (*d*) some even held, that an ordinary Devisee shall have this Benefit; but as to this last Point it hath been (*e*) held otherwise; and that if a Man mortgages his Land, and then devises it to *J. S.* or to *A.* for Life, the Remainder in Fee to *B.* that there the Charge doth pass with the Estate, there appeared no Intention of the Testator, that he should have it discharged ‡.

‡ *Vide infra* 639.

2 Salk. 450. Vern. 37.

So if the Mortgagor conveys away the Equity of Redemption, the Purchaser shall not have the Benefit of the personal Estate, but must take it *cum onere.*

2 Salk. 449. Vern. 436. Preced. Chan. 61.

It has likewise been held by some Opinions, that the Heir of the Mortgagor shall have the Benefit of the personal Estate to pay off the Mortgage, though there be no Covenant in the Mortgage-Deed for the Payment thereof; because the Mortgage-Money is a Debt, whether there be any express Covenant for the Payment of it or not.

Preced. Chan. 425. 2 Vern. 701. *Powel* ver. *Price.*

But where a Mortgage in Fee was made, redeemable at *Mich.* 1702, or any other *Mich.* Day following, on six Months Notice; and there was no Covenant for Payment of the Mortgage-Money; it was held by my Lord Chancellor *Cowper*, that the Mortgagor having devised his personal Estate to his Wife and Daughter, and having during his Life paid the Interest of the Mortgage, the personal Estate should not be applied in Ease and Exonera-

*Page 639

* tion of the real Estate, for the Benefit of the Heir at Law; for, as he said, there being no Covenant for Payment of the Money, there was no Contract at all between them, neither express nor implied; nor would any Action lie against the Mortgagor to subject his Person, or compel him to pay this Money; but this was in Nature of a conditional Purchase, subject to be defeated on Payment by the Mortgagor, or his Heirs, of the Sum stipulated between them, at any *Mich.* Day, at the Election of the Mortgagor, or his Heirs; so that here was an everlasting subsisting Right of Redemption, descendible to the Heirs of the Mortgagor, which could not be forfeited at Law like other Mortgages; and therefore there could be no Equity of Redemption, or any Occasion for the Assistance of this Court;

but

but the Plaintiffs might even at Law defeat the Conveyance, by performing the Terms and Conditions of it; which were not limited to any particular Time, but might be performed on any *Michaelmas* Day, to the End of the World; and ſince here was no Covenant or Contract, either expreſs or implied, to charge the perſonal Eſtate of the Mortgagor, he thought there was no Reaſon to lay the Load of this Debt upon that which was given to other Perſons.

Alſo if the Grandfather mortgages, and covenants to pay the Mortgage-Money, and the Lands deſcend to his Son, and his Son dies, having a perſonal Eſtate and a Son; the Son's perſonal Eſtate ſhall not go in Aid of this Mortgage. 2 Salk. 450.

So if an Heir has Land deſcended to him, incumbered with a Mortgage, and he, before any Application made by him to have Aid of the perſonal Eſtate, diſpoſes of them, he cannot afterwards come upon the perſonal Eſtate; for the Equity, which an Heir has, is, that the Lands may deſcend clear to the Family. Abr. Eq. 270, *Wood* ver. *Fenwick.*

If one deviſe Lands which are in Mortgage to *A.* for Life, Remainder to *B.* in Fee; *A.* ſhall contribute one Third towards the Diſcharge of the Mortgage, and *B.* the other two Thirds. Chan. Ca. 271. Preced. Chan. 62.

But if Lands in Mortgage are deviſed to *A.* for Life, Remainder to *B.* in Fee, and *A.* takes an Aſſignment of this Mortgage in a Truſtee's Name; though *B.* might have compelled *A.* to contribute one Third towards Payment of the Mortgage, in reſpect of his Eſtate for Life; yet if *A.* be dead, and the Bill is brought againſt his Executor, he ſhall be obliged to contribute only in Proportion to the Time that *A.* his Teſtator enjoyed it. 2 Vern. 117. Vern. 404. *Clyat* ver. *Battiſon.*

A. mortgaged his Lands upon Condition, that if he or his Heirs repaid 100 *l.* at ſuch a Day, he ſhould re-enter; before the Day he dies, leaving Iſſue a Daughter, his Wife *enſeint* with a Son; the Daughter pays the Money at the Day, and then the Son is born; the Daughter ſhall keep the Lands, and the Son ſhall not recover againſt her; for the Daughter is in Nature of a Purchaſer, where ſhe hath regained the Land by her own Vigilance, which otherwiſe had lapſed at Law to the Mortgagee †. Cro. Car. 87. Co. 99.

† *Sed qu.* Now, as by Stat. Perſons intitled may redeem, *vide ante* 636. n. and the 7 Geo. 2. c. 20. *poſt* 656, 7.

If a Man enters into a Bond, in which he binds himſelf, and his Heirs, and dies, leaving a real Eſtate to deſcend to his Heir, ſubject to a Mortgage for Years, and the Heir ſells the Equity of Redemption, the Obligee cannot redeem the Mortgage, without firſt having a Judgment at Law againſt the Heir. Abr. Eq. 315. *Bateman* ver. *Bateman.*

A Dowreſs may redeem a Mortgage, paying her Proportion of the Mortgage-Money; and as to the Reſt, ſhe may hold over till ſhe is ſatisfied. Abr. Eq. 219 *Palmer* ver. *Danby.*

So if a Jointure is made of Lands which are mortgaged, the Wife may redeem, and her Executor ſhall hold over till repaid with Intereſt; becauſe ſuch Tenant for Life ought to be reimburſed the Money ſhe paid to ſet her Eſtate free, and in the Condition ſhe ought to have been in. Chan. Ca. 271. 2 Vent. 243. 2 Chan. Ca. 100, 161.

* But if a Jointreſs after Marriage join with her Huſband in a Fine, and mortgage the Land, and the Huſband dies; there her Land is charged, and ſhe ſhall pay her Part towards the Diſburthening the Land; and her Executors ſhall not hold the Lands till ſatisfied thereof, becauſe ſhe herſelf concurred in laying on the Charge, and therefore muſt join in the Diſburthening of it, according to the Value of her Intereſt.. * Page 640 Chan. Ca. 271. 2 Chan Ca. 99, 100.

If the Wife joins in a Mortgage, and levies a Fine, with an Intent to bar her Dower; and in Conſideration thereof the Huſband agrees, that ſhe ſhall have the Equity of Redemption in lieu of her Dower, and he afterwards mortgages the ſame Eſtate twice more; thuogh this Agreement be Vern. 294. *Dolin* ver. *Coltman.*

fraudulent

fraudulent againſt the ſubſequent Mortgagees, ſo far as to intitle the Wife to the whole Equity of Redemption, yet ſhe ſhall have her Dower, if ſhe ſurvives her Huſband, and ſhall not be put to her Writ of Dower, becauſe the Eſtate may be ſo conveyed away by ſome of the Mortgagees that poſſibly ſhe may not know againſt whom to bring her Writ of Dower.

Vern. 213. *Brend* ver. *Brend.* If a Man marries a Jointreſs of Houſes which are burnt down, and the Huſband and Wife borrows 1500*l.* to build on the Ground, and levy a Fine *ſur Conceſſit* for ninety-nine Years, if the Wife lives ſo long, and a Deed is made between the Conuſee and the Huſband, wherein the Huſband covenants to repay the Mortgage-Money, with Intereſt; and the Equity of Redemption is limited to the Huſband and his Heirs, and the Huſband expends 3 or 4000*l.* in Building on this Ground, and dies; the Wife ſhall redeem, and not the Heir of the Huſband; for the Wife was no Party to the Deed of Re-demiſe, by which the Redemption was limited to the Huſband; and the Wife being a Jointreſs, and having granted a Term for Years only, out of her Eſtate for Life, there reſts a Reverſion in her, which naturally attracts the Redemption.

2Vern. 480. *Acton* ver. *Pierce.* *A.* on his Marriage agreed to leave his Wife 1000*l.* if ſhe ſurvived him; the Drawing of the Agreement was left to the Parſon of the Pariſh, who made a Bond from *A.* to his intended Wife in 2000*l.* conditioned to leave her 1000*l.* if ſhe ſurvived him: The Marriage was had, and *A.* died, leaving a Freehold and Copyhold Eſtate in Mortgage, and which were mortgaged together; and it was held, that the Wife ſhould redeem as well the Freehold as Copyhold, and hold over till ſhe was ſatisfied.

2Vern. 437. *The Earl* ver. *The Counteſs of Huntington.* *A.* joins with *B.* her Huſband in making a Mortgage for Years of her Inheritance for 4500*l.* to ſupply the Huſband's Occaſions, and to pay for the Place of Captain of the Band of Penſioners; and ſubject to the Mortgage, which was for a Term of Years, the Eſtate was ſettled on *A.* for Life, Remainder to her Son in Tail; *B.* in the Mortgage Deed covenants to pay the Money, and the Proviſo was, that on Payment of the Mortgage-Money the Term was to ceaſe; the Mortgage was ſeveral Times aſſigned, and particularly in 1683, and the Wife joined in it, and there the Proviſo was, that on Payment of the Money by them, or either of them, the Mortgage-Term was to be aſſigned as they, or either of them, ſhould direct or appoint; a few Days after the Mortgage was made, *B.* by Letter thanked his Wife for having ſealed it, and added, that the Profits of the Office ſhould be religiouſly applied to pay off the Incumbrance; but afterwards when Money came in, though he paid off the Mortgage, yet he took an Aſſignment thereof in Truſt for himſelf; and by Will deviſed his perſonal Eſtate, and the Benefit of this Mortgage, to his ſecond Wife; and on a Bill by the Son of the firſt Wife, to have this Mortgage aſſigned him, it was declared by my Lord Keeper, that he could not decree for him, but upon the uſual Terms of Redemption, on Payment of Principal, Intereſt and Coſts, diſcounting Profits; but upon an Appeal to the Lords, the Son obtained a Decree to have the Mortgage aſſigned to him.

*Page 641 2Vern. 604 *Pocock* ver. *Lee.* * So where *A.* and his Wife mortgaged the Wife's Eſtate, and *A.* covenanted to pay the Money, but the Equity of Redemption was reſerved to them and their Heirs; the Huſband dying, it was decreed, that the Mortgage ſhall be diſcharged out of the Huſband's Eſtate.

2. To whom the Mortgage Money ſhall be paid.

Chan Ca. 88. *Smith* ver. *Smoult.* Mortgages, being Part of the perſonal Eſtate, belonging to the Executors or Adminiſtrators; though it was formerly held, that if a Feoffment in Fee were made upon Condition, that if the Mortgagor paid the Sum to the Mortgagee, his Heirs, Executors or Adminiſtrators, that then the Mort-

Mortgagor ſhould re-enter, and the Day paſſed without Payment, and the Mortgagee died, whereby the Lands deſcended to his Heir; in ſuch Caſe, the Heir being named in the Condition, and no Bond or Covenant given o make it appear a perſonal Matter, and no Deficiency of Aſſets to pay Creditors, that the Heir parting with the Benefit deſcended to him, ſhould have the Money on the Mortgage.

But afterwards it was truly ſettled by the Lord Chancellor *Finch*, that the Money ſhould go to the Executors or Adminiſtrators, and not to the Heir; and the Reaſon was, becauſe Equity follows the Law; and at Common Law, if Conditions or Defeazances of Mortgages are ſo penned, as no Mention is made either of their Heirs or Executors, in that Caſe, the Money ought to be paid to the Executors, becauſe the Money came out of the perſonal Eſtate, and therefore ought to return thither again; but if the Defeazance appoints the Money to be paid to the Heir or Executor disjunctively, there, as by the Common Law already mentioned, if the Mortgagor pay the Money preciſely at the Day, he may elect to pay it either to the Heir or to the Executor; but where the preciſe Day is paſt, and the Mortgage forfeited, all Election is gone in Law, for in Law there is no Redemption; and when the Caſe is reduced to an Equity of Redemption, it were perfectly againſt Equity to revive the Election of the Mortgagor; becauſe that would only tend to the Delay of the Payment of the Money as long as he pleaſed, and end in Compoſitions to pay the Money into that Hand which would uſe him beſt; and to ſay that the Election ſhould be in the Court, would be to place an arbitrary Power in it, which would tend to the Inconvenience of the Subject; ſince no Man could ſafely pay the Money in ſuch Caſes, without applying to the Court in a Suit in Equity; and therefore, ſince there ought to be a certain Rule, a better cannot be choſen, than to come as near as can be to the Rule and Reaſon of the Common Law; now the Law always gives the Money to the Executor, where no Perſon is named, and where the Election to pay either to the Heir or the Executor is gone and forfeited in Law, it is all one, as if neither Heir nor Executor were named in the Condition; and then in natural Juſtice and Equity, the principal Right of the Mortgagee is to his Money, and his Right to the Land is only as a Depoſit or Pledge for his Money; and therefore the Money ought to be paid into the proper Hand, that the Mortgagee hath appointed Receiver of his Money, and that is his Executor; and then the Heir, that is only a Truſtee to keep the Pledge, ought to deliver it back to the Mortgagor; and though the Heir has the Uſe and Benefit of the Land till redeemed, yet he has it only as a Pledge, and therefore is a Truſtee to reſtore it when the Money is paid to the proper Hand; and the Heir himſelf, though he be proper to keep the Pledge, being Land, yet he is not proper to receive the Money, it being purely Perſonal; and it is not hard, that the Heir ſhould part with the Land, without having the Money that comes in lieu of it; becauſe we are to conſider, that the Money was originally parted with from the perſonal Eſtate, and had * immediately come into the Hands of the Executor, had it not been placed out on this real Security; and therefore decreed, whether the Executor has Aſſets or not, that the Mortgage Money ſhould be paid to him; but the Mortgagee, by any Conveyance in his Life-time, or by his Laſt Will and Teſtament, may diſpoſe of it otherwiſe to whom he pleaſes.

Chan. Ca. 283. 2 Chan. Ca. 50, 51, 220. 2 Vent. 348. 351. Hard. 467. Vern. 170, 412. Preced. Chan. 11.

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If the Heir of the Mortgagee foreclоſes the Mortgagor, the Executor being no Party, upon a Bill by the Executor againſt the Heir of the Mortgagee and the Mortgagor, the Land will be decreed the Executor. 2 Vern. 66.

But if the Executor of the Mortgagee, after a Foreclоſure by the Heir, brings a Bill to have the Benefit of the Mortgage, the Heir, if he thinks fit, may take the Benefit of the Foreclоſure to himſelf, paying the Executor the Mortgage Money and Intereſt. 2 Vern. 67.

If

2 Vern. 367. *Tabor* ver. *Greaves.* If there be a Mortgage in Fee of a long ſtanding, and there are two Deſcents caſt ſince the Mortgage was made; and though the Mortgagor, by Anſwer ſays, he will not redeem, yet the Mortgage ſhall go to the Executor, and not to the Heir, the Equity of Redemption not being foreclоſed or releaſed.

Vern. 271. *Cotton* ver. *Iles.* But if a Mortgagee in Fee enters for a Forfeiture, and after ſeven Years Enjoyment abſolutely ſells the Land to *J. S.* and his Heirs, the Eſtate ſhall not be looked upon to be a Mortgage in the Hands of *J. S.* ſo as to make it Part of his perſonal Eſtate, but it ſhall be for the Benefit of his Heir.

Preced. Chan. 265. *Neys* ver. *Mordant.* *A.* being in Poſſeſſion of an Eſtate that was a Mortgage in Fee, by Will deviſes it to his Daughters *B.* and *C.* and their Heirs, and dies; *B.* marries, and dies; the Queſtion was, whether the Share of *B.* ſhould be decreed real or perſonal Eſtate, and conſequently go to her Heir, or to her Huſband as her Adminiſtrator; and it was decreed againſt the Huſband; and my Lord Keeper put this Caſe: A Man ſeiſed of Lands in Fee, which were only mortgaged to him, deviſes them to his Son and Heir, and his Heirs; ſurely theſe Lands ſhall deſcend as an Inheritance; or though the Mortgage be paid off, ſhall not the Money be conſidered as Lands, and go to the Heir and his Heirs, as the Lands would have done, and this purely by the Intention of the Teſtator; and did not the Teſtator, who had a governing Power, intend in the preſent Caſe, that the mortgaged Lands ſhould be conſidered as any other Lands of Inheritance, and be ſubject to, and be directed by, the ſame Rules that other Eſtates are?

3. Of the Precedency and Right of Redemption, where there are ſeveral Mortgages or Incumbrances; and herein of their Remedies againſt each other, as well as againſt the Mortgagor.

Abr. Eq. 320. Herein we muſt obſerve, as a ſure and eſtabliſhed Rule, that he who hath the firſt Mortgage, having the legal Eſtate, ſhall prevail before all other ſubſequent Mortgagees and Incumbrancers; but if a Man mortgages Land by a defective Conveyance, and afterwards mortgages by an Aſſurance which is good and effectual, without Notice, the ſecond ſhall prevail, becauſe that carries the legal Title; and Equity will not interpoſe, when both are equally upon valuable Conſideration; but if a Man mortgages by a defective Conveyance, and there be ſubſequent Debts that do not originally affect Lands, there the Defect of ſuch a Conveyance ſhall be ſupplied againſt a ſubſequent Incumbrancer, that acquires a legal Title afterwards; for ſince the ſubſequent Incumbrancer did not originally take the Lands for his Security, nor had in his View an Intention to affect them, when afterwards the Lands are affected, and he comes in under the very Perſon that *Page 643 * is obliged in Conſcience to make the Security good, he ſtands in his Place, and ſhall be poſtponed to ſuch defective Conveyance †.

† *Vide ante* 636. n. and *poſt* 647, 8.

This Rule and Diſtinction being grounded on the following Caſe, we ſhall here inſert it at large.

Eleanor Burgh & al' ver. *Henry Francis & al', 19 Decemb.* 1670. *Henry Francis*, Father of the Defendant *Henry*, in Conſideration of 400 *l.* Money lent, by Feoffment, 17 *July* 1665, mortgaged to the Plaintiff's Teſtator in Fee, a Piece of Ground called *Purſefield*, in the Pariſh of *Gibs* but no Livery thereon, and covenants for him and his Heirs, that he was lawfully ſeiſed in Fee of the Premiſſes, and for quiet Enjoyment, free from Incumbrances againſt him and his Heirs, and all Perſons claiming under him, with Covenant for farther Aſſurance within ſeven Years; *Henry Francis*, the Father, 1 *Mich.* 1669, borrowed of the Teſtator 77 *l.* on Bond, and

and promiſed that the mortgaged Premiſſes ſhould be Security for it; *Henry Francis*, the Father, in 1670, made his Will, and thereof made *Henry Francis*, his Son, Executor. The Teſtator, *Robert Burgh*, died, and the Plaintiff *Eleanor* proved his Will; the Defendant, *Henry Francis*, confeſſes ſeveral Judgments, on Bonds, entered into by his Father (to wit) ſeven Judgments, as Heir, and one as Executor to his Father; one of theſe ſeven Judgments was obtained by *Heyman*, a Defendant, on an Action brought the firſt or ſecond Day of *Hillary* Term 1670, for 400 *l.* and all the other Judgments were entered about the ſame Time. This Cauſe came to be heard by Sir *Heneage Finch*, Lord Keeper, aſſiſted by Judge *Wyld*, who declared, that the Court was fully ſatisfied, that the Plaintiff ought to be relieved, and that the ſaid Judgments ought not to incumber the Premiſſes, till the Mortgage Money was fully paid; wherein the Court did not ground its Judgment upon the Manner of obtaining the Judgments all in a Term, and moſt of them together, nor on the ſpecial Way, whereby the Heir charged the Lands, by pleading *Riens per Deſcent*, nor on the Priority of the *Teſte* of the *Subpœna*'s before the *Teſte* of the Original, on which the Judgments were grounded; but upon the true Nature of the Caſe the Court declared, that the Debt due by the Mortgage, did originally charge the Lands, which the Bond did not, till they were reduced to Judgments; and it ought not to be in the Heir's Power, by confeſſing Judgments, to charge the Lands in Prejudice of that Equity; and the rather becauſe of the Covenant for further Aſſurance; and though the Mortgage was defective in Law, for Want of Livery, yet Equity, which ſupplied that Defect, charged the Lands; and though the Creditors had no Notice, yet they ſhall be bound in this Caſe, becauſe they are put in no worſe Condition than they ought to be, *viz.* to be poſtponed to the Mortgage; therefore it was decreed, that the Defendant *Henry*, the Heir, ſhould convey to the Plaintiff, or her Aſſigns, in Fee, in Manner as a Maſter ſhould direct, but redeemable on the Payment of the ſaid 400 *l.* due on the former defective Mortgage, and the Premiſſes to be held quietly againſt the Plaintiffs, and all claiming under them, ſince the Date of the Mortgage; and he who has the Equity of Redemption, may, in convenient Time, bring a Bill to redeem; and in Default thereof, the now Plaintiffs may bring one to foreclose; and a perpetual Injunction was alſo awarded, to quiet the Plaintiffs and their Aſſigns in Poſſeſſion againſt all the Defendants and the aforeſaid Incumbrances, and to ſtay all Proceedings at Law, but the Plaintiffs to have no Coſts of this Suit, unleſs ſome come to redeem; then the now Plaintiffs to have all the Coſts of this, and ſuch Suits, as is uſual in the Redemption of Mortgages.

From this Caſe, which hath been a governing Caſe in the Courts of Equity, they have ſtated the Difference before-mentioned; for theſe Bond Creditors did not originally pitch upon the Land as a Pledge and Security for their Money; and when they came afterwards, and reduced their Securities into Judgments, to affect the Lands; yet ſince they affect it in the Hands of the Heir, who was ſubject to this Equity, and obliged in Con- * ſcience to ſupply the Defect in the Execution of the Deed, they can only ſtand in his Place, and therefore muſt be ſubject to the defective Security; but otherwiſe it had been, if there had been a ſubſequent Mortgage † duly executed, and without Notice of the former; becauſe the Lands being then originally pledged for the Money, and he having the legal Title, the defective Securities that could not prevail at Law, ſhould not overturn, in Equity, a Security that was equally upon valuable Conſideration; but the Bonds in the former Caſe did not originally take Hold of the Land at all; and when they were reduced to a Judgment, they only took Hold of the Land, together with other Things; and therefore Equity doth not look on them, as ſuch Charges on the Land as are to take Hold ſo immediately on it;

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† *Vide ante* 636. n. and *poſt* 647, 8.

it; that a prior defective Security is not to be relieved and ſet up againſt them; eſpecially, ſince ſuch Incumbrances did not take the Land as an original Security, but came in afterwards, under the Perſon who was obliged in Conſcience to ſupply that Defect, for the Difference between the two Caſes turns upon this, that in the Caſe of a ſecond valid Mortgage, we muſt, in all Manner of Juſtice ſuppoſe, that the Mortgagee would not have lent, if the Land had not been offered to ſecure his Money; and therefore when he hath the Title at Law, it is no Equity to overturn it, or to poſtpone him to a defective Security; but in the Caſe of the Bonds, they lent their Money upon the perſonal Security, and not on the Credit of Lands; and therefore when they come to affect the Lands, they muſt ſtand in the Place of the Perſon that had made himſelf liable, in a Court of Equity, to anſwer and make good the defective Sucurity.

2 Vern. 564. 2 Salk. 449. pl. 2. *Taylor* ver. *Wheeler.*

Thus it was alſo ruled by the Lord *Cowper*, where the Caſe was, *A.* ſurrenders his Copyhold by Way of Mortgage for Money lent, and the Surrender is not preſented at the next Court, according to the Cuſtom of the Manor; *A.* becomes a Bankrupt, and the Aſſignees, *&c.* are admitted, and bring their Ejectment, and the Surrenderee of the Copyhold brings his Bill in Equity to be relieved; and in this Caſe, the Court decreed a perpetual Injunction in Behalf of the Surrenderee; and though it was ſaid, that the Creditors of the Bankrupt were equally valuable as the Surrenderee, and having the Title at Law, they ought to be preferred; yet it was over-ruled becauſe the other Creditors of the Bankrupt did not lend on the Credit of the Land, as the Mortgagee did; and therefore when ſuch Creditors come under the Bankrupt to charge the Land, they ought to ſtand in his Place, and come under the ſame Obligation of Conſcience to make good the defective Security.

Oxwick & al' ver. *Plumer & al'*, *Paſch.* 3 *May* 1708.

The Caſe of *Oxwick* and *Plumer* turns upon the Reverſe of this Judgment, and was thus: *Richard Wiſeman*, Eſq; Son and Heir apparent of Sir *Richard Wiſeman*, intermarried with *Winefred Barrington*, intitled to a Portion of 4000 *l.* and brings his Bill againſt the Truſtees of his Wife; whereupon a Decree was had, to pay unto him the Fortune of his Wife, upon making a competent Settlement; and upon Failure thereof, the Fortune to be inveſted in Lands by the Approbation of the Maſter; but upon the Maſter's Report, that no competent Settlement could be made by *Richard* the Son, it was, by Choice of Parties, inveſted in Lands of Sir *Richard* the Father, of equal Value, Part of which Lands happened to be eight Acres of Copyhold, which in the Settlement were limited, and declared apart from the Freehold, to be to the Uſe of the Iſſue of the Marriage, in common Form, and afterwards in Fee to the Son, with a Covenant from Sir *Richard* to ſurrender the Copyhold; the Wife dies without Iſſue, and the Son mortgages both Copyhold and Freehold together, for a valuable Conſideration to *Oxwick* and others, Plaintiffs; but without any Surrender: the Son dies, and the Lands deſcend to *Eliz.* his Siſter and Heir at Law; the Mortgagees foreclose *Eliz.* by a Decree of the Court, and enter and take Poſſeſſion; to whom being in Poſſeſſion *Eliz.* releaſes, and confirms the Eſtate in Fee; Sir *Richard* the Father being* then out of Poſſeſſion of the Premiſſes from the Time of the Settlement, which was made thirteen Years paſt, ſurrenders the Copyhold Land to the Defendant *Plumer*, for a valuable Conſideration; *Plumer* is admitted, and brings his Ejectment, and the Mortgagees bring their Bills to be relieved; and the Maſter of the Rolls, on ſolemn Argument, diſmiſſed their Bill with Coſts; and held, that this Court would not ſupply the Defect of a Surrender againſt a Perſon that came in by Title, upon Surrender of the ſame Premiſſes; and this Caſe coming on to be re-heard before my Lord *Cowper*, he was of the ſame Opinion; and he took this Difference, that when there are two Perſons that have equal Equity, there thoſe that have the legal Title ſhall prevail, becauſe there is no Equity to take from ſuch Perſon the Title

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that

that he hath gained at Law; as, where *A. B.* and *C.* are three Mortgagees, and *C.* purchaſes in the Mortgage of *A.* to ſecure his own Money *bona fide* lent; Equity will never take from him the legal Intereſt he hath gained; but if the contending Parties in Equity have not equal Equity, then thoſe that have the greateſt Equity ſhall prevail againſt the legal Title; as, if a Creditor takes hold of the Land by a Feoffment in Mortgage, with Livery, Equity will ſupply the Defective Conveyance againſt a ſubſequent Judgment Creditor; becauſe the Judgment Creditor not relying on the Land for his Security, he hath not equal Equity to have that Land applied for the Payment of his Debt, as he that took it in Mortgage; but in this Caſe, where *Plumer* had equally lent Money, and taken hold of the Eſtate by a Mortgage made with a legal Surrender; ſo that the legal Intereſt was in him; the Covenant to ſurrender, though prior, cannot be ſet up againſt him who had no Notice of it; but *Oxwick* muſt purſue his Remedy at Law, for the Breach of the Covenant.

A precedent Mortgagee diſcounts his Mortgage Money by Purchaſe of Parcel of the Land, and the ſubſequent Mortgagee, having alſo a Judgment, comes to be relieved; the precedent Mortgagee pleads this Purchaſe; and without Notice it is good; for having a legal Title by the firſt Mortgage, kept on Foot precedent to the ſecond, this Court will not deſtroy it; and the Judgment on Record is no Notice, without expreſs Notice from the Party in Intereſt. Chan. Rep. 36.

If a Man makes a voluntary Deed, and mortgages the ſame Lands; this Deed, though fraudulent as to the Mortgagee, is good to paſs the Equity of Redemption, becauſe the voluntary Conveyance binds the Party and his Heirs. Chan. Rep. 59.

Tenant in Tail demiſeth the Lands for ninety nine Years, by way of Mortgage, under a Condition of Redemption; and on his Marriage ſuffers a Recovery, and in Conſideration of the Portion ſettles a Jointure; then the Huſband borrows more Money of the Mortgagee, and appoints the Term as a Security; the Recovery enures to make good the Term; and if the Mortgagee had no Notice of the Jointure, he ſhall be allowed his whole Money, for the Entail is deſtroyed by the Recovery; becauſe every Recovery places the Fee in the Recoverer; and neither the Huſband nor Wife, that comes in by Title under him, can vacate this Act precedent; ſo that the ſubſequent Recovery of Tenant in Tail makes good all precedent Incumbrances. Chan. Rep. 119, 120.

A Man makes a Mortgage, and afterwards makes a Marriage-Settlement of the Equity of Redemption, wherein he limits it on the Wife; and then on the Iſſue of his Body, with Remainder in Tail to his Brother; the Mortgagee exhibits his Bill againſt the Mortgagor, to have his Money, or that he may ſtand foreclоſed, without making the Brother a Party; and has a Decree accordingly; and afterwards the Mortgagor dies without Iſſue, and the Lands remain to the Brother by the Marriage-Settlement, who prefers his Bill to redeem; and it was diſmiſſed; for having made thoſe Parties to the Bill of Foreclоſure, that were Parties to the Mortgage, the Mortgagee did as much as was poſſible; and ſince at Law a Fine, or other Conveyance, * extinguiſhes an Equity of Redemption, which is but a *Choſe in Action*, though the modern Courſe hath allowed it to be transferred; yet it ought not to be ſo allowed, that the Mortgagee ſhould not know from whom to ſeek a Foreclоſure, in order to keep him an eternal Bailiff to the Mortgagor; therefore after Length of Time, and in Behalf of a meer Volunteer, they would not open the Account, after ſuch Decree to foreclоſe had againſt the Perſon that was Party to the Mortgage; for poſſibly the Mortgagee, ſince the Foreclоſure, had kept no Account, ſince he was not bound to do it. Chan. Rep. 217, &c. *Page 646

If a Man mortgages Lands, and then confeſſes ſeveral Judgments, and ſome of the Perſons, who have Judgments, give the Mortgagee Notice, Chan. Rep. 170.

and

and after he obtained, againſt the Mortgagor, a Decree to foreclose; ſuch Perſons, that gave Notice of their Intereſt ſhall notwithſtanding redeem; becauſe they are Creditors for a valuable Conſideration, and the Mortgagee had Notice of them, that he might have made them Parties to his Bill; but the Perſons, who gave no previous Notice of their Judgments, are totally barred of all Redemption, by the former Decree.

Chan. Rep. 123. *Brent* ver. *Engliſh.* *A.* mortgages to *B.* and *C.* obtains a Judgment in Debt againſt *A.* and then *A.* mortgages to *D.* and then *B. D.* and *A.* account together for what was due to *B.* and *D.* pays the Money, and *B.* aſſigns the Mortgage to *D. C.* ſues for his Debt, and to have an Account of what was really due to *B.* and *D.* on both Securities; *D.* pleads the Account thus made up in Bar to *C.* but it was diſallowed; becauſe their Account, being voluntary, ſhall never conclude a third Perſon, ſo that he ſhall not come into the Redemption; for it were unjuſt, that their Accounts ſhould ſhut him out of his Security, where he had no Opportunity to litigate or examine the Account.

Chan. Ca. 299. *Needler* ver. *Deeble.* But it hath been held, that if a firſt Mortgagee brings a Bill to foreclose the Mortgagor, and an Account is directed and taken between them, ſuch Account ſhall bind the ſecond Mortgagee, though he was no Party to the Bill, if there was no Fraud or Colluſion in the taking of it.

2 Chan. Rep. 57, 58. If a Man mortgages his Eſtate to two, who each of them lend ſeveral Sums upon the Eſtate, as appears by Notes under their Hands, and one of them dies, there ſhall be no Survivorſhip; for it is conſidered as a Sum of Money ſtill ſubſiſting apart, for which the Lands are only a Pledge and Security; ſo that the Money being diſtinct Sums, and the Intereſt in it being diſtinct and ſeparate, there can be no Survivorſhip between them.

Preced. Chan. 30. *Bentham* and *Haincourt.* If a Mortgagee after Notice of a ſubſequent Mortgage, joins with the Mortgagor in a Sale of the Lands to a Stranger, the Money received by either for the Purchaſe ſhall ſink ſo much of the Purchaſe Money: And in this Caſe the Mortgagor, being Son-in-Law to the Mortgagee, and he having entered, and afterwards ſuffered the Mortgagor to take the Profits for ſeveral Years, without requiring Intereſt, it was held by the Court, that the Intereſt of the firſt Mortgagee ſhould not affect the Lands, ſo as to keep out the ſecond Mortgagee longer than he would have been, had the Intereſt been duly paid.

2 Vern. 370, 554. If *A.* being about to lend Money to *B.* on a Mortgage, ſends *C.* to inquire of *D.* who had a prior Mortgage, whether he had any Incumbrance on *B.*'s Eſtate, and it is proved that *C.* went to him, and ſpoke to him accordingly, and *D.* denied having any; *D.*'s Mortgage ſhall be poſtponed.

Abr. Eq. 321, 322. *Peter* ver. *Ruſſel.* One *Goff*, being poſſeſſed of the *Thatched-Houſe* at *St. James's*, on a Building Leaſe for ſixty Years, mortgages it to Dr. *Lancaſter* and one *Habberfield*, for ſecuring 600 *l.* which the Defendant afterwards paid off, and advanced to *Goff* 600 *l.* more, and took an Aſſignment of this Mortgage, but had not the original Leaſe delivered to him till ſome Days after the Aſſignment; *Goff* afterwards, being in a declining Way, propoſed to borrow of the Plaintiff 350 *l.* on a Mortgage of a Vault and two Rooms, Part of the mortgaged Premiſſes; and on a Treaty for that Purpoſe, on *Remington*, who
*Page 647 * acted for the Plaintiff, deſired to ſee the original Leaſe; *Goff* told him, that he had it not by him, but that his Lawyer kept all his Writings for him, as not thinking it ſafe to truſt them in his own Houſe, where all Sorts of Company reſorted; upon which *Goff* goes to the Defendant, who was an Attorney in the City, tells him he was about agreeing with a Perſon for the rebuilding Part of the Premiſſes, at ſo much a Foot-ſquare, which would better his Security, and deſired him to let him have the original Leaſe, that he might ſee the Dimenſions of the Houſe; the Defendant would not truſt him with the Leaſe in his own Power, but goes along with him to the *Thatched-Houſe*; and after he had been there ſome Time, *Goff* ſends for the Plaintiff and *Remington*, told them he had now the original Leaſe, which they

they might ſee; and upon their coming to his Houſe, *Goff* goes into the Room where the Defendant was, and deſires him to let him have the Leaſe, to ſhew the Perſon he had mentioned, for that he was now in the Houſe; and accordingly the Defendant lets him have the Leaſe, which he carries to the Plaintiff and *Remington*; and they being ſatisfied therewith lend him the Money, and take a Mortgage of the Vault and two Rooms, inſiſting at the ſame Time to have the original Leaſe delivered to them; but *Goff* urging that it concerned much more than the Plaintiff had in Mortgage, and that he could not part with it, the Plaintiff permitted him to keep it; and he thereupon, in about an Hour's Time, delivered it again to the Defendant, without acquainting him with what he had done; and the Defendant ſwore expreſly in his Anſwer, that he had no Notice of this Tranſaction, or of the Plaintiff's Mortgage; afterwards the Plaintiff lent *Goff* a further Sum of Money, and he prevailed on the Defendant to let him have the original Leaſe a ſecond Time; but there was no Proof that the Defendant knew the Occaſion of it, and he, by his Anſwer, expreſly denied his having Notice of it; afterwards *Goff* failed, and thereupon the Defendant brought his Ejectment, and recovered; and this Bill was brought to have the Defendant's Mortgage poſtponed, upon Pretence, that here was a manifeſt Fraud on the Plaintiff, and that the Defendant was privy to it; and at the Rolls the Plaintiff had a Decree accordingly; but on Appeal the Decree was reverſed; but my Lord Chancellor ſaid, that if a Man makes a Mortgage, and afterwards mortgages the ſame Eſtate to another, and the firſt Mortgagee is in Combination to induce the ſecond Mortgagee to lend his Money, this Fraud will, without doubt, in Equity poſtpone his own Mortgage; ſo if ſuch Mortgagee ſtands by and ſees another lending Money on the ſame Eſtate, without giving him Notice of his firſt Mortgage, this is ſuch a Miſpriſion as ſhall forfeit his Priority; but here is no Manner of Proof that the Defendant knew any Thing of the Plaintiff's lending his Money; nay, if there had, yet the Plaintiff appears guilty of ſo much a groſſer Neglect, that he ought not to prevail; for the Defendant intruſted *Goff* with his original Leaſe but for a very little while; the Plaintiff takes his Word, that he could not part with it, and leaves it wholly in his Power to go on in defrauding whom elſe he had a Mind to; beſides, it appears the Defendant was impoſed on by *Goff*, for he parted with the Leaſe only to better his own Security, and had the moſt ſpecious Pretence that could be for it; and therefore it cannot be, without manifeſt Proof, objected to him, that he let *Goff* have the Leaſe to ſhew the Plaintiff, or with a Deſign to draw in the Plaintiff to lend his Money; and diſmiſſed the Bill with Coſts, unleſs the Plaintiff ſhould, within ſuch a Time, redeem the Defendant.

By the 4 & 5 *W.* 3. *cap.* 16. reciting, that great Frauds and Deceits are often practiſed by neceſſitous and evil diſpoſed Perſons, in borrowing of Money, and giving Judgments, Statutes and Recognizances, privately, for ſecuring the Re-payment of the ſaid Money; and the ſame Perſons do afterwards borrow Money, upon Security of their Lands, of other Perſons, and do not acquaint the later Lender thereof with the ſame; whereby ſuch late * Lender is very often in Danger to loſe his whole Money, or forced to pay off the Debts ſecured by the ſaid Judgments, Statutes and Recognizances, before they can have any Benefit of the ſaid Mortgages; and that divers Perſons do many Times mortgage their Lands more than once, without giving Notice of their firſt Mortgage; whereby Lenders of Money upon ſecond or after Mortgages do often loſe their Money, and are put to great Charges in Suit and otherwiſe; for Remedy whereof it is enacted, "That "if any Perſon ſhall borrow any Money, or for any other valuable Conſider- "ation for the Payment thereof voluntarily give, acknowledge, permit or "ſuffer to be entered againſt him, or them, one or more Judgment or Judg- "ments, Statute or Statutes, Recognizance or Recognizances, to any Perſon

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"or

" or Perſons, Creditor or Creditors; and if the ſaid Borrower or Borrowers, " Debtor or Debtors, ſhall afterwards take up or borrow any other Sum or " Sums of Money of any other Perſon or Perſons, or, for other valuable " Conſideration, become indebted to ſuch Perſon or Perſons, and for ſe- " curing the Re-payment and Diſcharge thereof, ſhall mortgage his, her " or their Lands or Tenements, or any Part thereof, to the ſaid ſecond or " other Lender or Lenders of the ſaid Money, Creditor or Creditors, or to " any other Perſon or Perſons, in Truſt for or to the Uſe of ſuch ſecond " or other Lender or Lenders, Creditor or Creditors, and ſhall not give No- " tice to the ſaid Mortgagee or Mortgagees of the ſaid Judgment or Judg- " ments, Statute or Statutes, Recognizance or Recognizances, in Writing, " under his, her or their Hand or Hands, before the Execution of the ſaid " Mortgage or Mortgages; unleſs ſuch Mortgagor or Mortgagors, his, her " or their Heirs, upon Notice to him, her or them given by the Mortgagee " or Mortgagees of the ſaid Lands and Tenements, his, her or their Heirs, " Executors, Adminiſtrators or Aſſigns, in Writing under his, her or their " Hands and Seals, atteſted by two or more ſufficient Witneſſes, of any " ſuch former Judgment or Judgments, Statute or Statutes, Recognizance " or Recognizances, ſhall, within ſix Months pay off and diſcharge the ſaid " Judgment or Judgments, Statute or Statutes, Recognizance or Recog- " nizances, and all Intereſt and Charges due thereupon, and cauſe or pro- " cure the ſame to be vacated, or diſcharged, by Record; that then the " Mortgagor or Mortgagors of the ſaid Lands and Tenements, his, her or " their Heirs, Executors, Adminiſtrators or Aſſigns, ſhall have no Bene- " fit or Remedy againſt the ſaid Mortgagee or Mortgagees, his, her, or their " Heirs, Executors, Adminiſtrators or Aſſigns, or any of them, in Equity " or elſewhere, for Redemption of the ſaid Lands and Tenements, or any " Part thereof; but the ſaid Mortgagee and Mortgagees, his, her, or their " Heirs, Executors, Adminiſtrators and Aſſigns, ſhall and may hold and " enjoy the ſaid Lands and Tenements, for ſuch Eſtate and Term therein, " as were or was granted and ſettled to the ſaid Mortgagee or Mortgagees, " againſt the ſaid Mortgagor or Mortgagors, and all Perſon and Perſons " lawfully claiming from, by or under him, her or them; freed from " Equity of Redemption, and as fully, to all Intents and Purpoſes whatſo- " ever, as if the ſame had been purchaſed abſolutely, and without any " Power or Liberty of Redemption."

And it is further enacted " That if any Perſon ſhall mortgage any Lands, " or Tenements to any Perſon or Perſons, for Security of Money lent, or " otherwiſe accrued or become due, or for other valuable Conſiderations; " and if the ſaid Mortgagor or Mortgagors ſhall again mortgage the ſame " Lands or Tenements, or any Part thereof, to any other Perſon or Per- " ſons for valuable Conſiderations, (the ſaid former Mortgage being in " Force, and not diſcharged,) and ſhall not diſcover to the ſaid ſecond or " other Mortgagee or Mortgagees, or ſome or one of them, the former " Mortgage or Mortgages, in Writing, under his or their Hands, that then, " and in theſe Caſes alſo, the ſaid Mortgagor or Mortgagors, his, her

*Page 649 " * or their Heirs, Executors, Adminiſtrators or Aſſigns, ſhall have no Re- " lief, or Equity of Redemption, againſt the ſaid ſecond or after Mortgagee " or Mortgagees, his, her or their Heirs, Executors, Adminiſtrators or " Aſſigns, upon the ſaid after Mortgage or Mortgages; but that ſuch " Mortgagee or Mortgagees, his, her or their Heirs, Executors, Admini- " ſtrators and Aſſigns, ſhall and may hold and enjoy ſuch more than once " mortgaged Lands and Tenements, for ſuch Eſtate and Term therein, as " were or was granted and conveyed by the ſaid Mortgagor or Mortgagors, " againſt him, her or them, his, her or their Heirs, Executors or Admi- " niſtrators reſpectively, freed from Equity of Redemption, and as fully, " to all Intents and Purpoſes, as if the ſame had been an abſolute Purchaſe, " and without any Power or Liberty of Redemption.

" Pro-

" Provided always, and be it further enacted by the Authority aforeſaid, " That nevertheleſs, if it ſo happen, there be more than one Mortgage at " the ſame Time made, by any Perſon or Perſons, to any Perſon or Per- " ſons of the ſame Lands and Tenements, the ſeveral late or under Mort- " gagees, his, her or their Heirs, Executors, Adminiſtrators or Aſſigns, " ſhall have Power to redeem any former Mortgage or Mortgages, upon " Payment of the Principal Debt, Intereſt and Coſts of Suit to the prior " Mortgagee or Mortgagees, his, her or their Heirs, Executors, Admini- " ſtrators or Aſſigns.

Provided always, " That nothing in this Act contained ſhall be con- " ſtrued, deemed or extended to bar any Widow of any Mortgagor of " Lands or Tenements from her Dower and Right in or to the ſaid Lands, " who did not legally join with her Huſband in ſuch Mortgage, or other- " wiſe lawfully bar or exclude herſelf from ſuch Dower or Right."

It hath been held, that if a Man mortgages certain Lands to one Man, and mortgages thoſe Lands with ſome others to another; though this ſeems to be a Caſe omitted out of the above Statute againſt clandeſtine Mortgages, yet if it appears to be a Contrivance to evade it, as if an Acre or two of Land were only added, this will not exempt it: Alſo a Perſon, who will take Advantage of the Statute, muſt be an honeſt Mortgagee; and therefore if a Man has uſed any Fraud or Practice in obtaining a ſecond Mortgage, he ſhall not have the Benefit of the Statute. 2 Vern. 589, 590.

4. How far the Purchaſing in a precedent Mortgage or Incumbrance will protect ſuch Purchaſor, and intitle him to a Precedency of Redemption.

It hath been eſtabliſhed as a Rule in the Courts of Equity, that if a Man mortgages Lands to *A.* and afterwards makes a ſubſequent Mortgage to *B.* without Notice at the Time of his making the Mortgage, and *B.* purchaſes in a precedent Mortgage, which ſtands out at Law, though nothing on it be due in Equity, or a Statute whereon Money is due, which he extends, he ſhall hold the Land till he is ſatisfied what is due upon both Securities, though he had Notice of *A.*'s Mortgage before his ſecond Purchaſe of the prior Security; becauſe, having at firſt innocently lent the Money, he may do what he can to ſecure that Money from being loſt; and when he hath purchaſed in the prior Incumbrance, it is but juſt that Equity ſhould leave it in the ſame Manner that it ſtood at Law; for there is no Room for Equity to interpoſe, to take away the Security the Law had given, where the Perſon that has the Security comes into the Title without any Corruption at all; and it were Partiality, and not Equity, to interpoſe, where the Security gives the fair Lender a good and legal Title; and it is all one whether ſuch third Lender or Purchaſer takes in a Mortgage, that is an Intereſt veſted, or a Statute, that is only a Charge; for both are real Liens, * and ſufficient to overthrow the Title of the meſne Incumbrancer; whether Money be due on the firſt Security or not, ſince that does not alter the legal Title. 2 Vent. 337. Chan. Ca. 20, 36, 149, 162, 166. Hard. 173. 2 Chan. Ca. 208. Vern. 187. 2 Vern. 157. *Page 650

A Man mortgages the Manor and Rectory of *D.* to *A.* and afterwards mortgages the Rectory to *B.* without Notice of the Mortgage to *A.* and then *B.* purchaſes in a precedent Incumbrance on both the Manor and Rectory; and the Queſtion was, when *B.* had received all the Money due on the firſt Security, whether he ſhould receive any more Profits of the Manor, or only keep the Incumbrance on Foot to protect the Rectory: This was argued before Sir *Heneage Finch* Lord Keeper, in the Preſence of *Wild* and *Twiſden*; and the two Judges held, that *B.* ſhould not receive Chan. Ca. 201. 3 Chan. Rep. 67. S. C. Sir *Ralph Bovey* ver. *Skipwith.*

the

the Profits of the Manor after the firſt Incumbrance was ſatisfied, becauſe he had taken the Rectory only for his Security of that Sum; and it would be unreaſonable to give him a Security beyond what he had in his original Intention. But the Lord Keeper over-ruled it; for that when he had purchaſed the precedent Incumbrances, which comprehended both the Manor and the Rectory, and were forfeited at Law, it was but reaſonable that the Eſtate ſhould not be taken away by the meſne Incumbrancer here in a Court of Equity, which by no Methods could be evicted at Law, unleſs ſuch Perſon that ſeeks Relief would do Equity, and pay the whole Money due on both Securities.

Chan. Ca. 166. But if *B.* the ſecond Mortgagee, had Notice of the Mortgage of *A.* at the Time of his firſt lending the Money, then he could not purchaſe in a prior Incumbrance, ſo as to crowd out *A.* becauſe he lent it on the Proſpect that *A.* was firſt to be paid, and under that immediate Expectation; and though the Eſtate would bear more Money at the Time of the Loan, yet if by prior Debts appearing, or any Accident, it is likely to fall ſhort, it ſeems he cannot crowd out *A.* of whoſe Intereſt he had Notice, ſince he took the Eſtate, with his Eyes open, under Notice of *A.*'s Intereſt; and therefore, on his original taking the Security, ran all the Hazards of that Nature; for it is Corruption in *B.* to purchaſe after ſuch Notice, with an ill Intention of deſtroying *A.*'s prior Security.

2 Chan. Ca. 20. A Man mortgages Lands (ſubject to an Annuity) to *A.* aad then mortgages the ſame Lands to *B.*: The Mortgagor and Annuitant borrow more Money of *A.* for which the Annuity is aſſigned, and the Lands farther charged; *A.* ſhall be allowed the whole Money if he had no Notice of *B.*'s Mortgage; if he had, then only what was paid to the Annuitant.

Breeton ver. *Jones*, *June* 8, 1709. *Per* Maſter of the Rolls. *A.* mortgaged his Eſtate to *B.* and then aſſigned the Equity of Redemption to *C.* afterwards *D.* obtained a Judgment againſt *A.* then *B.* the Mortgagee aſſigns to *D.* his Mortgage; and then *C.* tenders the Money due on the Mortgage to *D.* who had Notice of the Aſſignment of the Equity of Redemption, upon his purchaſing in of the Mortgage; and it was here objected, that *D.* having the legal Eſtate in him by the Aſſignment of the forfeited Mortgage, and *C.* having only an equitable Intereſt, not ſupported by the legal Eſtate, that if *C.* would have Equity, he ought to do Equity, by paying off both Monies to *C.* But it was anſwered and reſolved by the Court, that *C.* ſhould redeem, paying only the Money due on the Mortgage, and not what was due on the Judgment; becauſe the Equity of Redemption was never bound by the Judgment; for the Judgment was not confeſſed, ſo as to become a real Lien upon the Eſtate, at the Time when the Equity of Redemption was conveyed away; but it only ſubſiſted upon Bond, which was a Security *in perſonam*, not *in rem*, at the Time when this Equity was aſſigned; and therefore the Judgment could never charge nor affect it; and conſequently *C.* purchaſed an Eſtate not bound by the Judgment; and by Conſequence the Judgment Creditor, by purchaſing in the prior Mortgage, could never defeat the Intereſt of *C.* It was alſo declared, that if a Perſon who had a firſt Mortgage, without the Conſent of the Mortgagor, ſhall purchaſe in a ſubſequent Judgment, without the Conſent of the Mortgagor, that a meſne Mortgagee, or Aſſignee of

*Page 651 * the Equity of Redemption, ſhould not be obliged to pay the Money due on both Securities, in order to redeem, becauſe ſuch Tranſaction of the Mortgagee was only to load the Eſtate without the Conſent of the Owner, and had no Proſpect of bettering his own Security, as in the Caſe where a Mortgagee at a third Hand purchaſes in the firſt Incumbrance.

Stephenſon ver. *Hayward*, *Feb.* 9, 1710. *per* Lord Keeper *Harcourt*. *Beeching* made a Mortgage of his Eſtate, and became indebted to *Hayward* in 60*l.* and then conveyed to *Streater*, another Defendant, in Truſt to pay a Debt to *Streater*, and then all his other Debts in Average; then *Streater* tendered the Money to the Mortgagee, which he refuſed, and afterwards

terwards aſſigned the Mortgage to *Hayward*; and then *Hayward* obtained Judgment againſt *Beaching*, on his Bond of 60*l.* and then *Streater* ſold to the Plaintiffs, who not having paid their Purchaſe Money, preferred their Bill againſt the Mortgagees and *Hayward* to redeem. The Lord Keeper ordered, that the Plaintiffs ſhould redeem *Hayward*'s Mortgage, and deduct their Coſts out of the Mortgage Money, and that the Judgment ſhould be paid but in Proportion; for though *Hayward* had a Title at Law, and it was inſiſted, that his Judgment would affect the reſulting Equity in *Beeching*, if there was more than ſufficient to pay his Debts; and none of the Creditors of *Beeching* were made Parties to the Suit; yet the Lord Keeper thought, that the Conveyance made for the Payment of all *Beeching*'s Debts was a good Conſideration, and that being prior to the Judgment, the ſubſequent Judgment could not affect the Eſtate; and though no Creditors of *Beeching*'s were made Parties, yet they might be brought in before the Maſter. Preced. Chan. 310.

If a Man lends 600*l.* on a Mortgage, and afterwards, diſcovering that the Eſtate is pre-mortgaged to *J. S.* he gets in an old ſatisfied Incumbrance, and brings his Bill againſt *J. S.* to redeem or be foreclоſed, he need not prove the actual Payment of any Money for ſuch precedent Incumbrance, the having the Deed or Acquittance being ſufficient. 2 Vern. 279.

If a prior Mortgage or Statute be brought in, pending a Bill brought by *A.* againſt the Mortgagor, and *B.* who buys in ſuch precedent Statute or Mortgage to foreclоſe; though this Purchaſe be *pendente lite*, yet it will protect *B.* he being at Liberty to do what he can for his own Security. 2 Vern. 29. *Taylor* ver. *Leigh.*

But where *A.* made a Mortgage to *B.* and afterwards a Commiſſion of Bankruptcy was taken out againſt him, and the Commiſſioners made an Aſſignment of his Eſtate, and then *C.* lent the Bankrupt 2000*l.* on a ſecond Mortgage, having no Notice of the Bankruptcy, though he afterwards got in the firſt Mortgage; yet it was held by two Lords Commiſſioners againſt one, that this prior Mortgage ſhould not protect the Mortgage ſubſequent to the Bankruptcy; for every one is bound to take Notice of a Commiſſion of Bankruptcy. 2 Vern. 157, 160.

And though a Purchaſer or Mortgagee may buy an Incumbrance, or lay hold on any Plank to protect himſelf, yet he ſhall not protect himſelf by the Taking a Conveyance from a Truſtee, after he had Notice of the Truſt; for by taking ſuch Conveyance, he becomes the Truſtee himſelf. 2 Vern. 271.

5. Of the Equity which muſt be done by him, who would redeem, to the Perſon againſt whom a Redemption is prayed.

It is a Rule in Equity, that he, that will have Equity to help where the Law cannot, ſhall do Equity to the Party againſt whom he ſeeks to be relieved; and that therefore where there is an Eſtate ſubſiſting in Law, as there is in the Mortgagee after Forfeiture, Equity will not deſtroy it, * unleſs the Party redeeming will ſatisfy all equitable Demands out of the Eſtate. *Page 652

And on this Foundation it hath been frequently adjudged, that if a Mortgagor borrows more Money of the Mortgagee upon Bond, where the Heir is bound, and dies, the Heir of the Mortgagor ſhall not redeem without paying the Bond-Debt, as well as that ſecured by the Mortgage; becauſe when the Condition is broken, ſo that the Term or Intereſt becomes abſolute in the Mortgagee, if the Heir of the Mortgagor will have Equity, he muſt do Equity by the Payment of the whole Money due to the Mortgagee; and this is called a Rebutter; but if the Bill was exhibited by the Mortgagee to foreclоſe, there if the Heir of the Mortgagor tender Principal and Coſts, it ſufficeth, without Tender of the Money due on the Bond, 2 Chan. Ca. 164. 2 Chan. Rep. 247. Vern. 245. 2 Chan. Ca. 194.

becauſe ſuch Bond was not originally any Lien on the Land itſelf; and if that be tendered, for which the Land was originally pledged, there is no Reaſon to debar the Heir of his Right of Redemption.

Vern. 41. *Reaſon* ver. *Sacheverel.* So where a Huſband and Wife levy a Fine of the Wife's Land, to enable them to take up the Sum of 400*l.* and they make a Mortgage for it, and after the Mortgage is forfeited, the Huſband pays in Part of the Mortgage Money, but afterwards borrows again the ſame Sum of the Mortgagee; and it was decreed, that the Mortgagee having the Eſtate in Law in him, by the Forfeiture of the Mortgage, he ſhould hold the Land againſt the Heir of the Wife until the whole Money was paid; and if the Heir would not pay in the whole Principal, Intereſt and Coſts, he ſhould be foreclоſed.

2 Vern. 177. Preced. Chan. 18. S C. So if a Leſſee for Years mortgages his Term, and afterwards borrows Money of the Mortgagee on Bond, and dies, his Executor ſhall not redeem without paying the Bond as well as the Mortgage.

Preced. Chan. 2 Vern. 419, 691. *Denandry* ver. *Metcalf.* So where a Man borrowed 200*l.* on the Pawn of ſome Jewels, which were worth about 600*l.* and took a Note from the Pawnee, acknowledging the Jewels to be in his Hands for ſecuring the 200*l.* and afterwards the Pawner borrows at ſeveral Times three ſeveral other Sums of Money of the Pawnee, and gives his Note for each Sum, without taking any Manner of Notice of the Jewels, and dies; and his Executors having brought their Bill to redeem the Jewels, on Payment of the 200*l.* firſt lent thereon and Intereſt; it was held, that to intitle them to ſuch Redemption, they muſt pay all the Money due on the ſeveral Notes, on this Foundation, that he who will have Equity muſt do Equity; and that therefore ſince the Plaintiff's could not have back theſe Jewels without the Aſſiſtance of this Court, it is reaſonable and juſt he ſhould pay the Defendant all Monies due to him, it being natural to ſuppoſe, the Pawnee would not have lent him thoſe Sums, but on the Credit of the Pledge he had in his Hands before.

Chan. Ca. 97. *St. John* ver. *Halford.* If *A.* is bound in ſeveral Bonds with *B.* as his Surety for 4000*l.* and *B.* conveys the Manor of *C.* to *A.* by Way of Mortgage, to counter-ſecure him againſt the Bonds for 4000*l.* and *A.* dies, and after *D.* the Son and Heir of *A.* becomes bound with *B.* for 2000*l.* more; but there is no Agreement that the Mortgage ſhould be a Security to *D.* againſt the Bonds for 2000*l.* and after *B.* dies, his Heir ſhall not be permitted to redeem upon Payment of the 4000*l.* only, but muſt ſave *D.* harmleſs, as well touching the 2000*l.* as the 4000*l.* for he that would have Equity to help where the Law cannot, muſt do Equity to the Party againſt whom he ſeeks to be relieved.

Hard. 318. *Sir John Hedworth* and *Primate.* If *A.* acknowledge a Statute to *B.* for Payment of 800*l.* with Intereſt, which being forfeited, and the Lands extended upon it, *A.* for a valuable Conſideration ſettles the ſame Lands in Tail, and after borrows Money of *B.* and by Articles it is agreed, the Statute and Extent ſhall ſtand a Security for the laſt Money, and after *A.* dies, and the 800*l.* with In-

*Page653 * tereſt is ſatisfied by Reception of the Profits; yet the Iſſue in Tail ſhall not be relieved againſt the Penalty of the Statute; for though the Heir has an Equity, by Reaſon of the Tail made upon a Conſideration, yet the Money lent raiſes an Equity for *B.* ſo that *B.* hath both Law and Equity, whereas the Iſſue in Tail hath Equity only till the Penalty is ſatisfied.

2 Vern. 286. *Pape* ver. *Onſlow.* The Plaintiff, as Aſſignee of a Statute of Bankruptcy, brought his Bill to redeem a Mortgage of the Manor of *Newington* in *Kent*, made by the Bankrupt to the Defendant; the Defendant by Anſwer inſiſted, that he firſt lent the Bankrupt 200*l.* on a Mortgage of a particular Tenement, and afterwards lent him 300*l.* on a Mortgage of the Manor of *Newington*, which was of greater Value than the Money due, but the firſt Mortgage was deficient in Point of Value; and it was held, that if the Plaintiff will redeem one he muſt redeem both.

So

So if a Man make two ſeveral Mortgages of ſeveral Lands, and dies, and one of the Mortgages is of an entailed Eſtate, or is deficient in Value, the Heir of the Mortgagor ſhall not be admitted to redeem one without the other; neither ſhall the Mortgagor himſelf redeem the one, and leave the defective Mortgage, but he muſt take both together. Vern. 29, 245. 2 Vern. 207.

If a Man has a Debt owing to him by Mortgage, and another on Bond from the ſame Perſon, he cannot tack them together againſt the (*a*) Mortgagor, but he ſhall be let into a Redemption without Payment of both; becauſe the Land in his Hands is chargeable with the Bond even at Law; and (*b*) ſince the Statute againſt fraudulent Deviſes, † the Deviſee of the Equity of Redemption is in the ſame Caſe with the Heir, and cannot redeem without Payment of both; becauſe the Statute makes ſuch Deviſe void, as againſt Creditors, and then the Deviſee ſtands in the Place as the Heir muſt have done, if no Deviſe had been made; but before that Statute, ſuch Deviſee would not be liable to the Bond-Debt. Abr. Eq. 325. *Challis* ver. *Caſborn.* (*a*) In Vern. 244. it is held, that the Mortgagor himſelf muſt pay both Bond and Mortgage.—And in Preced. Chan. 419. it is ſaid by my Lord Chancellor, that if a Sum be ſecured by a Mortgage of Lands, the Mortgagor ſhall not be admitted to redeem after the Day of Payment is lapſed, without paying likewiſe all that is due to the Mortgagee on Notes or ſimple Contract; but that it is otherwiſe, if ſuch ſubſequent Debts had been ſecured by Bond. (*b*) But before the Statute, the Deviſee of the Equity of Redemption was not obliged to pay both. Abr. Eq. 325. Preced. Chan. 89.——† 3 & 4 *W.* & *M.* c. 14.

Alſo it hath been held, that if the Heir of the Mortgagor alien the Lands, the Purchaſor, on a Bill brought by him for a Redemption after Forfeiture, ſhall not be obliged to pay both the Mortgage-Money, and alſo a Bond-Debt due from the Mortgagor; for though the Heir muſt have paid both in ſuch a Caſe; yet the Reaſon of that is, becauſe the Heir is expreſly bound, and his Perſon is become Debtor, and not the Lands, and conſequently the Lands in the Hands of the Alienee can be charged with nothing but what is an immediate *Lien* thereon, which the Bond is not. Preced. Chan. 511. *Coleman* ver. *Wince.*

So if a Man, poſſeſſed of a Term for Years, mortgages it, and dies indebted to the Mortgagee in a Bond-Debt, if the Executor brings a Bill to redeem, he muſt pay both; becauſe the Equity of Redemption of the Term is Aſſets in his Hands; but if he alien the Equity of Redemption of his Term, though he ſhall be anſwerable for the Value, as it is ſo far a *Devaſtavit*, yet the Purchaſor ſhall be charged with no more than was immediately borrowed upon it. Preced. Chan. 512. *per Cur'.*

If a Bill is brought by an Heir at Law, or any other Perſon, againſt a Mortgagee, whereby the Party would avoid the Mortgage, under Pretence his Anceſtor was only Tenant for Life, and he ſeeks for a Diſcovery of Deeds and Writings to avoid the Title of the Mortgagee, he ſhall never have ſuch a Diſcovery, unleſs he, by his Bill, ſubmits to confirm the Title, and then he ſhall.

Father Tenant for Life, Remainder to the Son in Tail; the Father mortgages the Land, and dies; the Mortgagee, by a third Hand, procures the Son to borrow Money of him, as Tenant in Fee, on a Mortgage of the * Premiſſes; this ſhall not inure to make good the Money lent the Father; for though the Mortgagee hath got the legal Eſtate, yet it is only pledged for Money lent to the Son, and the Money lent to the Father was on another Eſtate, to which the Son is an ablolute Stranger; and therefore the Court will not compel the Son to pay the Debt of the Father, from whom he did not claim. But if the Tenant in Tail had mortgaged without Notice of the Entail, and the Mortgagee had got the Deed into his Poſſeſſion, Equity will not compel him to diſcover ſuch Deed to overthrow his own Poſſeſſion, ſince his Eſtate ariſes upon a valuable Conſideration, and the Heir in Tail claims under the Anceſtor who made the Mortgage, eſpecially if the Mortgage had worked a Diſcontinuance. 2 Chan. Ca. 23. *Bromley* ver. *Hammond.* *Page 654

Vern. 262. *Foſter* ver. *Merchant.* So where a Lunatick, before he became ſuch, made a Mortgage of a good Part of his Eſtate for 50*l* and the Committee transferred this Mortgage, and took up 3 or 400*l*. more upon it; and my Lord Chancellor declared the Mortgage ſhould ſtand a Security for the 50*l*. only.

6. At what Time the Redemption muſt be.

Chan. Ca. 20. When a Man made a Feoffment in Fee upon Condition, that if the Feoffor paid a Sum of Money at a Day he ſhould re-enter at Law; if the Money was not paid at the Day, the Eſtate was gone for ever; this made Pledging, according to the Rules of the Common Law, very inſecure, and alſo made it neceſſary for the Court of Equity to interpoſe; becauſe the Words of the Condition bound down the Conſtruction at Common Law to the Payment at the preciſe Day; yet a Truſt is ſuppoſed between the Mortgagor and Mortgagee, that in caſe the Payment was afterwards made, the Mortgagor might have up the Lands; and this the rather, becauſe the Land was eſteemed only a Pledge for Money, and that it would be a very unconſcionable Thing, that the Mortgagee ſhould take Advantage of the Non-payment at the preciſe Day, when Lands were generally pledged but for half Value; and in this the Chancellors, who were Eccleſiaſticks, were more generally confirmed from the Reaſonings of the Civil Law herein before mentioned.

Chan. Ca. 102. † *Vide poſt* 655, 6. n. Chan. Rep. 97, 184, 206. Abr. Eq. 313, 314. 2 Vern. 377. But though a Redemption has been allowed, yet no Time has been limited when the ſame may be †; but when a Man comes in at an Old Hand, it hath been ſometimes decreed, that the Poſſeſſor ſhould account no farther, than for the Profits made in his own Time, to diſcourage the ſtirring in ſuch dormant Titles; but it is the common Doctrine in the Courts of Equity, that there is no Time limited; for it is not within the Statute of Limitations, and the Courts of Equity are tender of ſettling any ſet Time; becauſe a Man can never be injured, if he receives Principal, Intereſt and Coſts; and the Proprietor is injured, if he parts with his Poſſeſſion under the true Value; but ſometimes the Court hath allowed Length of Time to be pleaded in Bar, where the mortgaged Eſtate hath deſcended, as a Fee, without Entry or Claim from the Mortgagor, and where the Poſſeſſor would be entangled in a long Account.

2 Vent. 340. *Ewre* ver. *White.* And therefore, at a Re-hearing before my Lord Keeper, aſſiſted with Juſtice *Vaughan* and *Turner*, concerning the Redemption of a Mortgage, which had been made above forty Years, my Lord Keeper declared, that he would not relieve Mortgages after twenty Years; for that the Statute of Limitations did adjudge it reaſonable to limit the Time of one's Entry to that Number of Years, unleſs there are ſome particular Circumſtances that may vary the ordinary Caſe; as Infants, Femes Covert, *&c.* who are provided for by the very Statute; though theſe Matters in Equity are to be governed by the Courſe of the Court, and that it is beſt to ſquare the Rules of Equity as near the Rules of Reaſon and Law as may be.

*Page 655 Vern. 418. *Orde* ver. *Herning.* * A Bill was exhibited to redeem a Mortgage; to which the Defendant demurred; becauſe, by the Plaintiffs own ſhewing it appeared the Mortgage was ſixty Years old; but upon Argument the Demurrer was overruled; becauſe it was charged in the Bill, that the Mortgagor agreed the Mortgagee ſhould enter and hold till he was ſatisfied, which is in the Nature of a (*a*) *Welſh* Mortgage.

(*a*) In a Conveyance by Leaſe and Releaſe there was a Proviſo, that if *A.* his Heirs or Aſſigns, ſhould on *Mich.* Day then next enſuing, or any other *Mich.* Day following, pay to *B.* his Heirs or Aſſigns, the Sum of 300*l*. (the Mortgage-Money) and all Arrears of Rent or Intereſt which ſhould be then due, then the ſaid Conveyance was to ceaſe, without any other Covenant for Payment of the Money; this was held to be a *Welſh* Mortgage

A Mort-

A Mortgage was made to *A.* in the Year 1639, to indemnify him againſt Debts for which he was ingaged for the Mortgagor; and in the Year 1649, he entered into the mortgaged Premiſſes, and had Poſſeſſion, and afterwards conveyed away ſeveral Parts of the mortgaged Premiſſes to ſeveral Perſons; and ſeveral Sales and Marriage Settlements had been made of them; in the Year 1663, a Bill was brought to redeem; but all the Aſſignees were not Parties; and a Decree to account, and a Report made, and Exceptions taken to that Report; and ſo it reſted for about eighteen Years; and then another Bill was brought; and another Decree to redeem; but no Proſecution upon it from the Year 1676 till 1697, and then the Plaintiff, having purchaſed the Equity of Redemption of thoſe Lands *(inter alia)* from the Heirs of the Mortgagor, brought his Bill to redeem. The Objections againſt it were the Length of Time, the many derivative Titles that had been made, and when no Suit was depending, and the Difficulty of taking the Account. To which it was anſwered, that there had been freſh Purſuits, and that the Difficulty of the Account had been occaſioned by the Mortgagees themſelves, and that there were Infants in the Caſe. My Lord Keeper held, there ought to be no Redemption; and that Length of Time excuſes the Mortgagee for taking the Eſtate as his own, and uſing it accordingly; and none that have come under him have done amiſs; and though there were Infants in the Caſe, yet the Time having begun on the Anceſtor, it ſhall run even upon Infants, as it is at Law in the Caſe of a Fine; and there is one great Objection to a Redemption in this Caſe, that it does not appear that the Plaintiff paid any Thing for this Equity of Redemption, only had it thrown into his Bargain. 2 Vern. 418. Abr. Eq. 314. *Saint John* ver. *Turner.*

The Plaintiff's Grandfather in the Year 1686 had made a Mortgage of the Eſtate in Queſtion, which was proved to be about nine or ten Pounds *per Annum*, for ſecuring about 100*l.* in the Year 1696 this Mortgage was aſſigned over to the Defendant; who by Agreement was then let into Poſſeſſion, and had continued ſo ever ſince, and was now about ninety Years of Age; the Mortgagor died ſeveral Years ſince, leaving the Plaintiff's Father his eldeſt Son and Heir of full Age, who likewiſe died in the Year 1714, leaving the Plaintiff his eldeſt Son and Heir, then about twelve Years of Age; who brought this Bill for an Account, and to be let into a Redemption of the Eſtate in Queſtion; but which the Defendant had been in Poſſeſſion of thirty-three Years, and ſo was greatly over-paid his Principal and Intereſt. But my Lord Chancellor diſmiſſed his Bill; and ordered it to be entered down as one of the Reaſons for diſmiſſing the Bill, that the Plaintiff had no Remedy by Ejectment at Law, to recover the Poſſeſſion, being barred by the Statute of Limitations; and he thought that a reaſonable Guide for this Court to follow, as to the Redemption in Equity; and though the Plaintiff was an Infant at his Father's Death, yet the Computation of Time began * long before, when there was no Infancy in the Caſe, and therefore will run on againſt Infants after †. Abr. Eq. 315. *Knowles* ver. *Spence.*

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† As 20 Years Poſſeſſion will bar an Entry or Ejectment, unleſs in Caſes of Infancy, Coverture, Impriſonment, or being beyond Sea (but not abſconding) ſo will it bar a Redemption, and it is a good Demurrer, *Jenner* ver. *Tracy*, P. 1731. *Belch* ver *Harvey*, M. 1736. 3 P. W. 288.—After the Diſability removed, 10 Years ſhould be the Rule in Equity, as it is in the Proviſo in the Statute of Limitations, *per Talbot C. ibid.* See farther Com. Dig. 6 V. 227, 8.

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gage, being in Nature of a conditional Purchaſe, ſubject to be defeated on Payment, by the Mortgagor, or his Heirs, of the Sum ſtipulated between them at any *Mich.* Day, at the Election of the Mortgagor, or his Heirs; and that here being an everlaſting ſubſiſting Right of Redemption, deſcendible to the Heirs of the Mortgagor, the ſame could not be forfeited at Law, like other Mortgages; and this was ſaid to be a common Practice in *Wales*, (proceeding from their Pride) being done with a Deſign to keep the Eſtate for ever in their Family. Preced. Chan. 423, 424.

7. Of the Manner of Redeeming and Foreclosing.

7 Geo. 2. c. 20. For the more eaſy Redemption and Foreclo-ſure of Mort-gages.

The Methods of Redemption and Foreclosing being dilatory, expenſive, and inconvenient, not only to the Mortgagee but alſo to the Mortgagor, the ſame ſeem now remedied by the 7 *Geo.* 2. *cap.* 20. which reciting, that whereas Mortgagees frequently bring Actions of Ejectment for the Recovery of Lands and Eſtates to them mortgaged, and bring Actions on Bonds given by Mortgagors to pay Money ſecured by ſuch Mortgages, and for performing the Covenants therein contained; and likewiſe commence Suits in his Majeſty's Courts of Equity to foreclose their Mortgagors from redeeming their Eſtates; and the Courts of Law, where ſuch Ejectments are brought, have not Power to compel ſuch Mortgagees to accept the Principal Money, and Intereſt due on ſuch Mortgages, and Coſts, or to ſtay ſuch Mortgagees from proceeding to Judgment and Execution in ſuch Actions, but ſuch Mortgagors muſt have Recourſe to a Court of Equity for that Purpoſe; in which Caſe the Courts of Equity do not give Relief until the Hearing of the Cauſe; for Remedy thereof, and to obviate all Objections relating to the ſame, it is enacted, "That from and after the firſt Day of *Eaſter* Term 1734, where "any Action ſhall be brought on any Bond for the Payment of the Money "ſecured by ſuch Mortgage, or Performance of the Covenants therein con-"tained; or where any Action of Ejectment ſhall be brought in any of his "Majeſty's Courts of Record at *Weſtminſter* or in the Court of Seſſions in "*Wales*, or in any of the Superior Courts in the Counties Palatine of *Cheſ-"ter*, *Lancaſter* or *Durham*, by any Mortgagee or Mortgagees, his, her or "their Heirs, Executors, Adminiſtrators or Aſſigns, for the Recovery of "the Poſſeſſion of any mortgaged Lands, Tenements or Hereditaments, "and no Suit ſhall be then depending in any of his Majeſty's Courts of "Equity, in that Part of *Great-Britain* called *England*, for or touching the "foreclosing or redeeming ſuch mortgaged Lands, Tenements or Hereditaments; if the Perſon or Perſons having Right to redeem ſuch mortgaged "Lands, Tenements or Hereditaments, and who ſhall appear and become "Defendant or Defendants in ſuch Action, ſhall, at any Time pending ſuch "Action, pay unto ſuch Mortgagee or Mortgagees, or in Caſe of his, her "or their Refuſal, ſhall bring into Court, where ſuch Action ſhall be depending, all the principal Money and Intereſt due on ſuch Mortgage, and "alſo all ſuch Coſts as have been expended in any Suit or Suits at Law or in "Equity, upon ſuch Mortgage, (ſuch Money for Principal, Intereſt and "Coſts, to be aſcertained and computed by the Court where ſuch Action is "or ſhall be depending, or by the proper Officer by ſuch Court to be appointed for that Purpoſe,) the Money ſo paid to ſuch Mortgagee or Mortgagees, or brought into ſuch Court, ſhall be deemed and taken to be in "full Satisfaction and Diſcharge of ſuch Mortgage; and the Court ſhall and "may diſcharge every ſuch Mortgagor or Defendant of and from the ſame "accordingly; and ſhall and may, by Rule or Rules of the ſame Court, "compel ſuch Mortgagee or Mortgagees at the Coſts and Charges of ſuch "Mortgagor or Mortgagors, to aſſign, ſurrender or re-convey ſuch mortgaged Lands, Tenements and Hereditaments, and ſuch Eſtate and Intereſt, "as ſuch Mortgagee or Mortgagees have or hath therein, and deliver up all "Deeds, Evidences and Writings in his, her or their Cuſtody, relating to "the Title of ſuch mortgaged Lands, Tenements and Hereditaments; and *Page 657 "* ſuch Mortgagor or Mortgagors who ſhall have paid or brought ſuch "Monies into the Court, his, her or their Heirs, Executors or Adminiſtrators, or to ſuch other Perſon or Perſons as he, ſhe or they ſhall for "that Purpoſe nominate or appoint."

Sect.

Sect. 2. And it is further enacted by the Authority aforeſaid, "That "from and after the ſaid *Eaſter* Term 1734. where any Bill or Bills, Suit "or Suits ſhall be filed, commenced or brought, in any of his Majeſty's "Courts of Equity in that Part of *Great Britain* called *England*, by any "Perſon or Perſons having or claiming any Eſtate, Right or Intereſt in any "Lands, Tenements or Hereditaments, under or by Virtue of any Mort-"gage or Mortgages thereof, to compel the Defendant or Defendants in "ſuch Suit or Suits, (having or claiming a Right to redeem the ſame) to "pay the Plaintiff or Plaintiffs in ſuch Suit or Suits the principal Money "and Intereſt due on any ſuch Mortgage, or the principal Money and In-"tereſt due on ſuch Mortgage, together with any Sum or Sums of Money "due on any Incumbrance or Specialty, charged or chargeable on the "Equity of Redemption thereof; and, in Default of Payment thereof, to "foreclose ſuch Defendant or Defendants of his, her or their Right or "Equity of Redeeming ſuch mortgaged Lands, Tenements or Heredita-"ments; ſuch Court and Courts of Equity, where ſuch Suit or Suits ſhall "be depending, upon Application made to ſuch Court by the Defendant "or Defendants in ſuch Suit, having a Right to redeem ſuch mortgaged "Lands, Tenements, or Hereditaments, and upon his or their admitting "the Right and Title of the Plaintiff or Plaintiffs in ſuch Suit, may and "ſhall, at any Time or Times before ſuch Suit or Cauſe ſhall be brought "to Hearing, make ſuch Order or Decree therein, as ſuch Court or Courts "might or could have made therein, in caſe ſuch Suit or Cauſe had then "been regularly brought to Hearing before ſuch Court or Courts; and all "Parties to ſuch Suit or Suits ſhall be bound by ſuch Order or Decree "ſo made, to all Intents and Purpoſes, as if ſuch Order or Decree had "been made by ſuch Court at or ſubſequent to the Hearing of ſuch Cauſe "or Suit; any Uſage to the contrary thereof in any wiſe notwithſtanding."

Sect. 3. Provided always, "That this Act, or any Thing herein con-"tained, ſhall not extend to any Caſe, where the Perſon or Perſons, againſt "whom the Redemption is or ſhall be prayed, ſhall (by Writing under "his, her or their Hands, or the Hand of his, her or their Attorney, "Agent or Solicitor, to be delivered before the Money ſhall be brought "into ſuch Court at Law, to the Attorney or Solicitor for the other Side) "inſiſt either that the Party praying a Redemption has not a Right to re-"deem, or that the Premiſſes are chargeable with other or different prin-"cipal Sums than what appear on the Face of the Mortgage, or ſhall be "admitted on the other Side; nor to any Caſe where the Right of Re-"demption to the mortgaged Lands and Premiſſes in Queſtion, in any "Cauſe or Suit, ſhall be controverted or queſtioned, by or between different "Defendants in the ſame Cauſe or Suit; nor ſhall be any Prejudice to any "ſubſequent Mortgagee or Mortgagees, or ſubſequent Incumbrancer; any "Thing in this Act to the contrary thereof in any wiſe notwithſtanding."

(F) Mortgagees and their Aſſignees how to account, and what Allowances to have.

THE Mortgagee is anſwerable in Equity, when he comes into the Poſ-ſeſſion of Lands, for the Profits that he made of the Lands, and not for the Profits which he might have made, unleſs there were Fraud; for it is the Fault and Laches of the Mortgagor, that he would let the Lands lapſe into the Hands of the Mortgagee, by the Non-payment of the Money, and

Chan. Ca. 258. Vern. 476.

Page 658 and when it doth, he is only a Bailiff for what he doth receive, but is not bound to the Trouble and Pains of making the beſt of what is another's.

Vern. 45. And therefore a Mortgagee ſhall not be bound by any Proof, that the Land was worth ſo much, unleſs it can likewiſe be proved that he did actually make ſo much of it, or might have done ſo had it not been for his wilful Default; as if he turned out a ſufficient Tenant that held it at ſo much Rent, or refuſed to accept a ſufficient Tenant that would have given ſo much for it.

3 Chan. Ca. If a Mortgagee in Poſſeſſion aſſigns over his Mortgage without Aſſent of the Mortgagor, the Mortgagee is bound to anſwer the Profits both before and after the Aſſignment, though aſſigned only for his own Debt; for he is under a Truſt to anſwer the Profits of the Pledge, and it is a Breach of Truſt to aſſign ſuch Pledge to a Perſon inſolvent; but *Quære*, if the Mortgagor hides, ſo that he cannot be ſerved with a *Subpœna* to foreclose whether the Mortgagee may not aſſign, and not be anſwerable for the Profits after Aſſignment.

Chan. Ca. 67, 258. Vern. 169. 2 Vern. 135. If the Mortgagee aſſigns his Mortgage, and the Mortgagor comes to redeem againſt the Aſſignee, all Monies really paid by the Aſſignee, either as Principal or Intereſt, ſhall be Principal to the Aſſignee, and ſhall bear Intereſt; otherwiſe it is if the Aſſignee had not paid the Money, and the Aſſignment was only colourable, in order to load the Mortgagor with compound Intereſt.

Vern. 336. If a Stranger get an Aſſignment of a Mortgage for leſs than is due, the Mortgagor, or his Heir, ſhall not redeem without paying all the Money due; but if a Man purchaſes the mortgaged Lands, without Notice of this Incumbrance, whether he has not an Equity to redeem them for what was really paid by the Stranger is made a *Quære*.

Vern. 476. But if there are ſubſequent Incumbrancers, or Creditors in the Caſe, a Man who buys in a prior Incumbrance, ſhall againſt them be allowed only what he really paid, though there was in Truth a greater Sum due.

2 Vern. 536. *Ramſden* ver. *Langley*. If an Infant, by his Guardian, endeavours to overthrow the Mortgage by a ſuppoſed Intail, and after a ſpecial Verdict, and great Agitation at Law, the Mortgagee prevails, and the Infant brings his Bill to redeem; the Mortgagee having ſworn he paid and expended above 120*l.* in defending his Mortgage at Law, although he had but 60*l.* Coſts allowed him there, ſhall not be held down to the Taxation at Law, but ſhall on the Account be allowed all he laid out or expended; and if the Mortgagee in this Caſe, fearing that his Mortgage would be defeated at Law, gets Adminiſtration, as principal Creditor, in the Spiritual Court, he ſhall be allowed the Coſts expended there alſo.

Vern. 270. The Mortgagee obtained Judgment in Ejectment, and entered on the mortgaged Premiſſes, and thereby prevented other Creditors that had ſubſequent Incumbrances from entering, and yet permitted the Mortgagor to take the Profits, and the other Incumbrancers coming to redeem him, the Court ordered the Mortgagee ſhould be charged with all the Profits he had, or might have received ſince his Entry.

Vern. 258, 267. So where a Bankrupt, before he became ſuch, having made a Mortgage of his Eſtate, and the Aſſignees of the Statute brought an Ejectment for Recovery of the Lands comprized in the Mortgage, and the Mortgagee refuſed to enter, but ſuffered the Bankrupt to take the Profits, and to fence againſt the Aſſignees with the Mortgage; and it was held, that the Mortgagee ſhould be charged with the Profits from the Time of the Ejectment delivered.

2 Vern. 401. *Amhurſt* ver. *Dawling*. *A.* mortgaged the Manor of *T.* to *B.* to which an Advowſon was appendant; *B.* brought a Bill to foreclose; the Church became void, and he likewiſe brought a *Quare Impedit* at Law; and on a Motion to ſtay the Proceedings on the *Quare Impedit*, the Court held, that though *A.* had no

Bill,

Bill, yet being ready, and offering to pay the Principal, Intereſt and Coſts; * if *B.* will not accept his Money, Intereſt ſhall ceaſe, and an Injunction to ſtay Proceedings on the *Quare Impedit* granted; for the Mortgagee can make no Benefit by preſenting to the Church, nor can account for any Value in Reſpect thereof, to ſink or leſſen his Debt; and the Mortgagee therefore, in that Caſe, is but in the Nature of a Truſtee for the Mortgagor. *Page 659

It was decreed, that a Mortgagee having received 8*l. per Cent.* ſince the Year 1660. ſhould account for the 2*l. per Cent.* over Value, to ſink the principal Mortgage Money; but if the Principal and Intereſt were over paid, the Parties muſt ſhake Hands, for there ſhall be no Refunding. Preced. Chan. 50. *Walker* ver. *Penrin*, & *vide* 2 Vern. 78, 145.

A. makes a Jointure of an Equity of Redemption, and afterwards becomes a Bankrupt, the Commiſſioners aſſign this Equity of Redemption, and the Aſſignees ſtate an Account. The Jointreſs brings her Bill to be relieved, alledging Combination between the Aſſignees and the Mortgagee, and that they had allowed more Money than was due on the Mortgage. Lord Keeper, The Aſſignees ſtand in the Place of the Huſband, and the Account ſtated by them ought to be as concluſive as if ſtated by the Huſband, and the Charge is not right in the Bill, being too general; however the Plaintiff had Leave to amend her Bill. 2 Vern. 179. *Knight* ver. *Bampfield.*

Mortgagor and Mortgagee ſettled an Account before a Maſter, and now a ſubſequent Mortgagee ſues for a new Account, ſuppoſing the former Account to be falſe, and made by Conſent, but did not inſiſt upon any Particulars; and the Lord Chancellor declared, that the Account ſhould bind the ſecond Mortgagee, if the Fraud and Colluſion were anſwered. Chan. Ca. 299. *Needler* ver. *Deeble.*

J. S. mortgaged his Eſtate to the Plaintiff, and died, leaving the Defendant his Daughter and Heir, who was an Infant, and had nothing to ſubſiſt on but the Rents of the mortgaged Eſtate; and the Intereſt being ſuffered to run in Arrear three Years and a Half, the Plaintiff grew uneaſy at it, and threatened to enter on the Eſtate, unleſs his Intereſt might be made Principal; upon which the Defendant's Mother, with the Privity of her neareſt Relations, ſtated the Account, and the Defendant herſelf, who was then near of Age, ſigned it; and the Account being admitted to be fair, it was held by my Lord Chancellor, that though regularly Intereſt ſhall not carry Intereſt, yet that in ſome Caſes, and upon ſome Circumſtances, it would be Injuſtice if Intereſt ſhould not be made Principal; and the rather in this Caſe, becauſe it was for the Infant's Benefit, who, without this Agreement, would have been deſtitute of Subſiſtence. Abr. Eq. 287. *Earl of Cheſterfield* ver. *Lady Cromwell.*

If *A.* mortgages for 450*l.* payable at the End of five Years with Intereſt, at 5*l. per Cent.* in the mean Time, and about two Months before the End of the five Years, the Mortgagee aſſigns over the Mortgage for 560*l.* being the Principal and Intereſt then due, the 560*l.* ſhall carry Intereſt, though the five Years were not elapſed, the Mortgage being forfeited by the Non-payment of Intereſt. 2 Vern. 135. *Gladman* ver. *Henchman.*

If the Mortgagor tenders the Money, and the Mortgagee refuſes, he loſes the Intereſt from the Time of the Tender; becauſe it is but a Pledge for the Money, and if the Money be tendered, he ought not to keep the Pledge; and no Man ought to pay for the Forbearance when he hath the Money ready. Chan. Ca. 29. 2 Chan. Ca. 206.

The Plaintiff had made a Mortgage in Fee of his Eſtate, which by ſeveral meſne Aſſignments was come to Sir *William Dodwell*, and there being likewiſe two ſeveral Terms for Years ſtanding out, they were aſſigned to Truſtees, in Truſt for Sir *William Dodwell* to protect the Inheritance, and ſubject to the ſame Equity of Redemption: The Plaintiff and Sir *William* ſettled an Account of what was due; and there appearing to be due thereon 4400*l.* Principal Money, the Intereſt was then paid off, and at the ſame Time Sir *William Dodwell* gave a Note, whereby he promiſed, that on Payment Abr. Eq. 318. 9. *Sir John Auſten* ver. *Executors of Sir William Dodwell.*

Payment of the Sum of 4479*l.* or thereabouts, on the 23 *October* then next, being the Intereſt computed to that Time, he would re-convey the
Page 660 * Inheritance to the Plaintiff and his Heirs, and would procure his Truſtees to aſſign the two Terms for Years, as the Plaintiff ſhould direct. In *Auguſt* following Sir *William Dodwell* died, and the Defendants were his Executors; and he likewiſe left the Defendant *Mary*, his only Child and Heir at Law, an Infant of about eight Years of Age; the Plaintiff provided the Money, and on the 23d *October* tendered a Bank-Bill of 4500*l.* to one of the Executors (there being four in all) for him to take thereout what was then due for Principal and Intereſt; but the Executors having none of them proved the Will, he refuſed to accept the Tender; upon which the Plaintiff aſked him, if he objected to the Legality of the Tender, being in a Bank-Bill and not in Money, and that if he did, he would immediately turn it into Money; to which the other anſwered, he had no Objection to the Tender, but, not having proved the Will, he would not accept of the Money. Afterwards the Plaintiff made the like Tender to another of the Executors, who likewiſe refuſed to accept of it, not having proved the Will; but he objected to the Legality of the Tender, not being in Money. Afterwards all the four Executors proved the Will; and the Bill was brought to redeem, on Payment of 4400*l.* and Intereſt, to the 23 *October*, being the Time mentioned in the Note, and that the Plaintiff might not be obliged to pay Intereſt beyond that Time, as the Executors inſiſted he ought. And it was held by my Lord Chancellor, that this Tender in a Bank-Note was not, ſtrictly ſpeaking, a legal Tender; but ſince it was proved the Plaintiff offered to turn it into Money, that made it a good Tender. 2*dly*, It was clearly agreed, that any or either of the Executors, before Probate, might have received, and given a good Diſcharge for the Money, eſpecially when, as appeared in this Caſe, they afterwards proved the Will, and ſo were Executors *ab initio*. 3*dly*, That though they were Executors only in Truſt for the Daughter, who was an Infant, yet none of them could be in a better Caſe than Sir *William Dodwell* himſelf would have been, if he had been living; and ſuch Tender, under theſe Circumſtances, would have bound him; ſo it will his Executors and Deviſee; and therefore decreed a Redemption on Payment of the 4400*l.* and Intereſt to the 23 *October*, the Time mentioned in the Note, and no longer, and no Coſts on either Side: and the Infant, Heir at Law, on Payment of the Money to the Executors, was to convey the Inheritance deſcended to her, according to the Act 7 *Ann. cap.* 19. for obliging Infant Truſtees and Mortgagees to aſſign and convey.

* Murder and Homicide.

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THE taking away the Life of another, whether it amount to Felony or not, is called by the general Name of Homicide, and is thus branched out and diſtinguiſhed by our Law.

1. Into *Murder*, which is uſually defined the wilful Killing of a Perſon through Malice prepenſe; and it is ſaid, that antiently it ſignified only the private Killing of a Man, for which, by Force of Law, introduced by King *Canutus*, for the Preſervation of his *Danes*, the Town or Hundred, where the Fact was done, was (*a*) amerced, unleſs it could be (*b*) proved, that the Perſon ſlain was an *Engliſhman*, or unleſs they could produce the Offender; and this Law was provided to avoid the ſecret Murder of the *Danes*, who were hated by the *Engliſh*, and often-times privately murdered by them. Bract. 134. Stamf. 17. Kelyng 121. & *vide Forteſcue's* Pref. to Abſolute and Limited Monarchy 59. (*a*) The Amercement was 46 Marks.

Wilk. Sax. Law 280. (*b*) This Proof was called *Engleſhire*, and was various according to the Cuſtom of ſeveral Places, but moſt ordinarily it was by the Teſtimony of two Males, of the Part of the Father of him that was ſlain, and by two Females of the Part of the Mother. Hal. Hiſt. P. C. 447.

But this Law having been aboliſhed by 14 *E.* 3. the Killing of any *Engliſhman* or Foreigner, through Malice prepenſe, whether committed openly or ſecretly, was by Degrees called Murder, and puniſhed with Death; but by the Common Law, as alſo by the Statute of 25 *E.* 3. *cap.* 4. Clergy was promiſcuouſly allowed, as well in Caſe of Murder as of Homicide or Manſlaughter, before the Statutes of 23 *H.* 8. *cap.* 1. 25 *H.* 8. *cap.* 3. 1 *E.* 6. *cap.* 12. 5 & 6 *Ed.* 3. *cap.* 10. by which Clergy is taken away from Murder *ex Malitia Præcogitata.* Hal Hiſt. P. C. 450. Hawk. P.C. 78.

2. *Manſlaughter*, by which is underſtood ſuch Killing, as happens either on a ſudden Quarrel, or in the Commiſſion of an unlawful Act, without any deliberate Intention of doing any Miſchief at all, and in which the Offender is allowed his Clergy, though it be Felony, and differs from Murder only in Degree and Quality. Hence it is, that upon an Indictment of Murder, the Party offending may be acquitted of Murder, and yet found guilty of Manſlaughter, as is every Day's Practice; and as it is done without Premeditation, it is held, that there can be no Acceſſaries to it before the Fact. 3 Inſt. 55. Dalt. c. 94. Hal. Hiſt. P. C. 450. Hawk. P.C. 76.

3. Homicide *per Infortunium* or *Chance-Medley*, is, where a Man in doing a lawful Act, without any Intent of Hurt, unfortunately chances to kill another; and though this be not Felony, yet as the King hath loſt a Subject, and in order to make Men the more careful of their Actions, the Law puniſhes the Offender with the Loſs of his Goods. Hal. Hiſt. P. C. 477. Hawk. P.C. 73.

4. Homicide *ſe defendendo* is, where one who has no other poſſible Means of preſerving his Life from one who combats with him, on a ſudden Quarrel, kills the Perſon, by whom he is reduced to ſuch an inevitable Neceſſity; and in this Caſe, as in the former, the Party forfeits his Goods, though it be not Felony. Hal. Hiſt. P. C. 478. Hawk. P.C. 73.

Juſtifiable Homicide is, 1*ſt*, Where in Defence of a Man's Houſe, he kills one who attempts to burn it, or to commit in it Murder, Robbery, or other Felony. 2*dly*, Where in Defence of a Man's Perſon, he kills one who aſſaults him in the Highway, with an Intent to murder or rob him. 3*dly*, When the Killing happens in the Advancement and due Execution Hal. Hiſt. P. C. 424. Hawk. P.C. 70.

of

Page 662 of public Juſtice; as where a Felon flies from thoſe who endeavour to apprehend him, &c. and this is ſo far from being Felony, that it cauſes no Forfeiture whatſoever †.

†On an Appeal of Murder, Acquittal, or Attainder, upon Indictment ſhall be no Bar, unleſs Clergy be had. 3 H. 7. c. 2.—No Forfeiture for killing a Man attempting to commit Murder or Robbery.—Where the Stroke or Poiſoning ſhall be in one County and the Death in another, the Indictment or Appeal ſhall be where the Death happens. 2 & 3 Ed. 6. c. 24.—The Acceſſaries may be indicted or appealed in the ſame County.—For Trial of Murderers, where either the Stroke or Death happens in *England*, *vide* 2 Geo. 2. c. 21.—The Sentence to be paſſed on Perſons convicted of Murder. 25 Geo. 2. c. 37.

But for the better underſtanding theſe ſeveral Species of Homicide, it will be neceſſary to conſider,

(A) In what Caſes a Man may be ſaid to kill another. 662.
(B) Who are ſuch Perſons, by killing of whom a Perſon may be ſaid to commit Murder. 665.
(C) What ſhall be deemed Murder. 665.

And herein,

1. Where it ſhall be ſaid to be expreſs Murder, and of Malice prepenſe. 665.
2. Where the Malice, ſhall be ſaid to be implied, or by Preſumption of Law. 667.

And herein,

1. *Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.* 667.
2. *When done on an Officer or Miniſter of Juſtice.* 668.
3. *When done by Perſons in the Execution of ſome other unlawful Act.* 670.

And herein.

(D) Of Manſlaughter; and herein of Manſlaughter exempt from Clergy by the Statute of 1 Jac. 1. c. 8. 671.
(E) Of Juſtifiable Homicide. 673.

And herein,

1. As it happens in the due Execution and Advancement of public Juſtice. 673.
2. As it happens in the Defence of a Man's Perſon, Houſe or Goods. 675.

(F) Of excuſable Homicide. 676.

And herein,

1. Of Homicide *per Infortunium*, or Chance-medley. 676.
2. Of Homicide *ſe Defendendo*. 677.

(A) In

(A) In what Cases a Man may be said to kill another.

AS there are as many Ways of Killing, as there are Modes by which one may die, *Moriendi mille Figuræ*, it is laid down in general, that not only he, who by a Wound or Blow, or by Poiſoning, Strangling, or Famiſhing, &c. directly cauſes another's Death; but alſo in many Caſes, he, who by wilfully and deliberately doing a Thing, which apparently endangers another's Life, thereby occaſions his Death, ſhall be adjudged to kill him. 3 Inſt. 48. Palm. 548. Hal. Hiſt. P. C. 431-2. Hawk b.PC. 78.

Hence in the Caſe of that unnatural Mother, who left her Child in an Orchard covered only with Leaves, in which Condition it was ſtruck by a Kite, and died thereof, it was adjudged Murder. Cromp 24. Dalt. c. 93. Hal. Hiſt. 432. Hawk. P. C. 78.

* So in the Caſe of that unnatural Son, who carried his ſick Father, againſt his Conſent, in cold frofty Weather from one Town to another, by Reaſon whereof he died. *Page 663 Cromp. 24. b.

Pult. 122. Dalt. c. 93. Hale's Hiſt. 432. Hawk. P. C. 78.

So if by Dureſs of Impriſonment a Priſoner die, it is Murder in the Gaoler; and this Dureſs is ſaid to be inflicted on every one, that by the Uſage of his Keeper is brought nearer to Death and further from Life; and therefore it is ſaid, not to be material whether it proceeds from the Neglect and Careleſneſs of the Gaoler, or from any actual Violence; and may be affected by confining the Priſoner too cloſely in a noiſome Place, loading him with Fetters, &c. Britt. c. 11. f. 38. Fitz. *Indictment* 3. Lamb. 240. Stamf. 36. 3 Inſt. 52. Palm. 548. Hale's Hiſt. 466.——And that therefore where any Perſon dies in Gaol, the Coroner ought to be ſent for to inquire of the Manner of his Death. Hale's Hiſt. 432.

So where one, by Dureſs of Impriſonment, compels a Man to accuſe an innocent Perſon, who on his Evidence is condemned and executed; this is Murder †. *Nil refert an quis mortem inferat, aut cauſam mortis præbeat.* Stamf. 36. 3 Inſt. 91. † This is Law according to the Stat. 14 E. 3. c. 10.

So in Judgment of Law, a Man may be ſaid to kill one, who in Truth is killed by another, or by himſelf; as where a Man incites a Madman to kill himſelf, or another; or where *A.* by Force takes the Arm of *B.* and the Weapon in his Hand, and therewith ſtabs *C.* whereof he dies; this is Murder in *A.* Plow. 19. a. Dalt. c. 93. Hale's Hiſt. 434.

So if a Man lays Poiſon with an Intent to kill one Man, which is accidentally taken by another, who dies thereof; this is Murder. 9 Co. 81. Plow. 474. Hale's Hiſt. 429.

So if a Woman be with Child, and a Perſon gives her a Portion to deſtroy the Child within her, and ſhe takes it, and it works ſo ſtrongly that it kills her; this is Murder.

Alſo a Perſon, who wilfully neglects to prevent a Miſchief, which he may and ought to provide againſt, is anſwerable for any ill Conſequences that may inſue his Neglect: And on this Foundation it is held by ſome Opinions, that if a Man have an Ox, Horſe, &c. which he knows to be miſchievous, by being uſed to gore or ſtrike thoſe who come near them, and he neglects to tie them up, by which they kill a Perſon, that the Owner may be indicted, as having himſelf feloniouſly killed him; which ſeems agreeable to the (*a*) *Jewiſh* Law; but herein my Lord *Hale* lays down the following Particulars, which he ſays ſeem to him to be agreeable to Law. Fitz. Coron. 311. Stamf. 17. Cromp. 24. Hawk. P. C. 79. (*a*) *Exod.* c. xxi. v. 29.

1. If

Hale's Hiſt. 430. 1. If the Owner have Notice of the Quality of his Beaſt, and it doth any Body Hurt, he is chargeable with an Action for it.

Hale's Hiſt. 430. 2. Though he have no particular Notice that he did any ſuch Thing before, yet if it be a Beaſt that is *Feræ Naturæ*, as a Lion, a Bear, a Wolf, yea an Ape or Monkey, if he get looſe and do Harm to any Perſon, the Owner is liable to an Action for the Damage; as it was adjudged in *Andrew Baker*'s Caſe, whoſe Child was bit by a Monkey that broke his Chain and got looſe.

Hale's Hiſt. 430. 3. And therefore in Caſe of ſuch a Wild Beaſt, or in Caſe of a Bull or Cow that doth Damage, where the Owner knows of it, he muſt, at his Peril, keep him up ſafe from doing Hurt; for though he uſe his Diligence to keep him up, if he eſcape and do Harm, the Owner is liable to anſwer Damages.

Hale's Hiſt. 431. 4. But as to the Point of Felony, if the Owner have Notice of the Quality of the Ox, *&c.* and uſe all due Diligence to keep him up, yet the Ox breaks looſe and kills a Man; this is no Felony in the Owner, but the Ox is a Deodand.

Hale's Hiſt. 431. 5. But if he did not uſe that due Diligence, but through Negligence the Beaſt goes abroad, after Warning or Notice of his Condition, and kills a Man, it is Manſlaughter in the Owner.

*Page 664 * 6. But if he did purpoſely let him looſe, or wander abroad, with Deſign to do Miſchief; nay, though it were with Deſign only to fright People, and make Sport, and it kill a Man, it is Murder in the Owner; and this he ſays, he had heard had been ſo ruled at the Aſſizes held at *St. Albans*; but he adds, this is only a Hearſay.

Hale's Hiſt. 429. If a Phyſician gives a Perſon a Potion, without any Intent of doing him any bodily Hurt, but with an Intent to cure or prevent a Diſeaſe, and, contrary to the Expectation of the Phyſician, it kills him, this is no Homicide; and the like of a Surgeon.

Stamf. 16. b. Pult. 22. b. Crom. 27. 43 E. 3. 33. b. Fitz. Coron. 163. Hale's Hiſt. 429. Hawk. P. C. 87. But ſome hold, that if a Perſon, not duly authorized to be a Phyſician or Surgeon, undertake a Cure, and the Patient die under his Hand, he is guilty of Felony; but this Opinion, ſays my Lord *Hale*, is erroneous; for Phyſick and Salves were before licenſed Phyſicians and Surgeons; and therefore, if they be not licenſed according to the Statutes of 3 *H.* 8. *cap.* 11. or 14 & 15 *H.* 8. *cap.* 5. they are liable to the Penalties in the Statutes, but are not guilty of Murder or Manſlaughter; and herewith agreeth *Hawkins*, who ſays, that the charitable Endeavours of thoſe Gentlemen, who ſtudy to qualify themſelves to give Advice of this Kind, in order to aſſiſt their poor Neighbours, can by no Means deſerve ſo ſevere a Conſtruction from their happening to fall into ſome Miſtakes in their Preſcriptions, from which the moſt learned and experienced cannot always be ſecure. But as it is highly raſh and preſumptuous for unſkilful Perſons to undertake Matters of this Nature, the Law cannot well be too ſevere in this Caſe, in order to deter ignorant People from endeavouring to get a Livelihood by ſuch Practice, which cannot be followed, without the manifeſt Hazard of the Lives of thoſe that have to do with them.

Hale's Hiſt. 432. If a Perſon, who is infected with the Plague, having a Plague-ſore running upon him, goes abroad to the Intent to infect another, and another is thereby infected, and dies; this it ſeems is Murder by the Common Law; but if no ſuch Intention evidently appear, though *de facto* by his Converſation another be infected, it is no Felony by the Common Law, though it be a great Miſdemeanor.

Hale's Hiſt. 429. If a Man, either by working upon the Fancy of another, or poſſibly by harſh or unkind Uſage, put another into ſuch Paſſion of Grief or Fear, that the Party either die ſuddenly, or contract ſome Diſeaſe, whereof he dies; though, as the Circumſtances of the Caſe may be, this may be Murder or Manſlaughter in the Sight of God; yet *in foro humano* it cannot come

come under the Judgment of Felony, becauſe no external Act of Violence was offered, whereof the Common Law can take Notice; and ſecret Things belong to God.

But in all theſe Caſes it is agreed, that no Perſon ſhall be adjudged, by any Act whatever, to kill another, who doth not (*a*) die thereof within a Year and a Day after; in the Computation whereof the whole Day on which the Hurt was done ſhall be reckoned the firſt. Stamf. 21. Dalt. c. 93. Hawk. P.C. 79.

(*a*) Antiently a barbarous Aſſault with an Intent to murder, ſo that the Party was left for dead, but yet recovered again, was adjudged Murder and Petit Treaſon; but that holds not now; for the Stroke without the Death of the Party ſtricken, nor the Death without the Stroke, or other Violence, makes not the Homicide or Murder. Hale's Hiſt. P. C. 425-6‡.

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‡ What Caſes of *Maiming* are Felony without Benefit of Clergy, *vide ante* 519, 20.

If a Perſon hurt by another, die thereof within a Year and a Day, it is no Excuſe for the other, that he might have recovered, if he had not neglected to take Care of himſelf. 3 Inſt. 53. Kely. 26. Keb. 17.

But if the Wound or Hurt be not mortal, but with ill Applications by the Party, or thoſe about him, of unwholeſome Salves or Medicines, the Party dies; if it can clearly appear that this Medicine, and not the Wound, was the Cauſe of his Death, it ſeems it is not Homicide; but then that muſt appear clearly and certainly to be ſo. Hale's Hiſt. P. C. 428.

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* (B) Who are ſuch Perſons, by killing of whom a Perſon may be ſaid to commit Murder.

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IT is agreed, that the malicious Killing of any Perſon, whatſoever (*a*) Nation or Religion he be of, or of whatſoever (*b*) Crime attainted, is Murder. Hawk. P. C. 80.

(*a*) If a Man kill an Alien Enemy within this Kingdom, yet it is Felony; unleſs it be in the Heat of War, and in the actual Exerciſe thereof. Hal. Hiſt. P. C. 433. (*b*) Though outlawed of Felony, or attainted in a *Præmunire*, for the Execution of the Sentence muſt be by a lawful Officer, lawfully appointed; and therefore, if a Perſon be condemned to be hanged, and the Sheriff behead him, this is Murder, and the Wife may have an Appeal. Hale's Hiſt. P. C. 433.

If a Woman be quick or great with Child, if ſhe take, or another give her, any Potion to make an Abortion, or if a Man ſtrike her, whereby the Child within her is killed; it is not Murder nor Manſlaughter by the Law of *England*, becauſe it is not *in rerum natura*; though it be a great Crime, and by the Judicial Law of *Moſes*, was puniſhable with Death; nor can it be legally known whether it were killed or not: So it is (*c*) if after ſuch Child were born alive and baptized, and after die of the Stroke given the Mother, this is not Homicide†. Hale's Hiſt. P. C. 433.

(*c*) But this *per Hawkins* is clearly Murder, notwithſtanding ſome Opinions to the contrary. Hawk. P. C. 80. † But concealing the Death of a Baſtard Child is to be puniſhed as *Murder*, by 21 Jac. 1. c. 27.

But if a Man procure a Woman with Child to deſtroy her Infant when born, and the Child is born, and the Woman, in Purſuance of that Procurement, kill the Infant; this is Murder in the Mother, and the Procurer is Acceſſory to Murder; and this, whether the Child were baptized or not. 7 Co. 9. Dyer 186. Hale's Hiſt. P. C. 433. Hawk. P. C. 80.

(C) What

(C) What ſhall be deemed Murder: And herein,

1. What ſhall be ſaid to be expreſs Murder, and of Malice prepenſe.

Hawk. P. C. 80.

HEREIN it ſeems to be agreed, that any (*a*) formed Deſign of doing Miſchief may be called Malice; and therefore, that not ſuch Killing only as proceeds from premeditated Hatred or Revenge againſt the Perſon killed, but alſo in many other Caſes, ſuch as is accompanied with thoſe Circumſtances that ſhew the Heart to be perverſly wicked, is adjudged to be of Malice prepenſe.

(*a*) My Lord *Hale* defines Malice in Fact to be a deliberate Intention of doing any bodily Harm to another, whereunto by Law he is not authorized; and the Evidences of ſuch a Malice, ſays he, muſt ariſe from external Circumſtances diſcovering that inward Intention; as Lying in wait, Menacings antecedent, former Grudges, deliberate Compaſſings, and the like, which are various, according to Variety of Circumſtances. Hale's Hiſt. P. C. 451.

Rol. Rep. 360. 2 Bulſt. 147. Cromp. 22. b.

If two Perſons in cool Blood meet and fight on a precedent Quarrel, and one of them is killed, the other is guilty of Murder; and this the Law adjudges to be of Malice, and that the Party cannot help himſelf by alledging, that he was firſt ſtruck by the Deceaſed, or that he often declined to meet him, and was prevailed upon to do it by his Importunity; or that it was his only Intent to vindicate his Reputation; or that he meant not to kill, but only to diſarm his Adverſary; for ſince he deliberately ingaged in an Act highly unlawful, in Defiance of the Laws, he muſt, at his Peril, abide the Conſequences thereof; and not only he who kills, but alſo his Seconds, are guilty of Murder; and ſome hold, (*b*) that the Seconds of the Deceaſed are alſo equally guilty.

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(*b*) By Reaſon of the Countenance they give, and it being done by Compact and Agreement; but this Conſtruction is ſaid to be too rigid; and that it would be hard to make a Man, by ſuch Reaſoning, the Murderer of his Friend, to whom he was ſo far from intending any Miſchief, that he was ready to hazard his own Life in his Quarrel. 1 Hawk. P. C. 82. Hale's Hiſt. P. C. 453.

Keil. 56. Sid. 177. Lev. 180.

A Man is eſteemed to fight in cool Blood, when he meets in the Morning on an Appointment over Night; or in the Afternoon on an Appointment in the Morning; or, as ſome ſay, if he fell into other Diſcourſe after the Quarrel, and talked calmly upon it; or if he have ſo much Conſideration as to obſerve, that it is not proper or ſafe to fight at preſent, for ſuch and ſuch Reaſons, which ſhew him to be Maſter of his Temper.

Hawk. P. C. 81.

If *A.* on a Quarrel with *B* tell him he will not ſtrike him, but that he will give *B.* a Pot of Ale to ſtrike him, and thereupon *B.* ſtrike, and *A.* kill him, he is guilty of Murder; for he ſhall not elude the Juſtice of the Law by ſuch a Pretence to cover his Malice.

Hawk. P. C. 81. Hale's Hiſt. P. C. 453.

In like Manner, if *B.* challenge *A.* and *A.* refuſe to meet him, but, in order to evade the Law, tells *B.* that he ſhall go the next Day to ſuch a Town about his Buſineſs; and accordingly *B.* meets him the next Day in the Road to the ſame Town, and aſſaults him, whereupon they fight, and *A.* kills *B.* he ſeems guilty of Murder; unleſs it appear by the whole Circumſtances that he gave *B.* ſuch Information accidentally, and not with a Deſign to give him an Opportunity of fighting.

Cromp. 22. b. Dalt. c. 93. Keil. 58, 129. Kelyng, *The Queen* ver. *Mawbridge.*

And at this Day it ſeems to be ſettled, that if a Man aſſault another with Malice prepenſe, and after be driven by him to the Wall, and kill him there in his own Defence, he is guilty of Murder, in reſpect to his firſt Intent.

And it hath been adjudged, that even upon a ſudden Quarrel, if a Man be ſo far provoked by any Words or Geſtures of another, ſo as to make a Puſh

Puſh at him with a Sword, or to ſtrike at him with any ſuch Weapon as manifeſtly endangers his Life, before the other's Sword is drawn, and thereupon a Fight enſue, and he who made ſuch Aſſault kills the other, he is guilty of Murder; becauſe that by aſſaulting the other in ſuch an outrageous Manner, without giving him an Opportunity to defend himſelf, he ſhewed that he intended not to fight with him, but to kill him; which violent Revenge is no more excuſed by ſuch a ſlight Provocation, than if there had been none at all. Hawk. P.C. 81.

But it is ſaid, that if he, who draws upon another in a ſudden Quarrel, makes no Paſs at him till his Sword is drawn, and then fight with him and kill him, he is guilty of Manſlaughter only; becauſe that by neglecting the Opportunity of Killing the other, before he was on his Guard, and in a Condition to defend himſelf, with like Hazard to both, he ſhewed that his Intent was not ſo much to kill as to combat with the other, in Compliance with thoſe common Notions of Honour, which prevailing over Reaſon, during the Time that a Man is under the Tranſports of a ſudden Paſſion, ſo far mitigate his Offence in Fighting, that it ſhall not be adjudged to be of Malice prepenſe. Keil. 55,61, 131. Hawk. P.C. 81.

And if two happen to fall out upon a ſudden, and preſently agree to fight, and each of them fetch a Weapon, and go into the Field, and there one kill the other, he is guilty of Manſlaughter only; becauſe he did it in the Heat of Blood. Hawk. P.C. 82.

And ſuch an Indulgence is ſhewn to the Frailties of Human Nature, that where two Perſons, who have formerly fought on Malice, are afterwards to all Appearance reconciled, and fight again on a freſh Quarrel, it ſhall not * be preſumed that they were moved by the old Grudge; unleſs it appear by the whole (*a*) Circumſtances of the Fact. Hawk. P. C. 82.

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(*a*) If upon Circumſtances it appears, that the Reconciliation was but pretended, or counterfeit, and that the Hurt done was upon the Score of the old Malice, then it is Murder. Hale's Hiſt. P. C. 452.

If a Man be ſo far provoked by a Breach of Promiſe, or by a Treſpaſs on his Lands or Goods, or by any Words or Geſtures whatſoever, as thereupon immediately to puſh at another with a Sword, or ſtrike him with a dangerous Weapon before his Sword is drawn, and thereupon a Fight enſue, and the Perſon aſſaulted be ſlain, the Aſſailant is guilty of Murder, though he was driven to the Wall when he gave the mortal Wound; for by aſſaulting the other in ſuch abuſive Manner, he ſhews that his Intent was not to fight with him, but to kill him; but if he had made no Paſs till the other's Sword had been drawn, or had only beaten him, in ſuch Manner as made it appear that he meant only to chaſtize him, he would have been guilty of Manſlaughter only. Hawk. P.C. 82. and ſeveral Authorities there cited.

So if a Perſon, ſeeing two others fighting together on a private Quarrel, whether ſudden or malicious, takes Part with one of them, and kills the other, it is but Manſlaughter. Hawk. P. C. 82.

So if two ſtrive for the Wall, and one happen to kill the other, or a Man happen to kill another, who, claiming a Title to his Houſe, attempts forcibly to enter it, &c. or to kill one who endeavours unlawfully to arreſt him; or to force him from his Poſſeſſion of a Room in a Public Houſe; or if a Man immediately kills one whom he finds in Bed with his Wife; or that pulls him by the Noſe; or fillips him in the Forehead, or actually ſtrikes him; in all theſe Caſes, the Party is, at moſt, only guilty of Manſlaughter †. Hawk. P.C. 82.

† But the Manner of Killing and the Inſtrument uſed, may perhaps vary the Caſe, where the Provocation was but ſmall. See the Caſes *ſupra and infra*.

So where *A.* the Son of *B.* and *C.* the Son of *D.* fall out in the Field, and fight, *A.* is beaten, and runs home to his Father all bloody, *B.* preſently takes 12 Co. 87. Cro. Jac. 296. Hale's Hiſt. P. C. 453. *Rayley's* Caſe,

takes a Staff, runs into the Fields, being three Quarters of a Mile diſtant, and ſtrikes *C.* that he dies; this is not Murder in *B.* becauſe done in a ſudden Heat and Paſſion.

Hawk.P.C. 83. If a Perſon in cool Blood, by way of Revenge, deliberately beat another in ſuch a Manner that he dies of it; or if a Man, upon a ſudden Provocation, execute his Revenge in ſuch a Manner as ſhews a cruel and deliberate Intent of doing a perſonal Hurt, he is guilty of Murder; as (*b*) where the Keeper of a Park, finding a Boy ſtealing Wood, tied him to a Horſe's Tail, and beat him, whereupon the Horſe ran away, and killed him.

(*b*) Cro. Car. 131. Jon. 198. *Holloway's* Caſe. Keil. 127. S. C. cited. 1 Hale's Hiſt. P. C. 454. S. C. cited and agreed; becauſe the Correction was exceſſive, and it was an Act of deliberate Cruelty.

2. Where the Malice ſhall be ſaid to be implied, or by Preſumption of Law: And herein,

1. *Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.*

Hale's Hiſt. P. C. 445. Herein it is laid down, that when one voluntarily kills another, without any Provocation, it is Murder; for the Law preſumes it to be malicious, and that he is *Hoſtis Humani Generis*; and therefore it is neceſſary for him, who happens to kill another, to ſhew ſuch a Provocation as will take off the Preſumption of Malice.

Hale's Hiſt. P. C. 455. He that wilfully gives Poiſon to another, whether he had provoked him or not, is guilty of wilful Murder; becauſe it is an Act of Deliberation odious in Law, and preſumes Malice.

* Page 668 Hale's Hiſt. P. C. 445. * If *A.* comes to *B.* and demands a Debt of him; or comes to ſerve him with a *Subpœna ad reſpondendum*, or *ad teſtificandum*, and *B.* thereupon kills *A.* this is Murder; for herein there is no Provocation.

Cro. Eliz. 778. *Brain's* Caſe. Hale's Hiſt. P. C. 455, cited. *Watts* came along by the Shop of *Brains*, and diſtorted his Mouth, and ſmiled at him: *Brains* kills him, it is Murder; for it was no ſuch Provocation as would abate the Preſumption of Malice in the Party killing.

Hale's Hiſt. P. C. 455, 456. If *A.* be paſſing the Street, and *B.* meeting him, there being a convenient Diſtance between *A.* and the Wall, takes the Wall of *A.* and thereupon *A.* kills him, this is Murder; but if *B.* had juſtled *A.* this Juſtling had been a Provocation, and would have made it Manſlaughter; and ſo it would be, if *A.* riding on the Road, *B.* had whipped the Horſe of *A.* out of the Track, and then *A.* had alighted, and killing *B.* it had been Manſlaughter ‡.

‡ But ſee the Caſes *ante* 666, 7.

Hawk.P.C. 82. Hale's Hiſt. P. C. 456. It ſeems agreed, that no Affront by bare Words or Geſtures, however ſlighting, or however falſe and malicious they may be, and aggravated by the moſt provoking Circumſtances, will excuſe him from being guilty of Murder, who is ſo far tranſported thereby, as immediately to attack the Perſon who offends him, in ſuch a Manner as manifeſtly endangers his Life; but if *A.* gives indecent Language to *B.* and *B.* thereupon ſtrikes *A.* but not mortally, and then *A.* ſtrikes *B.* again, and then *B.* kills *A.* this is but Manſlaughter; for the ſecond Stroke made a new Provocation; and ſo it was but a ſudden Falling-out; and though *B.* gave the firſt Stroke, and after a Blow received from *A. B.* gives him a mortal Stroke; this is but Manſlaughter, according to the Proverb, *The ſecond Blow makes the Affray.*

A. and

A. and *B.* are at ſome Difference, *A.* bids *B.* take a Pin out of the Sleeve of *A.* intending thereby to take Occaſion to ſtrike or wound *B.* which *B.* doth accordingly, and then *A.* ſtrikes *B.* whereof he died; this was ruled Murder; 1. Becauſe it was no Provocation, when he did it by the Conſent of *A.* 2. Becauſe it appeared to be a malicious and deliberate Artifice, thereby to take Occaſion to kill *B.* Hale's Hiſt. P. C. 457.

If there be chiding between Huſband and Wife, and the Huſband ſtrikes his Wife thereupon with a Peſtle, that ſhe dies preſently, it is Murder; and the Chiding will not be a Provocation to extenuate it to Manſlaughter. Hale's Hiſt. P. C. 457.

If a Perſon happen to occaſion the Death of another unadviſedly, doing an idle wanton Action, which cannot but be attended with the manifeſt Danger of ſome other, as by riding with a Horſe, known to be uſed to kick, among a Multitude of People, by which he means no more than to divert himſelf, by putting them into a Fright; he is guilty of Murder. Hawk. P. C. 86, 87.

2. *When done on an Officer or Miniſter of Juſtice.*

It hath been adjudged, and hath frequently been agreed, that if a Juſtice of Peace, Conſtable, Watchman, *&c.* be killed in the Execution of their Offices, he, by whom any ſuch Perſon is killed, is guilty of Murder; for herein the Law implies Malice; and the Indictment need not be ſpecial, but general, *Ex malitia ſua præcogitata interfecit & murdravit*; becauſe the Malice in Law maintains the Indictment. 9 Co. 68. 4 Co. 40. Cromp. 25. 3 Inſt. 52. Sav. 67. Keil. 66. Hawk. P. C. 84 Hale's Hiſt. P. C. 457.

So if (*a*) a private Perſon be killed in endeavouring to part thoſe whom he ſees fighting, the Perſon by whom he is killed is guilty of Murder; * and he cannot excuſe himſelf by alledging, that what he did was in a ſudden Affray, in the Heat of Blood, and through the Violence of Paſſion; but if ſuch Perſon do not give Notice for what Purpoſe he comes, by commanding the Parties in the King's Name to keep the Peace, or otherwiſe manifeſtly ſhewing his Intention to be not to take Part in the Quarrel, but to appeaſe it; he who kills him, is guilty of Manſlaughter only. Keil. 66. Hawk. P. C. 84. *Page 66.

(*a*) Killing the Aſſiſtant of the Conſtable is as well Murder, as the Killing of the Conſtable himſelf; ſo thoſe who come to the Conſtable's Aſſiſtance, though not ſpecially called thereunto, are under the ſame Protection, as they that are called to his Aſſiſtance by Name. Hale's Hiſt. P. C. 463.

Whoever kills a Sheriff, or any of his Officers, in the lawful Execution of a Civil Proceſs, as on arreſting a Perſon, a *Capias*, *&c.* is guilty of Murder. Hawk. P. C. 86.

Nor is it any Excuſe to ſuch Perſon, that the Proceſs was erroneous, (for it is not void by being ſo,) or that the Arreſt was in the Night, or that the Officer did not tell him for what Cauſe he arreſted him, and out of what Court, (which is not neceſſary when prevented by the Party's Reſiſtance,) or that the Officer did not ſhew his Warrant, which he is not bound to do at all, if he be a Bailiff commonly known, nor without a Demand if he be a ſpecial one. Hawk. P. C. 86.

But where the Warrant, by which he acts, gives him no Authority to arreſt the Party; as (*b*) where a Bailiff arreſts *J. S.* Baronet, who never was knighted, by Force of a Warrant to arreſt *J. S.* Knight, it is but Manſlaughter. Hawk. P. C. 86.

(*b*) So if the Name of the Bailiff, Plaintiff or Defendant

be interlined, or inſerted after the Sealing thereof, by the Bailiff himſelf, or any other; if ſuch Bailiff be killed it is but Manſlaughter. Hal. Hiſt. P. C. 457.——So if the Proceſs be executed out of the Juriſdiction of the Court, the Killing of the Officer is only Manſlaughter. 1 Hal. Hiſt. P. C. 458.——The Conſtable of the Vill of *A.* comes into the Vill of *B.* to ſuppreſs ſome Diſorder,

Hal Hiſt. P. C. 460. And as to the Point of Notice, it is herein further laid down by my Lord *Hale*, that if he be a Bailiff, Conſtable or Watchman *Jurus & Conus*, the Killing of him is Murder, though the Party does not know him to be ſuch; alſo it is not neceſſary for him to notify himſelf to be ſuch by expreſs Words; but it ſhall be preſumed that the Offender knew him.

Hal. Hiſt. P. C. 461. But if he be a private Bailiff, either the Party muſt know that he is ſo, or there muſt be ſome ſuch Notification thereof whereby the Party may know it; as by ſaying *I arreſt you*, which is of itſelf ſufficient Notice; and it is at the Peril of the Party, if he kill him after theſe Words, or Words to that Effect pronounced; for it is Murder, if *de facto* it fall out that he were a Bailiff, and had a Warrant.

Hal. Hiſt. P. C. 461. A Conſtable coming to appeaſe a ſudden Affray in the Day-time, in the Village whereof he is Conſtable, it ſeems every Man, *ex Officio*, is bound to take Notice that he is the Conſtable, becauſe he is to be choſen and ſworn in the Leet, where all Reſiants are to attend; but it is not ſo in the Night-time, unleſs there be ſome Notification that he is the Conſtable.

Hal. Hiſt. P. C. 461. But whether it be in the Day or Night, it is ſufficient Notice, if he declare himſelf to be the Conſtable, or command the Peace in the King's Name; and the like for any who come in his Aſſiſtance, or for a Watchman, *&c.* and therefore, if any of them are killed after ſuch Notification, it is Murder in them that kill him.

* Page 670 Hal Hiſt. P. C. 465. *Hugget's* Caſe, 25 *April* 1666, at *Newgate*, Kel. 59, 137. * A Preſs-Maſter ſeized *B.* for a Soldier, and with the Aſſiſtance of *C.* laid hold on him; *D.* finding Fault with the Rudeneſs of *C.* there grew a Quarrel between them, and *D.* killed *C.* By the Advice of all the Judges, except very few, it was ruled, that this was but Manſlaughter.

Hawk. P. C. 86. If a legal Warrant be executed in an unlawful Manner; as if a Bailiff be killed in breaking open a Door or Window to arreſt a Man; or perhaps if he arreſt one on a *Sunday* (*b*) ſince the Statute 29 *Car.* 2. *cap.* 7. by which all ſuch Arreſts are made unlawful, and he is killed; this is but Manſlaughter.

(*b*) This had been Murder before the Statute. Hal. Hiſt. P. C. 457.

3. *When done by Perſons in the Execution of ſome other unlawful Act.*

Kelyng 117. Dalt. c. 93. Moor 87. Plow. 101. It ſeems agreed, that wherever a Man happens to kill another in the Execution of a deliberate Purpoſe to commit any Felony, he is guilty of Murder; as where a Perſon, ſhooting at tame Fowl with an Intent to ſteal them, accidentally kills a Man; this is Murder.

3 Inſt. 52. Hal. Hiſt. P. C. 465. So if *A.* come to rob *B.* in his Houſe, or upon the Highway, or otherwiſe, without any precedent Intention of killing him; yet if in the Attempt, either without, or upon the Reſiſtance of *B.* *A.* kill *B.* this is Murder.

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der, and in the Tumult the Conſtable is killed in the Vill of *B.* this is only Manſlaughter, becauſe he had no Authority in *B.* as Conſtable. Hal. Hiſt. P. C. 459.——But it ſeems, that if the Conſtable of the Vill of *A.* had a particular Precept from a Juſtice of Peace directed to him by Name, or by the Name of the Conſtable of *A.* to ſuppreſs a Riot in the Vill of *B.* or to apprehend a Perſon in the Vill of *B.* for ſome Miſdemeanor, and within the Juriſdiction and Conuzance of the Juſtice of Peace, and, in Purſuance of that Warrant, he go to arreſt the Party in *B.* and in Execution of his Warrant is killed in *B.* this is Murder; for though, in ſuch Caſe, the Conſtable was not bound to execute the Warrant out of his Juriſdiction; neither could he do it ſingly, *Virtute Officii*, as Conſtable of *A.* yet he may do it as Bailiff or Miniſter, by virtue of the Warrant, and the Killing of him is Murder, as well as if he had been Conſtable of the Hundred wherein *A.* and *B.* lie; or Sheriff of the County; for a Juſtice of the Peace may, for a Matter within his Juriſdiction, iſſue his Warrant to a private Perſon as Servant, but then ſuch Perſon muſt ſhew his Warrant, or ſignify the Contents of it. Hal. Hiſt. P. C. 459.

So

So if Men come to ſteal Deer in a Park or Foreſt, or to rob a Warren of Conies, and the Parker, Forreſter or Warrener reſiſts, and is killed, this is Murder. Hal. Hiſt. P. C. 465.

And not only in ſuch Caſes, where the very Act of a Perſon having ſuch a felonious Intent, is the immediate Cauſe of a third Perſon's Death, but alſo, where it any Way occaſionally cauſes ſuch a Misfortune, it makes him guilty of Murder; and ſuch was the Caſe of the Huſband, who gave a poiſoned Apple to his Wife, who eat not enough to kill her, but innocently, and againſt the Huſband's Will and Perſuaſion, gave Part of it to a Child, who died thereof. Such alſo was the Caſe of the Wife, who mixed Ratſbane in a Potion ſent by an Apothecary to her Huſband, which did not kill him, but afterwards killed the Apothecary, who to vindicate his Reputation taſted it himſelf, having firſt ſtirred it about, neither is it material in this Caſe, that the Stirring of the Potion might make the Operation of the Poiſon more forcible than otherwiſe it would have been; for in as much as a murderous Intention, which of itſelf perhaps, in Strictneſs, might juſtly be puniſhed with Death, proves now, in the Event, the Cauſe of the King's loſing a Subject, it ſhall be as ſeverely puniſhed, as if it had had the intended Effect, the Miſſing whereof is not owing to any Want of Malice, but of Power. Plow. 473. 9 Co. 81. Hawk. P. C. 84.

So if *A.* by Malice forethought, ſtrikes at *B.* and miſſing him ſtrikes *C.* whereof he dies; though he never bore any Malice to *C.* yet it is Murder, and the Law transfers the Malice to the Party ſlain. Hal. Hiſt. P. C. 466.

If divers Perſons reſolve generally to reſiſt all Oppoſers in the Commiſſion of any Breach of the Peace, and to execute it in ſuch a Manner as naturally tends to raiſe Tumuls and Affrays; as by committing a violent Diſſeiſin with great Numbers of People, hunting in a Park, *&c.* and in ſo doing happen to kill a Man, they are all guilty of Murder; for they muſt, at their Peril, abide the Event of their Actions, who wilfully engage in ſuch bold Diſturbances of the Publick Peace in open Oppoſition to and Defiance of the Juſtice of the Nation. Savil. 67. Moor 86. Palm. 35. Crom. 24. Dyer 128. 5Mod. 289. Hawk. P. C. 84.

Yet where divers Rioters, having forcibly Poſſeſſion of a Houſe, afterwards killed the Perſon whom they had ejected, as he was endeavouring in the Night forcibly to regain the Poſſeſſion, and to fire the Houſe, they were adjudged guilty of Manſlaughter only, notwithſtanding they did the * Fact in Maintenance of a deliberate Injury; perhaps for this Reaſon (ſays *Hawkins*) becauſe the Perſon ſlain was ſo much in Fault himſelf. Crom. 28. Hawk. P. C. 85. * Page 671

But if in ſuch Caſe, or any other Quarrel, whether it was ſudden or premeditated, a Juſtice of Peace, Conſtable or Watchman, or even a private Perſon be ſlain, in endeavouring to keep the Peace and ſuppreſs the Affray, he who kills him is guilty of Murder; for though it was not his primary Intention to commit a Felony, yet in as much as he perſiſts in a leſs Offence with ſo much Obſtinacy, as to go on in it to the Hazard of the Lives of thoſe, who no otherwiſe offend him, but by doing their Duty in Maintenance of the Law, which therefore affords them its more immediate Protection, he ſeems to be in this Reſpect equally criminal, as if his Intention had been to commit a Felony. Hawk. P. C. 85.

If *A.* throws a Stone with an Intent to kill the Poultry or Cattle of *B.* and the Stone hit and kill a By-ſtander, it is Manſlaughter, becauſe the Act was unlawful; but not Murder, becauſe he did it not maliciouſly, or with an Intent to hurt the By-ſtander. 1 Hal. Hiſt. P. C. 475.

And though by the Statute 33 *H.* 8. *cap.* 6. no Perſon not having Lands, *&c.* of the Yearly Value of 100*l. per Ann.* may keep, or ſhoot in a Gun, upon pain of forfeiting 10*l.* yet, if a Perſon not qualified ſhoots with a Gun at a Bird or at Crows, and by Miſchance it kills a By-ſtander, by the Breaking of the Gun, or ſome other Accident that, in another Caſe, would have amounted only to Chance-medley; this will be no more than Chance-medley Hal. Hiſt. P. C. 475.

medley in him; for though the Statute prohibit him to keep or uſe a Gun, yet the ſame was but *malum Prohibitum*, and that only under a Penalty, and will not enhance the Effect beyond its Nature.

Hal. Hiſt. P. C. 475. If a Man, knowing that People are paſſing along the Street, throws a Stone, or ſhoots an Arrow over the Houſe or Wall, with an Intent to do Hurt to People, and one is thereby ſlain, this is Murder; and if it were without ſuch Intent, yet it is Manſlaughter, and not barely *per Infortunium*, becauſe the Act itſelf was unlawful; but if the Man were tiling an Houſe, and let fall a Tile knowingly, and gave Warning, and yet a Perſon is killed, this is *per Infortunium*; but if he gave not convenient Warning, it is Manſlaughter, *quia non adhibuit debitam Diligentiam* †.

†This is upon Suppoſition, that the Houſe do not ſtand near an Highway or Place of Reſort, for then, tho' he ſhould cry out firſt, it is Manſlaughter. See *Hull*'s Caſe 1664. Kel. 40.

[*Vide ante* Page 668.]

(D) Of Manſlaughter; and herein of Manſlaughter exempt from Clergy by the Statute of 1 Jac. 1. cap. 8.

Hal. Hiſt. P. C. 466. (*a*) By Manſlaughter is underſtood

MAnſlaughter, or ſimple Homicide (*a*), is the voluntary Killing of another without Malice expreſs or implied, and differs not, in Subſtance of the Fact, from Murder, but only differs in theſe enſuing Circumſtances.

ſuch Killing as happens either on a ſudden Quarrel, or in the Commiſſion of any unlawful Act, without any deliberate Intention of doing Miſchief. Hawk. P. C. 76.

Hal. Hiſt. P. C. 466. 7. 1. In the Degree of the Offence, Murder being aggravated with Malice preſumed or implied, but Manſlaughter not; and therefore in Manſlaughter there can be no Acceſſaries before. 2. In the Form of the In-
* Page 672
* dictment, the former being always *Felonice ex malitia præcogitata interfecit & Murdravit*, the latter only *Felonice interfecit*. 3. In the Point of Clergy, Murder being by the Statute of 23 *H.* 8. *cap.* 1. exempt from the Benefit of Clergy, but not Manſlaughter. 4. In the Form of the Pardon of Murder; for though at Common Law a Pardon of all Felonies had pardoned Murder, yet, by the Statute of 13 *Rich.* 2. *cap.* 1. the Pardon of Murder muſt either be by the expreſs Word of *Murder*, or elſe it muſt be a Pardon of *Felonice interfectio*, with a ſpecial *Non Obſtante* of the Statute of 13 *Rich.* 2.

But there is a particular Kind of Manſlaughter from which the Benefit of Clergy is taken away by the (*b*) 1 *Jac.* 1. *cap.* 8. "Where any Perſon ſhall ſtab or thruſt any Perſon or Perſons, that hath not then any Weapen drawn, or that hath not then firſt ſtricken the Party that ſhall ſo ſtab or thruſt, ſo as the Perſon or Perſons, ſo ſtabbed or thruſt, ſhall thereof die within the Space of ſix Months then next following; although it cannot be proved that the ſame was done of Malice forethought, the Offender is ouſted of Clergy, provided it ſhall not extend to him that kills *ſe Defendendo*, or by Misfortune, or in preſerving the Peace, or chaſtizing his Child or Servant."

(*b*) It is generally holden, that this Statute is but declarative of the Common Law. Bulſ. 87. Kelyng 55. Hawk. P. C. 77.

In

In the Conſtruction of this Statute, the following Opinions have been holden:

That wherever a Perſon, who happens to kill another, was ſtruck by him in the Quarrel before he gave the mortal Wound, he is out of the Statute, though he himſelf gave the firſt Blow. Jon. 240. 3 Lev. 266. Hawk. P.C. 77.

That he only who actually gives the Stroke, and not any of thoſe who may be ſaid to do it by Conſtruction of Law, as being preſent and aiding and abetting the Fact, are within the Statute; from whence it follows, that if it cannot be proved by whom the Stroke was given, none can be found guilty within the Statute; but the Indictment, though formed ſpecially upon the Statute, and concluding *contra formam Stat.* is yet a good Indictment of Manſlaughter againſt them that were preſent aiding and abetting; and upon ſuch a ſpecial Indictment of Manſlaughter upon the Statute, the Priſoner may be convicted of ſimple Manſlaughter, and acquitted of Manſlaughter upon the Statute, and the Indictment ſerves for a common Manſlaughter, as well as a Man upon an Indictment of Murder may be acquitted of Murder, and convicted of Manſlaughter. Allen 44. Salk. 542. pl. 2. Hawk. P.C. 77. Hal. Hiſt. P. C. 468.

That the Killing of a Man with a (*b*) Hammer, or ſuch like Inſtrument, which cannot come properly under the Words *thruſt* or *ſtab*, is not a Killing within the Statute; but it ſeems that the diſcharging a (*c*) Piſtol, or throwing a Pot, or other dangerous Weapon at the Party, is within the Equity of the Words *having a Weapon drawn*; for penal Statutes are conſtrued ſtrictly and favourably and equitably for the Subject. Jon. 432. 3 Lev. 266. Hawk. P.C. 77.

(*b*) If the ſtabbing or thruſting were with a Sword or with a Pikeſtaff, it is within the Statute; but if by a Shot of a Piſtol, Blow with a Sword or Staff, *Quere*, Hal. Hiſt. P. C. 470. (*c*) So if the Party ſlain had a Cudgel in his Hand, it is a Weapon drawn within this Statute; but this muſt be intended of ſuch a Cudgel as might probably do Hurt, not a ſmall riding Rod or Cane. Hal. Hiſt. P. C. 470.

The Indictment to ouſt the Priſoner of his Clergy, muſt de ſpecially formed purſuant to the Statute, *viz.* that he did with a Sword, *&c.* ſtab the Party dead, he having no Weapon drawn, nor having ſtruck firſt; otherwiſe it will be but a common Manſlaughter, and the Party will have his Clergy. Hal. Hiſt. P. C. 463.

The Indictment need not conclude *contra formam Statuti*, no more than in Burglary or Robbery; for the Statute doth not make the Offence to be Felony, but ouſts the Priſoner of his Clergy, where the Crime is ſo circumſtanced as the Statute expreſſeth. Styl. 86. Hal. Hiſt. P. C. 468.

But yet it doth not vitiate the Indictment, though it do conclude *& ſic interfecit contra formam Statuti*, and accordingly, for the moſt Part, to this Day the Indictments upon this Statute do conclude *contra formam ſtatuti*; ſo it is good with or without ſuch Concluſion; but it is beſt to follow the common Uſage, becauſe every Man doth not readily obſerve the Reaſon of the Omiſſion of that Concluſion. Cro. Jac. 283. Hal. Hiſt. P. C. 468. * Page 673

Alſo the Uſe hath been, in Caſes of this Nature, to prefer two Indictments againſt Offenders in this Kind, *viz.* one of Murder, another upon this Statute, and put the Priſoner to plead to both; and to charge the Jury firſt with the Indictment of Murder, and if they find it not to be Murder, then to charge them to inquire upon the other Bill; becauſe, if convict upon either, the Offender is ouſted of Clergy. Hal. Hiſt. P. C. 468.

In the Year 1657, at *Newgate*, before *Gl—*, who then ſat as Chief Juſtice, a Man was indicted upon this Statute, and a Special Verdict found, that a Bailiff, having a Warrant to arreſt a Man, preſſed early into his Chamber, with Violence, but not mentioning his Buſineſs, nor the Man knowing him to be a Bailiff, nor that he came to make an Arreſt, ſnatched down a Sword that hung in his Chamber, and ſtabbed the Bailiff, whereof he preſently died; there was ſome Diverſity of Opinion among the Judges, whether this were within the Statute; but at length the Priſoner was admitted to his Clergy; for though this Caſe was within the Words of the Hal. Hiſt. P. C. 470.

the Statute, and not within the particular Exceptions, yet it was held, that this Case was never intended in the Statute; for the Prisoner did not know but that the Party came in to rob or kill him, when he thus violently broke into his Chamber, without declaring his Business.

(E) Of justifiable Homicide: And herein,

1. As it happens in the due Execution and Advancement of public Justice.

22 Ass. 55. Bro. *Coron.* 87, 89. Stamf. 13. 3 Inst. 221. Dalt. c. 98. Cromp. 30. Fitz. *Coron.* 192, 258. Hale's Hist. P. C. 489.

SUCH Killing as happens in the due Execution and Advancement of Public Justice, is deemed justifiable Homicide; the Ministers of Justice being under the special Protection of the Law; and therefore if a Person, having actually committed a Felony, will not suffer himself to be arrested, but stand on his own (*a*) Defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private Persons or public Officers, with or without a Warrant from a Magistrate, he may be lawfully slain by them.

Hawk. P. C. 70 (*a*) But if the Prisoner makes no Resistance, but flies, and the Officer, being fearful least the Prisoner should escape, strikes him, whereof he dies; this is Murder. Hale's Hist. P. C. 481. For here was no Assault first made by the Prisoner, and so it cannot be *se defendendo* in the Officer.

Hawk. P.C. 71.

So if an innocent Person be indicted of Felony, where, in Truth, no Felony was committed, and will not suffer himself, to be arrested by the Officer who has a Warrant for that Purpose; he may lawfully be killed by him, if he cannot otherwise be taken; for there is a Charge against him on Record, to which, at his Peril, he is bound to answer.

9 Co. 68. Hal. Hist. P. C. 481.

So if a Prisoner, endeavouring to break the Gaol, assault his Gaoler, he may lawfully be killed by him in the Affray.

Hawk. P.C. 71. Poph. 121.

So if those who are engaged in a Riot, or forcible Entry, or Detainer, stand in their Defence, and continue the Force, in Opposition to the Command of a Justice of Peace, *&c.* or resist such Justice endeavouring to arrest them, the Killing of them may be justified; and so, perhaps, may the Kiling of dangerous Rioters by any private Person, who cannot otherwise sup-

* Page 674

* press them, or defend himself from them; inasmuch as every private Person seems to be authorized by the Law to arm himself for the Purposes aforesaid.

Cromp. 30. Dyer 326. Hawk. P.C. 71.

So if Trespassers in a Forest, Chase, Park, or Warren, or any inclosed Ground, wherein Deer are kept, will not render themselves to the Keepers, upon an Hue and Cry made to stand to the King's Peace, but fly from, or defend themselves against them; they may be slain, by Force of the Statute *De malefactoribus in parcis*, and 3 & 4 *W. & M. cap.* 10.

Plow. 9. b. Dalt. c. 98. 3 Inst. 221. 37 H. 6. 21. a.

If either of the Parties fighting in a Combat, allowed by Law for the Trial of some special Cases, be slain, he who kills him is justified; and the Death of the other is imputed to the just Judgment of God, who is presumed to give the Victory to him who fights in the Maintenance of Truth.

Rol. Rep. 189. 3 Inst. 56. Cromp. 24. Dalt. c. 98. Hawk. P.C. 71.

If a Sheriff, being resisted by one whom he attempts lawfully to arrest in a Civil Action, or to retake after he has arrested him, unavoidably kill him in the Affray, he may justify it; though he never gave back, but stood his Ground, and attacked the Party; but if a Person barely fly from the

the Execution of (*a*) Civil Proceſs, the Sheriff cannot juſtify killing him.

(*a*) Herein, ſays my Lord *Hale*, the Difference is between Civil Actions and Felonies; that if a Man be in Danger of Arreſt by a *Capias* in Debt or Treſpaſs, and he flies, and the Bailiff kills him, it is Murder; but if a Felon fly, and he cannot be otherwiſe taken, if he be killed, it is no Felony; and in that Caſe the Officer ſo killing forfeits nothing, but the Perſon ſo aſſaulted and killed forfeits his Goods. Hale's Hiſt. P. C. 481.

Homicide may be juſtified in the due Execution of Public Juſtice; but herein theſe Rules muſt be obſerved.

1. That the Judgment, by Virtue whereof the Party was put to Death, be given by one who had Juriſdiction in the Cauſe; for otherwiſe both Judge and Officer may be guilty of Felony; as if the Court of Common Pleas give Judgment on an Appeal of Death; or Juſtices of Peace on an Indictment of High Treaſon, and award Execution, which is executed; but if Juſtices of Peace condemn a Man to Death on an Indictment of Treſpaſs, and he be executed, they only, and not the Officers, are guilty of Felony; becauſe they had a Juriſdiction over the Offence, and therefore their Proceedings are erroneous only, and not void. 10 Co. 76. Dalt. c. 98. 22 E. 4. 33. a. Hawk. P. C. 70.

A Man hath the Liberty of *Infangthief*, the Steward of the Court gives Judgment of Death againſt a Priſoner againſt Law; this was a Cauſe of Seizure of the Liberty, but was not Murder in the Judge, *quia factum judicialiter licet ignorantur*. 2 *R.* 3. 10. *a.* The Caſe of the Steward of the Liberty of the Abbot of *Crowland*. Hal. Hiſt. P. C. 454.

The Judgment muſt be executed by the lawful Officer; for thoſe ancient Opinions, that any one may kill a Perſon attainted of Felony, and that a Man condemned in an Appeal of Death is to be executed by the Relations of the deceaſed, are now obſolete; and at this Day, even the Judge who condemns a Man, cannot execute his own Sentence; neither can the proper Officer do it, but by a lawful Command, without being guilty of Felony. Hawk. P. C. 70. Hal. Hiſt. P. C. 455.

The Execution muſt purſue the Judgment; therefore if the Sheriff behead a Man, where Beheading is no Part of the Sentence, it is the general Opinion, that he is guilty of Felony. Hawk. P. C. 70. Hal. Hiſt. P. C. 433. S. P. Becauſe an Act of deliberate Cruelty.

* 2. As it happens in the Defence of a Man's Perſon, Houſe, or Goods. *Page 675

It is clear, that the Killing of a Perſon in the Defence of a Man's Perſon, Houſe, or Goods, is juſtifiable in the following Inſtances; as, where a Man kills one who aſſaults him † in the Highway to rob or murder him; or the Owner of a Houſe, or any of his Servants, or Lodgers, *&c.* kills one who attempts to burn it, or to commit in it Murder, Robbery, or other Felony; or a Woman kills one who attempts to raviſh her; or a (*a*) Servant coming ſuddenly and finding his Maſter robbed and ſlain, falls upon the Murderer immediately, and kills him; for he does it in the Height of his Surpriſe. and under juſt Apprehenſions of the like Attempt upon himſelf; but in other Circumſtances he could not have juſtified the Killing of ſuch an one, but ought to have apprehended him. Hawk. P. C. 71. and ſeveral Authorities there cited. Hal. Hiſt. P. C. 484.

(*a*) So of a Huſband in Defence of his Wife, a Child of his Parent, & *e converſo*, for the Act of the Aſſiſtant ſhall have the ſame Conſtruction, in ſuch Caſes, as the Act of the Party aſſiſted ſhould have had, if it had been done by himſelf. Hal. Hiſt. P. C. 484.——† By 24 H. 8. c. 5. it is no Forfeiture for killing a Man attempting to commit Murder or Robbery.

But a Man cannot juſtify the Killing another in Defence of his Houſe or Goods, or even of his Perſon, for a bare private Treſpaſs; and therefore he Hawk. P. C. 72. Hal. Hiſt. P. C. 485.

he who kills another, who claiming Title to his Houſe, attempts to enter it by Force, and ſhoots at it, or that breaks open his Windows in order to arreſt him, or that perſiſts in breaking his Hedges, after he is forbidden, is guilty of Manſlaughter; and he, who in his own Defence kills another that aſſaults him in his Houſe in the Day-time, and plainly appears to intend to beat him only, is guilty of Homicide *ſe defendendo*, for which he forfeits his Goods, but is pardoned of Courſe; yet it ſeems, that a private Perſon, and *a fortiori* an Officer of Juſtice, who happens unavoidably to kill another in endeavouring to defend himſelf from, or ſuppreſs dangerous Rioters, may juſtify the Fact, inaſmuch as he only does his Duty, in Aid of the Public Juſtice.

Hawk. P.C. 72. If a Man be dangerouſly aſſaulted by another, as with a drawn Sword, *&c.* without any previous Affray, though in a Town, or other Place where Help may be expected, and uſe the ſame Caution to avoid fighting as would make the Killing the Aſſailant Homicide *ſe defendendo* only, if there had been a previous Affray, and then unavoidably kill the Aſſailant, it ſeems reaſonable that he may juſtify it.

Dalt. c. 98. It ſeems alſo that in ſome ſpecial Caſes, a Man may juſtify even killing an innocent Perſon; as where in a Shipwreck two Perſons get upon the ſame Plank, which will not ſupport them both, and one thruſts the other off.

Cro. Car. 538. March 5. So if a Man be awakened in the Night with an Alarm that Thieves are in his Houſe, and ſearching for them in the Dark, with his Sword drawn, happen to kill a Perſon lying hid in Part of the Houſe, who in Truth had no ill Deſign, and was brought thither by a Servant in order to aſſiſt in cleaning the Houſe; it ſeems he may juſtify the Fact, inaſmuch as it hath not the Appearance of a Fault.

Hawk. P.C. 73. But a Man ſhall never juſtify himſelf under a Neceſſity which he brought upon himſelf by his own Fault; and therefore, if Rioters, wrongfully detaining a Houſe by Force, kill the Party ejected, or any of his Aſſiſtants who attack it from without, and endeavour to burn it, they are guilty of Manſlaughter.

Hawk. P.C. 60. *Page 676 (b) But herein my Lord *Hale* ſays, it is generally to be obſerved, that in Caſe of any Indictment, or Charge of Felony, the Priſoner cannot plead any Thing by Way of Juſtification, as, that he did it in his own Defence, or *per infortunium*, but muſt plead Not guilty; and, upon his Trial, the ſpecial Matter is to be found by the Jury, and thereupon the Court gives Judgment. Hal. Hiſt. P. C. 478.

It ſeems a reaſonable Opinion, and countenanced by the old Books, that a Fact amounting to *juſtifiable* Homicide, being ſpecially (*b*) pleaded, and * proved to the Court on an Indictment or Appeal of Murder, the Party ſhall be diſmiſſed without being arraigned, *&c.* But it is certain, that a Fact amounting to *excuſable* Homicide cannot be ſo pleaded; but the Party muſt plead Not guilty, and give the ſpecial Matter in Evidence: Alſo it is certain, that where a Fact amounting to *juſtifiable* Homicide is found by a Jury, the Party is to be diſmiſſed, without being obliged to purchaſe a Pardon, *&c.*

—† *Vide infra* 676.

(F) Of excuſable Homicide: And herein,

1. Of Homicide *per Infortunium*, or Chance-medley.

Hal. Hiſt. P. C. 471. EXcuſable or Involuntary Homicide is of two Kinds. 1*ſt*, When it is purely Involuntary and Caſual; as the Killing of a Man *per infortunium*. 2*dly*, When it is partly Involuntary, and partly Voluntary, but occaſioned by a Neceſſity which the Law allows, which is commonly called Homicide *ex neceſſitate*; as killing a Man in his own Defence.

Homicide

Homicide *per infortunium* is where a Man is doing a lawful Act, and without Intention of bodily Harm to any Perſon, and by that Act, Death of another enſues; as if a Man be ſhooting at Butts or Pricks, and by Caſualty his Hand ſhakes, and the Arrow kills a By-ſtander. Hal. Hiſt. P. C. 472.

And though the Killing of another *per infortunium*, be not in Truth Felony, nor ſubjects the Party to a Capital Puniſhment; and therefore, in ſuch Caſes the Verdict uſually concludes *quod interfecit per infortunium & non per feloniam*; yet the Party forfeits his Goods; and though he ought to have, *quaſi de jure*, a Pardon of Courſe, upon the Certificate of the Conviction, yet he is not to be diſcharged out of Priſon, but bailed to the next Term, or Seſſions, to ſue out his Pardon of Courſe; for though it was not his Crime, but his Misfortune, yet becauſe the King hath loſt a Subject, and that Men may be the more careful, he forfeits his Goods; and is not preſently abſolutely diſcharged of his Impriſonment, but bailed. Hal. Hiſt. P. C. 477.

Alſo it is agreed, that no one can excuſe the Killing of another, by ſetting forth in a ſpecial Plea, that he did it by Miſadventure, or *ſe defendendo*, but that he muſt plead Not guilty, and give the ſpecial Matter in Evidence †. Hawk. P.C. 76. † *Vide ante* 657. n.

As where, without any Intent of doing Hurt, a Perſon chances to kill another by the Head of a Hatchet flying off at Work; this being proved in Evidence, the Party is guilty of Homicide *per infortunium* only. Hal. Hiſt. P. C. 472.

So where a Perſon happens to kill another by a Piece of Timber flung down from a Houſe ſtanding out of any Road, after loud Warning to all Perſons to ſtand clear; or by a Gun diſcharged at Wild Fowl; or by an unlucky Fall or Kick at Wreſtling or Football, or other ſuch like Sports; or in fighting at Barriers; or tilting by the King's Command; or by moderate Correction of a Child, Scholar, or Servant; but if the Correction be immoderate, the Offence will be Manſlaughter at leaſt; and if the Inſtrument be ſuch as apparently endangers Life, as an Iron Bar, *&c.* it will be Murder. Hal. Hiſt. P. C. 473. Hawk. P.C. 74.

So if a Man whip a Horſe on which another is riding, whereupon he ſprings out and runs over a Child, and kills him, the Rider is guilty of Homicide *per infortunium*, the other of Manſlaughter. Hawk. P.C. 74.

* But regularly, if the Act, which occaſions the Death of a Man, be a Treſpaſs, or cannot but be attended with the manifeſt Danger of Hurt to the Perſon of ſome Man, or be of ſuch a Nature, that it cannot be uſed without manifeſt Hazard of Life, and there were no deliberate Intent of Miſchief, the Killing is eſteemed Manſlaughter; as if a Man kill another by ſhooting at Deer in a third Perſon's Park; or by flinging down a Piece of Timber into a common Street or Highway, though in Work, and after Warning to ſtand clear; or by throwing Stones at another wantonly at Play; or by tilting without the King's Command; or by parrying with naked Swords covered with Buttons at the Points, or with Swords in the Scabbards. * Page 677 Hal. Hiſt. P. C. 473, *&c.* Hawk. P.C. 75.

But if a Man in the Execution of a deliberate Purpoſe to commit a Felony, or to do a perſonal Hurt to another, or to do any unlawful Act, which cannot but manifeſtly be attended with Danger of great perſonal Hurt to ſome other, happen to kill another, though it be not intended againſt any one in particular, he is guilty of Murder; as where a Man kills another by maliciouſly Beating or Wounding him; or by Shooting at tame Fowl, with an Intent to ſteal them; or by knowingly and deliberately diſcharging a Gun; or throwing a great Stone or Piece of Timber; or riding with a Horſe, uſed to ſtrike, among a Multitude, though he do it only with an Intent to divert himſelf by frighting them; or by engaging in a Riot; or robbing in a Park, *&c.* Hawk. P.C. 74, 75. Hal. Hiſt. P. C. 475.

A Man at the Diverſion of Cock-Throwing at *Shrovetide* miſſed his Aim, and a Child looking on received a Blow from the Staff, of which he ſoon died; this was ruled Manſlaughter. Foſ. *Cr. Law.* 261.

2. Of Homicide *ſe Defendendo.*

Hawk. P.C. 75.

Homicide *(a) ſe defendendo* is where one is forced to fight, on a ſudden Affray, retreats as far as he can without endangering his own Life, and then, and not before, in order to ſave his Life, or to defend his Perſon from a Battery, (eſpecially if the Aſſault were in his own Houſe) gives the other a mortal wound; and it is ſaid by ſome, not to be material who ſtruck firſt; but if a Man attack another upon Malice, in ſuch a Manner as endangers his Life, and then fly to the Wall, and kill him, he is guilty of Murder.

(a) In Homicide *ſe defendendo* there ſeems neceſſary ſome Act to be done by the Party killing; for if he be merely paſſive, this will make it only a Killing *per infortunium*; and though it be not Felony, not being accompanied with a felonious Intent, yet it ſubjects the Party to a Forfeiture of his Goods and Chattels. Hal. Hiſt. P. C. 478. *&c.*

Hal. Hiſt. P. C. 481.

Regularly, it is neceſſary that the Perſon, who kills another in his own Defence, fly as far as he may to avoid the Violence of the Aſſault, before he turn upon his Aſſailant; for though in Caſes of Hoſtility between two Nations, it is a Reproach and Piece of Cowardice to fly from an Enemy, yet in Caſes of Aſſaults and Affrays between Subjects under the ſame Law, the Law owns not any ſuch Point of Honour; becauſe the King and his Laws are to be the *Vindices injuriarum*; and private Perſons are not truſted to take capital Revenge one of another.

Hal. Hiſt. P. C. 479.

There is Malice between *A.* and *B.* they appoint a Time and Place to fight, and meet accordingly, *A.* gives the firſt Onſet, *B.* retreats as far as he can with Safety, and then kills *A.* who had otherwiſe killed him, this is Murder; for they met by Compact and Deſign, and therefore neither ſhall have the Advantage of what they themſelves created.

Hal. Hiſt. P. C. 479.

There is Malice between *A.* and *B.* they meet caſually, *A.* aſſaults *B.* and drives him to the Wall, *B.* in his own Defence kills *A.* this is *ſe defendendo*, and ſhall not be heightened by the former Malice into Murder; for it was not a Killing upon the Account of the former Malice, but upon a Neceſſity impoſed upon him by the Aſſault of *A.*

* Page 678 Hal. Hiſt. P. C. 483.

* In *Fleet-ſtreet A.* and *B.* were walking together, *B.* gave ſome provoking Language to *A.* *A.* thereupon gave *B.* a Box on the Ear, they cloſed, *B.* was thrown down and his Arm broken, he runs to his Brother's Houſe preſently, which was hard-by, *C.* his Brother, taking the Alarm, came out with his Sword drawn and made towards *A.* who retreated ten or twelve Yards, *C.* purſued him, *A.* drew his Sword and made a Paſs at *C.* and killed him; *A.* being indicted at *Newgate* Seſſions for Murder, the Court directed the Jury upon the Trial to find this Manſlaughter; not Murder, becauſe upon a ſudden Falling-out; not *ſe defendendo*, partly becauſe *A.* made the firſt Breach of the Peace, by ſtriking *B.* and partly becauſe, unleſs he had fled as far as might be, it could not, by Way of Interpretation, be ſaid to be in his own Defence; and it appeared plainly upon the Evidence, that he might have retreated out of Danger; and his ſtepping back was rather to have an Opportunity to draw his Sword, and with more Advantage to come upon *C.* than to avoid him; and accordingly at laſt it was found Manſlaughter, 1671, at *Newgate* †.

† *Vide* Foſter's *Crown Law*, Diſc. II. c. 5, 6, 7.

NONSUIT.

(A) Of the Nature thereof, and how it differs from a Retraxit. 678.
(B) Who may be nonsuit. 679.
(C) In what Actions there may be a Nonsuit. 680.
(D) At what Time a Nonsuit may be. 680.
(E) How far the Nonsuit of one shall be the Nonsuit of another. 681.
(F) How far a Nonsuit for Part of the Thing in Demand shall be a Nonsuit for the Whole. 682.
(G) Of the Effect of a Nonsuit; and herein of its being a peremptory Bar. 682.

(A) Of the Nature thereof, and how it differs from a Retraxit.

WHERE a Plaintiff is demanded and doth not appear, he is said to be nonsuit; and this usually happens, where upon the Trial, and when the Jury are ready to give their Verdict, the Plaintiff discovers some Error or Defect in the Proceedings, or is unable to prove a material Point, for want of a necessary Witness, &c. and thereupon the Plaintiff being demanded, (as he must be) his Default is * recorded by the Secondary, and the (*a*) Entry is *in Misericordia quia non Prosecutus est breve suum*; upon which the Defendant recovers his Costs against him, but this arising from some supposed Neglect or Oversight, the Plaintiff, except in some particular Cases, is not (*b*) barred from commencing a new Action. A *Re-*

Co. Lit. 139. a. 2 Lil. Reg. 230.

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(*a*) For the Form of the Entry, *vide* Cro. Jac. 213. 2 Leon. 177.

2 Salk. 456. pl. 6. (*b*) That where a Plaintiff is nonsuit, if he will again proceed in the same Cause, he must put in a new Declaration; for by his being nonsuit, it shall be intended that he had no such Cause of Suit as he declared in, and so that Declaration is void, and he hath no Day in Court. 1 Lil. Reg. 231 †.——But a Nonsuit by Mistake may be set aside, and a *Distringas de novo* awarded, for which *vide* Cro. Car. 203. Cro. Jac. 669. Godb. 328. Raym. 38, 73. 2 Salk. 455.—A Motion to set aside a Nonsuit occasioned by the Judge's mistaking the Law. *Ca. Law and Eq.* 315.——Nonsuit discharged, being entered on *Nisi Prius* without *Habeas Corpus*. Sid. 164. ‡

† He must commence his Suit *de novo*.——‡ A Plaintiff sometimes submits to be nonsuited, where the Opinion of the Judge is against him, the Judge giving him Leave to move the Court to set the Nonsuit aside, without Costs.——If the Judge does not give such Leave, but directs a Nonsuit, the Plaintiff, if he conceives the Judge mistaken in the Law, may move to set the Nonsuit aside; and if the Court is of Opinion the Judge was mistaken, will set same aside, and generally without Costs; In some particular Cases, however, there may be Reasons sufficient to induce

Co.Lit.139. a. A *Retraxit* is when he is preſent in Court (as regularly he is ever by Intendment of Law, till a Day be given over, unleſs it be when a Verdict is given, and then he is but demandable;) and this is either privative, when the Entry is *quod ſolemniter exactus non venit, ſed a ſecta ſua in Contemptum Curiæ ſe retraxit, &c.* or poſitive, when the Entry is *quod fatetur ſe, ſeu cognoſcit ſe ulterius nolle Proſequi, &c.* It is called a *Retraxit*, becauſe that is the effectual Word uſed in the Entry, and is (*c*) a Bar to all Actions of the like or inferior Nature.

(*c*) 8 Co. 58. 62. S.P. laid down as a Rule. 4 Mod. 87. S. P.

9 Co. 58. *Beecher's* Caſe. A *Retraxit* is always of the Part of the Plaintiff or Demandant, and cannot be, unleſs the Plaintiff or Demandant be in Court in proper Perſon †.

Cro. Jac. 211. S. C. Co. Lit. 138. b. S. P.——† *Sed qu.* if Plaintiff's Council, with Conſent of the Attorney, may not conſent to a *Retraxit*, tho' the Plaintiff is not preſent in Court? A Juror is thus frequently withdrawn, when thoſe concerned for the Plaintiff clearly ſee it is for his Benefit.

Dalſ. 78. 3 Leon. 19. It is held, that a *Retraxit* cannot be entered (*d*) before the Plaintiff hath declared, and if entered before, it hath but the Effect of Nonſuit

(*d*) Whether a *Retraxit* may be entered after a general Verdict. Cro. Eliz. 465. *dubitatur*.

Debt was brought upon a Bond againſt *A.* wherein *A.* and *B.* were jointly and ſeverally bound, and after Plea pleaded, the Plaintiff entered a *Retraxit*, and in an Action after brought againſt *B.* upon the ſame Bond, whether this ſhould be a Bar, between *(e) Dennis* and *Paine*, *Cro. Jac.* 551. *dubitatur & adjornatur.* It was ſaid, that a *Retraxit* was in Nature of a Releaſe, and a Releaſe to one joint Obligor diſcharged the other; but on the other Side it was ſaid to be a Bar only by way of Eſtoppel between the Parties, whereof no other ſhould take Advantage.

(*e*) Jon. 451. S. C. and Judgment given for the Plaintiff, becauſe of a Defect in the Plea.

(B) Who

March 95. S. C. *dubitatur*, but varies in the ſtating it; for by this Report, Debt was brought both againſt *A.* and *B.* and the Plaintiff entered a *Retraxit* againſt *A.* and whether this was a Diſcharge of *B.* is made the Queſtion, *Vide* Cro. Eliz. 762.——[None but the Defendant can demand the Plaintiff. If neither Plaintiff nor Defendant appear after Cauſe called, and Jury ſworn, the only Way is to diſcharge the Jury. *Arnold* v. *Johnſton*, H. 6 Geo. Str. 267. *Smith* v. *Whiſtler*, T. 9 Geo. 2. Ca. *B. R. temp.* Hard. 305.——If a Cauſe is tried by Proviſo, there muſt be a Rule given in the Office, *fiat niſi prius per proviſo ſi querens fecerit defaltam*; and if there is not, and Plaintiff is nonſuited, the Nonſuit ſhall be ſet aſide. *Dodſon* v. *Taylor*, M. 10 Geo. 2. Str. 1055.——If it appears on the Record, that no Iſſue is joined, the Jury muſt be diſmiſſed. *Heath* v. *Walker*, T. 12 Geo. 2. Str. 1117.——By Stat. 14 Geo. 2. c. 17. If Plaintiff neglects to bring Iſſue to Trial according to the Courſe of the Court, the Court on Motion on Notice, ſhall give Judgment as in Caſe of Nonſuit, unleſs they allow farther Time, and Defendant to have Coſts as in Nonſuit.——But if in Action againſt two on a Joint-promiſe, there is Judgment againſt one by Default; and on Plaintiff's neglecting to bring Iſſue joined by the other on to Trial, Rule is obtained for Judgment as in Caſe of a Nonſuit, yet Coſts cannot be taxed; for Plaintiff could not have been nonſuited on a Trial. *Weller* v. *Goyton*, T. 30 & 31 Geo. 2. 1 Bur. 358.——A Nonſuit at *Niſi Prius* muſt be recorded by the Judge of *Niſi Prius*, and cannot afterwards be recorded in Bank. *Gardner* v. *Davis*, P. 24 Geo. 2 1 Wilſ. 301.——If Defendant has obtained a Rule for Coſts for not proceeding to Trial, he cannot afterwards move for Judgment as in Caſe of Nonſuit. Barnes 131, 314, 316.——Nonſuit ſhall not be ſet aſide, becauſe Plaintiff thought Defendant was miſtaken. Barnes 295.——*Non pros*, for want of Declaration demanded in the Country, ſhall be ſet aſide. Barnes 311.——If a Judge of Aſſize directs Nonſuit erroneouſly, there is no Remedy. Barnes 311.——If Plaintiff dies after Nonſuit, and before Day in Bank, it is not helped by the Statute, but is Error. Barnes 312.——Rule to declare in *C. B.* muſt be in the Office where

induce the Court to refuſe to ſet aſide the Nonſuit, unleſs the Plaintiff will pay Coſts——If there are ſeveral Defendants, and all found guilty, Plaintiff may enter a *Nolle proſequi* againſt any one; therefore, if in *Trover* againſt a Defendant Executor, and other Defendants not Executors, there is a Verdict againſt theſe, and the Executors found Not guilty, Judgment ſhall not be arreſted, for Plaintiff may enter *Nolle proſequi* as to him. *Dale* v. *Eyre*, T. 24 & 25 Geo. 2. 1 Wilſ. 306.

(B) Who may be nonſuit.

IT is every where agreed, that the King, being in Suppoſition of Law always preſent in Court, cannot be nonſuit in any Information or Action wherein he himſelf is the ſole Plaintiff; but it is held, that any Informer *qui tam*, or Plaintiff in a popular Action, may be nonſuit, and thereby wholly ‡ determine the Suit, as well in Reſpect of the King as of himſelf. Bro. *Nonſuit* 68. Co. Lit. 139. b. Rol. Abr. 131.

‡ But *qu.* if this does not mean a Nonſuit on the Merits, and if ſuch Plaintiff, by Colluſion with the Defendant, does not chooſe to proceed, whether the King may not proceed for his Share of the Penalty?—In a *qui tam* Action, Judgment as in Caſe of a Nonſuit may be entered on a Rule to ſhew Cauſe. *Watſon* v. *Johnſon*, P. 25 Geo. 2. 1 Wilſ. 325.

If an Infant bring an Aſſize by Guardian, although that the Infant diſavow the Suit in proper Perſon, yet no Nonſuit ſhall be awarded. 39 Aſſ. pl. 1. 2 Rol. Abr. 130. S. C.

* Where an Executor need not name himſelf Executor, he ſhall pay Coſts upon a Nonſuit, and the naming himſelf Executor ſhall not exempt him from it. * Page 680 6 Mod. 181.

If an Attorney of the *Common Pleas* is ſued in an Action there, he ſhall not be demanded, becauſe he is ſuppoſed always preſent aiding the Court. 20 H. 6. 44. b. Rol. Abr. 581. S. C.

(C) In what Actions there may be a Nonſuit.

A Perſon may be nonſuit in a Writ of Error. 2 Rol. Abr. 130.

A Perſon may be nonſuit in a Writ of falſe Judgment. Sid. 255. S. P. 20. H. 6. 18 b.

One cannot be nonſuit in any Action in which he is not an Actor or Demandant; and though he afterwards become an Actor, yet, not being originally ſo, he cannot be nonſuit as an Avowant; ſo of Garniſhees who become Actors, but were not ſo originally. 2 Rol. Abr. 130. S. C. 22 E. 4. 10.

So if a Perſon outlawed hath a Charter of Pardon, and ſues a *Scire facias* againſt the Party, though hereby he is an Actor, yet he cannot be nonſuit. 2 Rol. Abr. 130.

So if a Man traverſe an Office he cannot be nonſuit, although he is an Actor, for he hath no Original pending againſt the King. 2 Rol. Abr. 130. Dyer 141. pl. 47. this is made a *Quære*.

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where Plaintiff's Attorney practiſes. Barnes 312.——On Motion for Judgment, as in Caſe of Nonſuit, Rule for the Plaintiff to enter Iſſue; if he does not, Defendant may have *Non proſ.* if he enters it, the Roll muſt be produced, and Defendant may move for Nonſuit; if Court admits Cauſe, why Nonſuit ſhould not, &c. they appoint Day for Trial; on ſuch Motion, there muſt be Affidavit that the Cauſe is not tried. Barnes 313, 316.——Sickneſs of Plaintiff—Marriage of *Feme* Plaintiff—that the Bankrupt did not attend Aſſignees, Plaintiffs—that material Witneſſes were ill—or if Record offered to be entered, though a little out of Time—ſufficient to prevent Judgment as of Nonſuit. Barnes 313, 314, 315, 316, 464.——Judgment as for Nonſuit ſhould be applied for the firſt Term after Plaintiff has not proceeded to Trial. Barnes 314.——Replevins and Actions *qui tam* are within the Statute. Barnes 315, 317.——If Plaintiff was ready, but the Cauſe did not come on becauſe the View was not returned by ſix Jurors, Judgment ſhall not be ſigned. Barnes 498.——If Defendant has obtained a Rule for Judgment *niſi*, the Court will not give Plaintiff Leave to amend his Declaration by ſtriking out Allegation, but Judgment ſhall be abſolute. Barnes 318.——Judgment as in Nonſuit, may be moved for without Term's Notice, though no Proceedings in a Year. Barnes 308.——In Replevin, If Plaintiff does not appear at Trial, but Defendant brings down Record, Nonſuit ſhall be entered, and not Verdict for Defendant; if it is, it ſhall be ſo amended at Defendant's Coſt. Barnes 458.

But

11 H. 4. 52. 2 Rol. Abr. 130. But in a Petition of Right againſt the King the Plaintiff may be nonſuit.

47 E. 3. 5. b. So in an *Audita Querela* to avoid a Statute, the Plaintiff may be nonſuit, for he is Plaintiff in this Action.

45 E. 3. 16. If to two *Nihils* returned on a *Scire facias* on a Charter of Pardon, the Plaintiff does not appear, he ſhall be nonſuit; for the Statute ordains, that upon his appearing he ought to count againſt the Defendant.

(D) At what Time a Nonſuit may be.

Co. Lit. 139. b. that at Common Law if he did not like the Damages given by the Jury, he might be nonſuit. 5 Mod. 208. AT the Common Law, upon every Continuance, or Day given over before Judgment, the Plaintiff was demandable, and upon his Non-appearance might have been nonſuit.

But now by the 2 *H.* 4. *cap.* 7. it is enacted in the Words following: "Whereas, upon Verdict found before any Juſtice in Aſſiſe of *Novel Diſ-* "*ſeiſin Mortdanceſter*, or any other Action whatſoever, the Parties before "this Time have been adjourned upon Difficulty in Law, upon the Matter "ſo found; it is ordained and eſtabliſhed, that if the Verdict paſs againſt "the Plaintiff, that the ſame Plaintiff ſhall not be nonſuited."

Co. Lit. 139. 2 Jon. 1. 2 Rol. Abr. 131-2. But notwithſtanding this Statute it hath been held, that the Plaintiff may be nonſuited after a ſpecial Verdict, or after a Demurrer and (*a*) Argument thereupon.

3 Leon, 28. & *vide* 2 Hawk. P. C. 184. (*a*) In Debt upon an Obligation, upon Demurrer, the Caſe being argued, the Opinion of the Court was againſt the Plaintiff, and Rule given, that Judgment ſhould be entered for the Defendant; and the Plaintiff prayed that he might be nonſuited; and becauſe he had the ſame Term appeared, and argued by his Counſel, and had prayed Judgment, he could not be nonſuited the ſame Term. Cro. Jac. 35.

*Page 681 2 Rol. Abr. 131. *Vide* Co. Lit. 139. b. * If there be Judgment to account, and Auditors aſſigned, and thereupon a *Capias ad Computandum*, the Plaintiff cannot be nonſuited on the Original, becauſe the Original is determined by the Judgment to account.

3 H. 6. 13. 2 Rol. Abr. 131. If the Defendant wages his Law, and a Day is given him over to another Term to make his Law, if the Plaintiff does not appear that Day he will be nonſuited; otherwiſe, if he wages his Law immediately, or, as ſome hold, on a Day in the ſame Term.

(E) How far the Nonſuit of one ſhall be the Nonſuit of another.

Co. Lit. 139. 2 Inſt. 563. 2 Rol. Abr. 132. Several Caſes to this Purpoſe. IN real or mixt Actions, the Nonſuit of one Demandant is not the Nonſuit of both; but he that makes Default ſhall be ſummoned and ſevered; but regularly, in perſonal Actions, the Nonſuit of the one is the Nonſuit of both.

Co. Lit. 139. a. *Vide* Head *Executors.* But in perſonal Actions, brought by Executors, there ſhall be Summons and Severance, becauſe the beſt ſhall be taken for the Benefit, of the Dead; and

and ſo it is in Action of Treſpaſs, as Executors for Goods taken out of their own Poſſeſſion. Like Law in Account, as Executors by the Receipt of their own Hands.

In an (a) *Audita Querela* concerning the Perſonalty, the Nonſuit of the one is not the Nonſuit of the other; becauſe it goeth by Way of Diſcharge, and freeing themſelves, and therefore the Default of the one ſhall not hurt the other. Co. Lit 139.

(a) In an *Audita Querela, Scire facias*, Attaint, the Nonſuit of one ſhall not prejudice the other. 6 Co. 26.

In a *Quid Juris clamat*, the Nonſuit of the one is the Nonſuit of both, becauſe the Tenant cannot attorn according the Grant. Co. Lit. 139. a.

Some Actions follow the Nature of thoſe Actions whereupon they are grounded; as the Writs of Error, Attaint, *Scire facias*, and the like. If a real Action be brought by ſeveral *Præcipe's* againſt two or more, if the Demandant be nonſuit againſt one, he is nonſuit againſt (b) all; for, as to the Demandant, it is but one Writ under one *Teſte*. Co. Lit. 139. a. b. 2 Rol. Abr. 133.

(b) But where a Plaintiff may enter a *Nolle Proſequi* againſt one, and have Judgment againſt the reſt, *vide* 2 Rol. Abr. 101. Cro. Car. 239, 243. Hob. 70, 180. Carth. 19. 3 Mod. 101.

In an Appeal againſt divers, whether they plead the ſame or ſeveral Iſſues, it hath been adjudged, that a Nonſuit againſt one, at the Trial of any one of the Iſſues, is a Nonſuit as to all, becauſe ſuch a Nonſuit operates in Nature of a Releaſe to the Whole. Cro. Eliz. 460. pl. 6. Dyer 120. 2 Rol, Abr. 133. Sid. 387.

A *Latitat* was ſued out againſt four Defendants in Treſpaſs, the Plaintiff was nonſuit for (c) Want of a Declaration, and the Defendants Attorney entered four Nonſuits againſt him; and it was held to be irregular, becauſe the Treſpaſs is joint; and though the Plaintiff may count ſeverally againſt the Defendants, yet it remains joint till it is ſerved by the Count. 2 Salk. 455. pl. 1.

(c) There is a Nonſuit before Appearance at the Return of the Writ, or after Appearance at ſome Day of Continuance. Co. Lit. 138. 8.

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* (F) How far a Nonſuit for Part of the Thing in Demand ſhall be a Nonſuit for the Whole.

* Page 682

IT is laid down as a general Rule, that a Nonſuit for Part is a Nonſuit for the Whole; but it hath been held, that if a Defendant plead to one Part, and thereupon Iſſue is joined, and demur to the other, the Plaintiff may be nonſuit as to one Part, and proceed for the other. 2 Leon. 177. Hob. 180.

If in Debt the Defendant acknowledges the Action as to Part, and joins Iſſue as to the Reſidue, and the Plaintiff hath Judgment for that which is ſo confeſſed; but there is a *Ceſſat Executio*, by reaſon of the Damages to be aſſeſſed by the Jury; if the Plaintiff be nonſuited in this Iſſue, this ſhall not be a Nonſuit for the Damages to be given, becauſe that he had Judgment. 2 Rol. Abr. 134.

If in Trover for divers Goods the Defendant pleads, that as to ſome of the Goods they were fixed to his Freehold, as to others that he had them of the Gift of the Plaintiff, and as to the reſt Not guilty; and as to the firſt, the Plaintiff enters *non vult ulterius Proſequi*; this amounts only to a *Retraxit*, and is no Nonſuit, ſo as to bar the Plaintiff from proceeding on the other Parts of the Plea, on the Rule, that a Nonſuit for Part is a Nonſuit for the whole. 2 Leon. 177. Sir *John Sands* ver. *Packſal Brocas*.

(G) Of the Effect of a Nonſuit; and herein of its being a peremptory Bar.

A Nonſuit, as hath been obſerved, is regularly no peremptory Bar; but the Plaintiff may, notwithſtanding, commence any new Action of the ſame or like Nature; but this general Rule hath the following Exceptions.

Co.Lit.139. a. 1. It is peremptory in a *Quare Impedit*; and in that Action a Diſcontinuance is alſo peremptory; and the Reaſon is, for that the Defendant had, by Judgment of the Court, a Writ to the Biſhop; and the Incumbent, that cometh in by that Writ, ſhall never be removed; which is a flat Bar that Preſentation.

Co.Lit.139. a. 2. Nonſuit in an Appeal of Murder, Rape, Robbery, &c. after (*a*) Appearance, is peremptory, and this *in favorem Vitæ*; (*b*) but the Nonſuit of the Plaintiff in an Appeal is not ſuch an Acquittal, on which the Defendant ſhall recover Damages againſt the Abbettors, by *Weſt. 2. cap.* 12. unleſs, after the Nonſuit, he were arraigned at the King's Suit upon the Appeal, and acquitted.

(*a*) But the bare taking out of a Writ of Appeal, and cauſing it to be delivered of Record to the Sheriff, and a Nonſuit upon it, is no Bar of a ſecond Appeal; becauſe it doth not appear of Record, but that it might be done by a Stranger; and therefore the Nonſuit muſt be after an Appearance in proper Perſon of Record. 2 Hawk. P. C. 193-4.

(*b*) 2 Inſt. 385.

Co. Lit.139. a. 3. So if the Plaintiff, in an Appeal of Mayhem, be nonſuit after Appearance, it is peremptory; for the Words therein are *Felonice Mayhemavit*.

Co. Lit.139. a. Cro. Eliz. 881. 4. A Nonſuit after Appearance is alſo peremptory in a *Nativo Habendo*, and the Nonſuit of one Plaintiff in that Action nonſuits both *in favorem Libertatis*; for in a *Libertate Probanda* ſuch Nonſuit is not peremptory; neither is the Nonſuit of one Plaintiff the Nonſuit of both.

*Page 683. Co.Lit.139. a. *5. Such Nonſuit is alſo peremptory in an Attaint, but a Diſcontinuance in an Attaint is not, becauſe there is a Judgment given upon the Nonſuit, but not upon the Diſcontinuance †.

† *Vide ante* 679. n.

NUSANCES.

4 Rol. Abr. 83. Hawk. P.C. 197. A Common Nuſance is an Offence againſt the Public, either by doing a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the common Good requires.

Under which Deſcription we ſhall conſider,

(A) What ſhall be ſaid a Nuſance. 683.
(B) How far the Indictment muſt charge it to be an Annoyance to all the King's Subjects. 687.
(C) How

(C) How a Nuſance is to be removed or abated. 687.
(D) How the Offence is puniſhable. 688.

For Nuſances relating to the Highways, *vide* Title **Highways.**
For thoſe relating to Bridges, Tit. **Bridges.**
For thoſe relating to public Houſes, Tit. **Inns and Inn-keepers.**

(A) What ſhall be ſaid a Nuſance.

IT is clearly agreed, that keeping a Bawdy-houſe is a common Nuſance, as it endangers the public Peace, by drawing together diſſolute and debauched Perſons; and alſo has an apparent Tendency to corrupt the Manners of both Sexes, by ſuch an open Profeſſion of Lewdneſs. 3 Inſt. 205. Kitchen 11. Hawk. P.C. 196. 2 Bur. Rep. 1232.

Alſo it hath been adjudged, that this is ſuch an Offence, of which a Feme Covert may be guilty as well as if ſhe were ſole; and that ſhe together with her Huſband, may be indicted and condemned to the Pillory for keeping a Bawdy-houſe; for the keeping the Houſe does not neceſſarily import Property, but may ſignify that Share of Government which the Wife has in a Family as well as the Huſband; and in this ſhe is preſumed to have a conſiderable Part, as thoſe Matters are uſually managed by the Intrigues of her Sex. Salk. 348. pl. 35. *The Queen* ver. *Williams.*

It is clearly agreed, that all common Gaming-Houſes are Nuſances in the Eye of the Law, being detrimental to the Public, as they promote Cheating and other corrupt Practices, and incite, to Idleneſs and avaritious * Ways of gaining Property, great Numbers, whoſe Time might otherwiſe be employed for the general Good of the Community; alſo it hath been (*a*) adjudged, that this is ſuch an Offence, for which a Feme Covert may be indicted; for as, in the preceding Caſe, the Wife may be concerned in Acts of Bawdry, ſo here ſhe may be active in promoting Gaming, and furniſhing the Gueſts with all Conveniencies for that Purpoſe. Hawk. P.C. 198. * Page 684 (*a*) Trin. 2. Geo. 1. *The King* ver. *Dixon.*

It ſeems to be the better Opinion, that all common Stages for Rope-Dancers, *&c.* are Nuſances, not only becauſe they are great Temptations to Idleneſs, but alſo becauſe they are apt to draw together Numbers of diſorderly Perſons, which cannot but be very inconvenient to the Neighbourhood. Mod. 76. 2 Keb. 846. 3 Keb. 464. Vent. 169. 5 Mod. 142. Hawk. P.C. 198.

But it ſeems the better Opinion, that Playhouſes, having been originally inſtituted with a laudable Deſign of recommending Virtue to the Imitation of the People, and expoſing Vice and Folly, are not Nuſances in their own Nature, but may only become ſuch by Accident; as where they draw together ſuch Numbers of Coaches or People, *&c.* as prove generally inconvenient to the Places adjacent; or when they pervert their original Inſtitution, by recommending vicious and looſe Characters under beautiful Colours to the Imitation of the People, and make a Jeſt of Things commendable, ſerious and uſeful. Ruſhworth's *Coll.* Part. 2. Vol. 1. Fol. 220, 247. Rol. Rep. 109. 5 Mod. 142. Skin. 625. pl. 21.

And now for the better Regulation of Players and Play-Houſes, by the 10 *Geo. 2. cap.* 28. it is enacted, "That every Perſon who ſhall for Hire, "Gain or Reward, act, repreſent or perform, or cauſe to be acted, repre-"ſented or performed, any Interlude, Tragedy, Comedy, Opera, Play, "Farce, And ſee 25 Geo 2. c. 36. made perpetual by 28 Geo. 2. c. 19. for pre-

venting Thefts and Robberies, regulating Places of public Entertainment, and puniſhing Perſons keeping diſorderly Houſes. And Note; theſe Sort of Players are within the Deſcription of the Vagrant Act 17 Geo. 2. c. 5.—† By 25 Geo. 2. c. 36. ſ. 2. Houſes and Gardens of Entertainment are not to be kept without Licence. —By 30 Geo. 2. c. 24. ſ. 14. Penalties are inflicted on Publicans, permitting Journeymen to game in their Houſes.

" Farce, or other Entertainment of the Stage, or any Part or Parts therein, " in caſe ſuch Perſon ſhall not have any legal Settlement in the Place " where the ſame ſhall be acted, repreſented or performed, without Authority by Virtue of Letters Patent from his Majeſty, his Heirs, Succeſſors " or Predeceſſors, or without Licence from the Lord Chamberlain of his " Majeſty's Houſhold for the Time being, ſhall be deemed to be a Rogue " and a Vagabond, within the Intent and Meaning of the 12 *Ann. ſtat.* 2. " *cap.* 23. and ſhall be liable and ſubject to all ſuch Penalties and Puniſh- " ments, and by ſuch Methods of Conviction, as are inflicted on, or ap- " pointed by the ſaid Act, for the Puniſhment of Rogues and Vagabonds " who ſhall be found wandering, begging, and miſordering themſelves, " within the Intent and Meaning of the ſaid Act.

And *Sect.* 2. it is further enacted, " That if any Perſon having, or not " having a legal Settlement as aforeſaid, ſhall, without ſuch Authority or " Licence as aforeſaid, act, repreſent or perform, or cauſe to be acted, re- " preſented or performed, for Hire, Gain or Reward, any Interlude, Tra- " gedy, Comedy, Opera, Play, Farce, or other Entertainment of the Stage, " or any Part or Parts therein, every ſuch Perſon ſhall, for every ſuch Of- " fence, forfeit the Sum of fifty Pounds; and in caſe the ſaid Sum of fifty " Pounds ſhall be paid, levied or recovered, ſuch Offender ſhall not, for " the ſame Offence, ſuffer any of the Pains or Penalties inflicted by the ſaid " recited Act.

And by *Sect.* 3. it is further enacted, " That no Perſon ſhall for Hire, " Gain or Reward, act, perform, repreſent, or cauſe to be acted, per- " formed or repreſented, any new Interlude, Tragedy, Comedy, Opera, " Play, Farce, or other Entertainment of the Stage, or any new Pro- " logue or Epilogue, unleſs the Copy thereof be ſent to the Lord Cham- " berlain of the King's Houſhold for the Time being, 14 Days at leaſt " before the acting, repreſenting or performing thereof, together with an " Account of the Play-houſe or other Place where the ſame ſhall be, and " the Time when the ſame is intended to be firſt acted, repreſented or " performed, ſigned by the Maſter or Manager, or one of the Maſters or " Managers of ſuch Play-houſe, or Place, or Company of Actors therein.

* And it is further enacted by *Sect.* 4. " That it ſhall and may be lawful
* Page 685 " to and for the ſaid Lord Chamberlain for the Time being, from Time to " Time, and when and as often as he ſhall think fit, to prohibit the Act- " ing, Performing or Repreſenting any Interlude, Tragedy, Comedy, " Opera, Play, Farce, or other Entertainment of the Stage, or any Act, " Scene or Part thereof, or any Prologue or Epilogue; and in caſe any " Perſon or Perſons ſhall for Hire, Gain or Reward, act, perform or re- " preſent, or cauſe to be acted, performed or repreſented, any new Inter- " lude, Tragedy, Comedy, Opera, Play, Farce, or other Entertainment of " the Stage, or any Act, Scene, or Part thereof, or any new Prologue or " Epilogue, before a Copy thereof ſhall be ſent as aforeſaid, with ſuch Ac- " count as aforeſaid; or ſhall for Hire, Gain or Reward, act, perform or " repreſent, or cauſe to be acted, performed or repreſented, any Interlude, " Tragedy, Comedy, Opera, Play, Farce, or other Entertainment of the " Stage, or any Act, Scene, or Part thereof, or any Prologue or Epi- " logue, contrary to ſuch Prohibition as aforeſaid; every Perſon ſo of- " fending ſhall, for every ſuch Offence, forfeit the Sum of 50*l.* and every " Grant, Licence and Authority, (in caſe there by any ſuch,) be or un- " der which the ſaid Maſter or Maſters, Manager or Managers, ſet up, " formed or continued ſuch Play-houſe, or ſuch Company of Actors, ſhall " ceaſe, determine, and become abſolutely void to all Intents and Purpoſes " whatſoever.

Provided, *Sect.* 5. " That no Perſon or Perſons ſhall be authorized, by " Virtue of any Letters Patent from his Majeſty, his Heirs, Succeſſors or Pre-

" deceſſors,

" deceſſors, or by the Licence of the Lord Chamberlain of his Majeſty's Houſ-
" hold for the Time being, to act, repreſent or perform for Hire, Gain or
" Reward, any Interlude, Tragedy, Comedy, Opera, Play, Farce, or other
" Entertainment of the Stage, or any Part or Parts therein, in any Part of
" *Great Britain*, except in the City of *Weſtminſter*, and within the Liberties
" thereof, and in ſuch Places where his Majeſty, his Heirs or Succeſſors,
" ſhall in their Royal Perſons reſide, and during ſuch Reſidence only.

And it is further enacted by *Sect.* 6. " That all the pecuniary Penalties in-
" flicted by this Act, for Offences committed within that Part of *Great*
" *Britain* called *England*, *Wales*, and Town of *Berwick* upon *Tweed*, ſhall
" be recovered by Bill, Plaint or Information in any of his Majeſty's Courts
" of Record at *Weſtminſter*, in which no Eſſoin, Protection or Wager of
" Law ſhall be allowed: And for Offences committed in that Part of *Great*
" *Britain* called *Scotland*, by Action or ſummary Complaint before the
" Court of Seſſions or Juſticiary there; or for Offences committed in any
" Part of *Great Britain*, in a ſummary Way, before two Juſtices of the
" Peace for any County, Stewarty, Riding, Diviſion or Liberty, where
" any ſuch Offence ſhall be committed, by the Oath or Oaths of one or
" more credible Witneſs or Witneſſes, or by the Confeſſion of the Offender
" the ſame to be levied by Diſtreſs and Sale of the Offender's Goods and
" Chattels, rendering the Overplus to ſuch Offender, if any there be, above
" the Penalty and Charge of Diſtreſs; and for Want of ſufficient Diſtreſs,
" the Offender ſhall be committed to any Houſe of Correction in any ſuch
" County, Stewarty, Riding or Liberty, for any Time not exceeding ſix
" Months, there to be kept to hard Labour, or to the common Gaol of
" any ſuch County, Stewarty, Riding or Liberty, for any Time not ex-
" ceeding ſix Months, there to remain without Bail or Mainpriſe; and if
" any Perſon or Perſons ſhall think him, her, or themſelves aggrieved by
" the Order or Orders of ſuch Juſtices of the Peace, it ſhall and may be
" lawful for ſuch Perſon or Perſons to appeal therefrom to the next General
" Quarter-Seſſions, to be held for the ſaid County, Stewarty, Riding or
" Liberty, whoſe Order therein ſhall be final and concluſive; and the ſaid
" Penalties againſt this Act ſhall belong, one Moiety thereof to the Infor-
" mer, or Perſon ſuing or proſecuting for the ſame, the other Moiety to the
" Poor of the Pariſh where ſuch Offence ſhall be committed.

And it is further enacted by *Sect.* 7. " That if any Interlude, Tragedy,
" Comedy, Opera, Play, Farce, or other Entertainment of the Stage, or
" * any Act, Scene or Part thereof, ſhall be acted, repreſented or performed, * Page 686
" in any Houſe or Place where Wine, Ale, Beer, or other Liquors ſhall be
" ſold or retailed, the ſame ſhall be deemed to be acted, repreſented and
" performed for Gain, Hire and Reward.

" Provided that every Proſecution, for any Offence within this Act, ſhall
" be commenced within ſix Kalendar Months after the Offence committed."

It was formerly held, that the Erecting a Dove-houſe on a Man's own Frank-Tenement was a Nuſance, becauſe the Pigeons † and Doves were to be accounted tame Animals, in as much as they had *Animum revertendi*; and that therefore whoever erected ſuch Houſes, were anſwerable for the Damages done by them; and becauſe they were not liable to every Man's Action, to avoid Multiplicity of Suits, it was thought a Matter indictable in the Leet; but the contrary Opinion prevailed; becauſe it was allowed the Lord of the Manor might erect, or permit by his Licence any Perſon to erect a Dove-houſe; which he could not do, if it were a Nuſance, every Nuſance being *Malum in ſe*; beſides, theſe Animals are rather to be accounted *Feræ naturæ*; and by Conſequence, the only Remedy any Perſon had, for the Damage ſuſtained by the Birds feeding on his Ground, was to kill them and take them to himſelf, which was the proper Relief according to the common Law; in as much as the Birds were accounted no Man's Property. But it is ſaid, that a Dovecote newly erected in a Manor, without the Lord's Licence,

2 Rol. Abr. 138. Poph 148. Cro. Jac. 382 Godb. 259. Cro, Eliz. 548. Rol. Rep. 136, 200. 2 Rol. Rep. 3, 4, 34. 5 Co. 104. Moor 238.

† As to Pigeons ſee 1 Jac. 1. c. 27. amended by 2 Geo. 2. c. 29.

Licence, is a good Ground for an Action on the Caſe, at the Suit of the Lord.

Vide Title *Highways*, Letter (E). Jon. 221. Cro. Car. 184. Bulſt. 203. 2 Rol. Abr. 137.

It is clearly agreed to be a Nuſance to dig a Ditch, or make a Hedge over-thwart a Highway, or to erect a new Gate, or to lay Logs of Timber in it; or generally to do any other Act which will render it leſs commodious: But it ſeems that a Gate, which has continued Time out of Mind, is no Nuſance; but that the ſame may be juſtified by Preſcription, being at firſt intended to have been ſet up by Conſent, on a Compoſition with the Owner of the Land, on the Laying out the Road; in which Caſe, the People had never any Right to a freer Paſſage than what they ſtill enjoy.

Noy 103. 3 Keb. 640, 759.

And as navigable Rivers are deemed Highways, it is a Nuſance to divert Part of the River, whereby the Current of it is weakened, and made unable to carry Veſſels of the ſame Burthen as it could before; alſo the laying of Timber in a common River, though the Soil belong to the Party, is equally a Nuſance, as if the Soil was not his, if thereby the Paſſage of Boats, *&c.* is obſtructed; and from hence alſo it ſeems to follow, that private Stairs from thoſe Houſes that ſtand by the *Thames* into it, are common Nuſances; but it ſeems, that where there are Cuts made in the Banks, that are not Annoyances to the River, the Timber lying there is no Nuſance.

2 Rol. Abr. 139. pl. 3.

It hath been holden to be a common Nuſance, to divide a Houſe in a Town for poor People to inhabit in; by Reaſon whereof it will be more dangerous in the Time of Infection of the Plague.

6 Mod. 145. *The Queen* ver *Leich.* Hawk. P. C. c. 75. 2 Hawk. P. C. c. 25. ſ. 35. 61.

Bringing a great Ship of 300 Tuns into *Billingſgate-Dock*, though a common Dock, yet being only ſo for ſmall Ships coming with Proviſion to the Markets of *London*, is a Nuſance, in the ſame Manner, as a Man uſing with his Cart a common Pack and Horſe Way, ſo as to plough it up, and thereby render it leſs convenient to Riders, is a Nuſance indictable.

12 Mod. 342, 510, 519, 626, 635, 639, 640.

2 Rol. Abr. 139. Cro. Car. 510. Hut. 136. Palm. 536. Vent. 26. Keb. 500. 2 Salk. 458. pl. 3. 460. pl. 7. 2 Ld. Raym. 1163.

It ſeems the better Opinion, that a Brew-houſe, Glaſs-houſe, Chandler's Shop, Stie for Swine, ſet up in ſuch inconvenient Parts of a Town, that they cannot but greatly incommode the Neighbourhood, are common Nuſances.

Bur. Rep. 333, *&c.* in the Caſe of the late Doctor *Ward's* Erections at *Twickenham*.

Buildings for making Acid Spirit of Sulphur, whereby the Air was impregnated with noiſome and offenſive Stinks in a Pariſh, near the King's Highway, and near ſeveral Dwelling-Houſes, to the common Nuſance of all Perſons inhabiting, *&c.* and paſſing, *&c.* declared a Nuſance †.

——†Acting under old Charters, not continued, to the Prejudice of Trade, a public Nuſance, Stat. 6 Geo. 1. c. 18. ſ. 18.

Page 687 (B) How far the Indictment muſt charge it to be an Annoyance to all the King's Subjects.

2 Rol. Abr. 83. Hawk. P. C. 197.

EVERY Nuſance, puniſhable by a public Proſecution, muſt be charged to be *ad commune nocumentum*, or to the general Annoyance of all the King's Subjects; for if they are only Injuries to particular Perſons, they are left to be redreſſed by the private Actions of the Parties aggrieved by them.

And

And therefore an Indictment for Surcharging such a Common, or Inclosing such a Piece of Ground, or Disturbing such a Water-course, or doing any other Act, not apparently of a public Nature, to the Nusance of the Inhabitants of such a Town, or of *J. S.* and his Tenants, is not good. Hawk. P. C. 199. and several Authorities there cited.

So an Indictment in a Court-Leet for keeping a Glass-house *ad maximum nocumentum* was quashed, because it was not a Nusance, unless it had been *ad commune nocumentum*. Vent. 26. 2 Keb. 500.

So an Indictment for stopping a Water-course was quashed, being only laid *ad nocumentum omnium prope inhabitantium*, without saying *& transeuntium*. Mod. 107. 3 Keb. 284.

But it hath been held, that an Indictment, for not repairing a Bridge, *per quod ligei Domini Regis transire non possunt, &c. ad nocumentum eorundem*, is sufficient; for by the King's Liege People shall be understood all his Liege People. 2 Leon, 183, 184. 9 Co. 113. Vent. 208. 3 Keb. 28.

Also an Indictment for doing a Thing which plainly appears immediately to tend to the Prejudice of Religion, or of the King; as for breaking the Walls of a Church, or imbezilling the King's Treasure, *&c.* is good, without expressly laying it as a common Grievance. 2 Rol. Abr. 83, 84. Hawk. P. C. 198.

So an Indictment of a common Scold, by the Words *Communis rixatrix*, hath been held good, though it concluded *ad commune nocumentum diversorum*, instead of *Omnium*; because, says *Hawkins*, from the Nature of the Thing, it cannot but be a common Nusance; and for the same Reason, says he, an Indictment with such a Conclusion, for a Nusance to a River, plainly appearing to be a public and navigable River, or to a Way, plainly appearing to be a Highway, is sufficient; and perhaps, says he, the (*a*) Authorities, which seem to contradict this Opinion, might go upon this Reason, that in the Body of the Indictment it did not appear, with sufficient Certainty, whether the Way wherein the Nusance was alledged, were a Highway, or only a private Way; and therefore it shall be intended from the Conclusion of the Indictment, that it was a private Way. 6 Mod. 11, 178, 213, 239, 311. 2 Ld. Raym. 1094. See 7 Mod. 52. Hawk. P. C. 243. Sid. 282. Fitzgib. 56. Ld. Raym. 443. 2 Ld. Raym. 1013.

Stra. 2. 8. 2 Stra. 866. Barnard K. B. 298, 331. But see now 30 Geo. 2, c. 24. 2 Stra. 999. Moor 847. 2 Keb. 410. Keb. 161. Rol. Rep. 201. Hawk. P. C. 198. (*a*) *Viz.* Cro. Eliz. 148. 2 Keb. 461. 2 Rol. Abr. 83.

(C) How a Nusance is to be removed or abated.

HEREIN it is laid down by *Hawkins*, that any one may pull down or otherwise destroy a common Nusance; as a new Gate, or even a new House erected in a Highway, *&c.* for if one, whose Estate is or may be prejudiced by a private Nusance actually erected, as a House hanging over his Ground, or stopping his Lights, *&c.* may justify the Entring into another's Ground, and pulling down and destroying such a Nusance, whether it were erected before or since he came to the Estate; surely it cannot but follow *a fortiori*, that any one may lawfully destroy a common Nusance; and as the Law is now holden, it seems, that in a Plea, justifying the Removal of a Nusance, the Party need not shew that he did as little Damage as need be. Hawk. P. C. 199. for which are cited 2 Rol. Abr. 144-5. Cro. Car. 184. Jon. 221. Yelv. 142. 5 Co. 101. 9 Co. 54. Salk. 458. pl. 3.

* If a River be stopped to the Nusance of the Country, and none appear bound by Prescription to clear it, those who have the Piscary, and the neighbouring Towns, who have a common Passage and Easement therein, may be compelled to do it. * Page 688 3 Ass. 10. 2 Rol. Abr. 137. Hawk. P. C. 200. said to have been adjudged.

(a) A Writ to prohibit a Bowling-Alley erected near St. *Dunſtan*'s Church, ſaid by *Hale* to have been granted 8 Car. 1. on *Noy*'s Motion.

It ſeems to be the better Opinion, that the Court of King's Bench may by a (a) Mandatory Writ, prohibit a Nuſance, and order that the ſame ſhall be abated; and that if the Party diſobeys the Writ, he ſubjects himſelf to an Attachment; but upon ſuch Attachment, for proceeding after the Writ of Prohibition, there ought to be a Declaration, ſetting forth the Nature of the Offence, and that the ſame is a Nuſance, and that, notwithſtanding the Writ of Prohibition, the Defendant proceeded or continued it; to which, if the Defendant can in Pleading ſet forth a ſufficient Juſtification, his Proceeding *poſt prohibitionem regiam* will be good in Law, and himſelf diſcharged of all Contempt and Coſts againſt the Complainant.

Mod. 76.—So a Prohibition reſtraining *Jacob Hall*, a Rope-Dancer, who had erected a Stage at *Charing-Croſs*. Vent. 169. 2 Keb. 846. Mod. 76. & *vide* Skin. 625. pl. 21. 5 Mod. 142.

(D) How the Offence is puniſhable.

2 Rol. Abr. 84. Hawk. P. C. 200. 6 Mod. 11, 178, 213. Salk. 382. pl. 31.

ALL common Nuſances to the Public are regularly puniſhable by Fine and Impriſonment, at the Diſcretion of the Judges; but in ſome Caſes, Corporal Puniſhment may be inflicted; as in the Caſe of a common Scold, who is ſaid to be properly puniſhable, by being put into the Ducking-Stool; alſo the Offence of keeping a Bawdy-houſe is puniſhable, not only with Fine and Impriſonment, but alſo with ſuch infamous Puniſhment, as to the Court in Diſcretion ſhall ſeem proper.

2 Rol. Abr. 84. Hawk. P. C. 200.

Alſo a Perſon convicted of a Nuſance done to the King's Highway, may be commanded by the Judgment to remove the Nuſance at his own Coſts; and *per Hawkins*, it is but reaſonable that thoſe, who are convicted of any other common Nuſance, ſhould alſo have the like Judgment.

Co. Lit. 56. a. Rol. Abr. 88, 110. 2 Rol. Abr. 140, 141. Moor 180. 4 Co. 18. 9 Co. 113.

But it is clearly agreed, that common Nuſances againſt the Public are only puniſhable by a public Proſecution; and that no Action on the Caſe will lie at the Suit of the Party injured; as this would create a Multiplicity of Actions, one Man being as well intitled to bring an Action as another; and therefore, in thoſe Caſes, the Remedy muſt be by Indictment at the Suit of the King.

2 Brownl. 147. Vaugh. 341. Cro. Eliz. 664. 3 Mod. 294. Carth. 191. Salk. 15. pl. 7. 2 Stra. 909, 1004. Ld. Raym. 486. Comyns 58. pl. 38.

Co. Lit. 56. Cro. Jac. 446. Keb. 847.

But if by ſuch a Nuſance the Party ſuffer a (b) particular Damage, as if by ſtopping up a Highway with Logs, &c. his Horſe throws him, by which he is wounded or hurt, an Action lies.

2 Jon. 157. Salk. 15. pl. 15. (b) But if a Highway is ſtopped, that a Man is delayed in his Journey a little while, and by Reaſon thereof he is damnified, or ſome important Affair neglected; this is not ſuch a ſpecial Damage, for which an Action on the Caſe will lie; but a particular Damage, to maintain this Action, ought to be direct, and not conſequential; as for Inſtance, the Loſs of his Horſe, or ſome Corporal Hurt, in falling into a Trench in the Highway, &c. Carth. 194.

Salk. 10. pl. 3. Carth. 455. Ld. Raym. 370.

Alſo an Action lies for continuing a Nuſance; as where, for erecting a Nuſance 2 *die Febr'*, the Defendant pleaded a prior Action, brought for erecting a Nuſance 20 *die Martii*, and a Recovery thereupon, and averred theſe to be the ſame Nuſance and Erection; and on Demurrer the Plaintiff had Judgment; for though he cannot have a new Action for the ſame Erection, yet he may for the Continuing the ſame Nuſance.

*OBLIGATIONS. *Page 689

(A) Of the Nature of the Security, called a Bond or Obligation. 690.
(B) What Words create such a Security. 692.
(C) Of the Ceremonies requisite to a Bond or Obligation; and herein of Signing, Sealing, Date and Delivery. 693.
(D) Of the Parties to the Obligation. 695.

And herein,

1. Who may bind themselves, or be Obligors. 695.
2. Who may take such Security, or be Obligees. 695.
3. Who shall be said the Obligee; and herein of making several Obligees. 696.
4. Where there are several Co-obligors or Sureties; and herein, where they shall be said to be jointly and severally bound, and of the Obligee's Remedy against all or any of them. 697.
5. Of their Remedies against each other. 701.

(E) Of the Condition and Consideration of the Obligation. 701.

And herein,

1. Of possible and impossible Conditions. 701.
2. Of repugnant Conditions. 702.
3. Of lawful and unlawful Conditions. 703.

(F) Of the Breach and Performance of the Condition of an Obligation. 706.

And herein,

1. What shall be a Breach or sufficient Performance. 706.
2. Where there are disjunctive Conditions, how to be performed. 708.
3. By and to whom to be performed. 708.
4. At what Time to be performed. 710.
5. At what Place to be performed. 712.
6. What the Obligee must do in order to intitle him to take Advantage of the Breach; and herein of Notice, Request, &c. 713.
7. How the Breach must be assigned and set forth, and the Manner of pleading Performance, and in Bar. 714.

(A) Of

Page 690 (A) Of the Nature of the Security, called a Bond or Obligation.

Co. Lit. 172. a. OBLIGATION, ſays my Lord *Coke*, is a Word in its own Nature of a large Extent, but is uſually taken in the Comon Law for a Bond, containing a Penalty with Condition for Payment of Money, or to do or ſuffer ſome Act or Thing, &c. and a Bill ſays he, is moſt commonly taken for a ſingle Bond without Condition.

This Security is alſo called a Specialty; the Debt being therein particularly ſpecified in (*a*) Writing, and the Party's Seal, acknowledging the Debt or Duty, and confirming the Contract; rendering it a Security of a (*b*) higher Nature than thoſe entered into without the Solemnity of a Seal; and therefore Bonds or Specialties ſhall be (*c*) preferred to ſimple Contracts, in a Courſe of Adminiſtration; and from its being a higher Security, it is held, that for a Breach or Non-performance an Action of Debt (*d*) only will lie.

(*a*) An Obligation may be made upon Parchment or Paper, and in looſe Parchment, or Paper, or in a Piece of Parchment or Paper ſewed in a Book, and either Way, it is good; but if it be made on a Talley, Piece of Wood, or any other Thing but Paper or Parchment, (although it be ſealed and delivered,) it is void. Bro. *Oblig.* 30, 67.——Becauſe theſe are leaſt ſubject to Alteration or Corruption. Co. Lit. 229. a.——May be in a Letter, or other Writing, ſo it be ſealed. Comb. 87. 3 Mod. 154. 8 Mod. 242. 10 Mod. 47. Comyns 139. pl. 93. 2 Stra. 1146.—But *note*, That by the late Statutes it muſt be on ſtamped Paper or Parchment. (*b*) Therefore if a Man accepts an Obligation for a Debt due by ſimple Contract, this extinguiſhes the ſimple Contract Debt. Rol. Abr. 604. 2 Leon. 110.—So if a Man accepts a Bond for a Legacy, he cannot after ſue for his Legacy in the Spiritual Court; for by the Deed the Legacy is extinct, and it is become a meer Duty at Common Law. Yelv. 38.——Alſo from its being of a higher Nature than a ſimple Contract, the Defendant cannot plead *Nil debit*, but muſt plead *Solvit ad diem*, or *Non eſt factum*; for the Seal of the Party continuing, it muſt be diſſolved *eo Ligamine quo Ligatur*. 2 Inſt. 651. Hard. 218. (*c*) For this *vide* Head of *Executors and Adminiſtrators*. (*d*) And therefore it is held, that if the Obligor in a Bond, without any new Conſideration, as Forbearance, &c. promiſes to pay the Money, an *Aſſumpſit* will not lie, but the Obligee muſt ſtill purſue his Remedy by Action of Debt. Rol. Abr. 8. Hut. 34. Cro. Eliz. 240.

Cro. Eliz. 773. Salk. 141. 3 Lev. 348. 6 Mod. 221. 2 Ld. Raym. 1046. A Bond or Obligation is a Debt or Duty which adheres to the Obligor or Debtor, let it be contracted where it will, and let the Debtor fly to what Place he pleaſes; and being chargeable every where, it need not be dated from any particular Place; and therefore uſually begins with *Noverint univerſi*; but yet the Plaintiff in his Declaration muſt lay a Place where it was made, that it may receive Trial, if it be denied.

See 2 Ld. Raym. 1212, 1214. 10 Mod. 255. 11 Mod. 51. pl. 21. Stra. 614, 646. 2 Stra. 775. 2 Ld. Raym. 1504. Barnard. K. B. 16.

Co. Lit. 232. A Bond is (*e*) a *Choſe in Action*, which cannot be aſſigned over, ſo as to enable the Aſſignee to ſue in his (*f*) own Name; yet he has by the Aſſignment ſuch a Title to the Paper and Wax, that he may keep or cancel it.

(*e*) That being given to a Feme Sole, who afterwards marries, and the Huſband dies, it ſhall ſurvive to her, being a *Choſe in Action*, which the Huſband might have reduced into Poſſeſſion.—So if the Wife, who is the Obligee, dies, her Huſband is no otherwiſe intitled to it than as Adminiſtrator to his Wife. Noy. 149. Style 205. for this *vide* Tit. *Baron and Feme*. (*f*) And by the modern Practice, he may ſue for it in the Name of the Obligee, as his Attorney; but *quære*, whether this can be done without an expreſs Authority.

2 Vern. 595. Abr. Eq. 44. there muſt be a Conſideration paid. 3 Chan. Rep. 90. Alſo in Equity a Bond is aſſignable for a valuable (*g*) Conſideration paid, and the Aſſignee alone becomes intitled to the Money; ſo that if the Obligor, after Notice of the Aſſignment, pays the Money to the Obligee, he will be compelled to pay it over again.

(*g*) 2 Vern. 540. But Payment to the Obligee, without Notice of the Aſſignment, is good. Chan. Ca. 232.

The

The Aſſignee muſt take it, ſubject to the ſame Equity that it was in the Hands of the Obligee; as if, on a Marriage-Treaty, the intended Huſband * enters into a Marriage Brokage Bond, which is afterwards aſſigned to Creditors, yet it ſtill remains liable to the ſame Equity, and is not to be carried into Execution againſt the Obligor. 2 Vern. 428, 692, 764. *Page 691

Bonds are to be conſidered as Securities for the Peformance of Contracts, and are uſually entered into with (*a*) Penalties, which are to be conſidered as (*b*) Compenſations for the Breach of the Contract; as that a Man ſhall pay 200 *l.* if he omits to pay 100 *l.* within ſuch a Time, that he ſhall pay ſo much if he does not perform ſuch and ſuch Covenants, do or omit ſuch and ſuch Acts; and in thoſe he may *cedere ſuo Jure*, provided the Thing be not unlawful in itſelf, or injurious to the Public, *&c.* Yelv. 192. 2 Mod. 201. Sand. 66. (*a*) That the Reſervation of a greater Sum than is allowed by the Statute for Intereſt, for the Non-payment of the Principal at the End of the Year, is not uſurious within the Statute, becauſe it is in the Power of the Borrower to avoid the Payment of the Money ſo reſerved, by paying the Principal at the Day appointed. 5 Co. 69. Cro. Jac. 509. (*b*) A Contract or Covenant to give Bond for the Payment of a certain Sum of Money, without ſhewing of what Sum the Obligation ſhall be, is good, and ſhall be intended of double the Sum. 5 Co. 77. b. 78. a. Lev. 88.—So where there was an Agreement to enter into certain Covenants, and to enter into a Bond for the Performance of the Covenants; and upon an Action, Breach was laid that he did not enter into Bond, *&c.* and a Verdict for the Plaintiff, and in Arreſt of Judgment it was moved, that this Part of the Agreement was uncertain and void, becauſe it was not expreſſed of what Sum the Bond ſhould be, and here was no Certainty to guide it, as in the above Caſe; but *per Windham* Juſtice, the Sum in the Bond muſt be to the Value of the Agreement; *& per Cur.* you ſhould have entered into Bond, though the Sum were never ſo ſmall, and why did you not tender ſuch a one? Sid. 270. Keb. 776.

If a Man enters into a Bond of ſuch a Sum, on Condition to be void on Payment of a leſſer Sum; or if a Man bind himſelf in the Penalty of 100 *l.* that he will pay 50 *l.* by ſuch a Day, after the Day of Payment is paſt, the Penalty or Sum of 100 *l.* is the legal Debt; and for ſo much it hath been (*c*) reſolved, that an Executor of an Obligor of ſuch forfeited Bond, may cover the Aſſets of his Teſtator. Cro. Car. 490. Vent. 354. 3 Lev. 368. (*c*) Hil. 9 Geo. 2. in *B. R.* *The Bank of England* ver. *Morris.* 2 Stra. 1028. 2 Barnard. K. B. 183. Caſ. *Temp. King* C. and Lord *Raym.* and *Hardw.* C. J. 165. Andr. 110 ‡.

‡ But it may be ſhewn in Pleading, that only ſo much is due for Principal and Intereſt, which the Obligee is ready to receive; and that the Bond is kept on foot by Fraud, *&c.*

And as the Penalty, by the Bond's being forfeited, becomes the legal Debt; ſo there was no Remedy againſt ſuch Penalty, but by Application to a Court of Equity, which relieves in thoſe Caſes, on Payment of Principal, Intereſt and Coſts; alſo though at Law there can be no Remedy beyond the Penalty, becauſe in that the Obligee ſeems to have taken up his Security; yet, as it is on the Foundation of doing equal Juſtice to both Parties that Equity proceeds, it will, on any Application for a Favour from the Obligor, compel him to pay the Principal, Intereſt and Coſts, though exceeding the Penalty. Show. Par. Ca. 15. Abr. Eq. 91, 92. Salk. 154. Vern. 342, 350. 2 Vern. 509.

And this Rule of compelling the Party to do Equity who ſeeks Equity, ſeems to be the Reaſon why an Obligee ſhall have Intereſt after he has entered up Judgment; for though in Strictneſs it may be accounted his own Fault why he did not take out Execution, and therefore not intitled to Intereſt; yet, as by the Judgment he is intitled to the Penalty, it does not ſeem reaſonable that he ſhould be deprived of it, but upon paying him Principal and the Intereſt, which incurred as well before as after the entring up of the Judgment. Abr. Eq. 92, 288.

Alſo by the 4 & 5 *Ann. cap.* 16. it is enacted, "That where any "Action of Debt ſhall be brought on any ſingle Bill, or where an Action "of Debt, or *Scire facias*, ſhall be brought upon any Judgment, if the "Defendant hath paid the Money due on ſuch Bill or Judgment, ſuch

"Payment

" Payment ſhall and may be pleaded in Bar of ſuch Action or Suit; and " where an Action of Debt is brought upon any Bond, which hath a Con- " dition or Defeazance to make void the ſame, upon Payment of a leſſer " Sum at a Day or Place certain; if the Obligor, his Heirs, Executors or " Adminiſtrators have, before the Action brought, paid to the Obligee, " his Executors or Adminiſtrators, the Principal and Intereſt due by the " Defeazance or Condition of ſuch Bond, though ſuch Payment was not
*Page 692 " * ſtrictly made according to the Condition or Defeazance; yet it ſhall and " may be pleaded in Bar of ſuch Action, and ſhall be as effectual a Bar " thereof, as if the Money had been paid at the Day and Place according " to the Condition or Defeazance, and had been ſo pleaded.

And it is further enacted by the ſaid Statute, *Sect.* 14. " That if at any " Time pending an Action upon any ſuch Bond with a Penalty, the De- " fendant ſhall bring into Court, where the Action is (*a*) depending, all " principal Money and Intereſt due on ſuch Bond, and alſo all ſuch Coſts as " have been expended in any Suit or Suits in Law or Equity upon ſuch " Bond; the ſaid Money ſo brought in, ſhall be deemed and taken to be " in full Satisfaction and Diſcharge of the ſaid Bond; and the Court ſhall " and may give Judgment to diſcharge every ſuch Defendant of and from " the ſame accordingly. †

(*a*) One cannot move to ſtay Proceedings upon a Bond upon Payment of Principal, Intereſt and Coſts, till Bail be put in; for till then the Parties are not in Court. 6 Mod. 11. —— † Stealing a Bond made Felony, by 2 Geo. 2. c. 25. ſ. 3.

(B) What Words create ſuch a Security.

Yelv. 193. 2 Rol. Abr. 146-7.

HEREIN we muſt obſerve, that the Law does not ſeem to require any particular ſet Form of Words, as eſſentially neceſſary to create an Obligation, but that any Words, which declare the Intention of the Party, and denote his being bound, will be ſufficient; becauſe ſuch Obligation is only in Nature of a Contract, or a Security for the Performance of a Contract which ought to be conſtrued according to the Intention of the Parties.

Dyer 22. *b.*

Therefore if a Man uſeth this Form of Words, *viz. This Bill witneſſeth, that I* A. B. *have borrowed* 10 l. *of* C. D. or this Form, *Memorandum quod talis debet to* B. *ten Pounds*; or thus, *Memorandum all Things reckoned and accounted between* A. *and* B. A. *cognovit ſe debere to* B. *ten Pounds*; all theſe Forms are good, and ſhall as effectually bind the Party and his Executors, as if the moſt formal Words were made uſe of, provided the Writing be ſealed and delivered.

not his Heirs as they are not mentioned in the Bond

Shep. T. 369 Leon, 25.

So a Writing in this Form, *Memorandum I* A. B. *have agreed to pay* J. S. 20 l. though this be in the preterperfect Tenſe, yet if it hath all other Ceremonies eſſential, it ſhall amount to an Obligation.

Cro. Eliz. 729.

So in this Form, *This Bill witneſſeth, that I* R. S. *have received of* T. B. 40 l. *to the Uſe of* R. *and* J. S. *Children of*, &c. *equally to be divided between them; which Sum I confeſs to have received to the Uſes aforeſaid, and the ſame to repay at ſuch Time as ſhall be thought beſt for the Profits of the ſaid* R. *and* J. S. and this was reſolved to be a good Obligation,

Cro. Eliz. 561. & *vide* Cro. Eliz. 758.

So a Writing in this Form, *Memorandum that I bind myſelf to* J. M. *to pay him as much Money as my Brother owes him*: and in the End of the Bill is wrote the Sum of 40 *l.* which is ſaid to be the Debt due from the Brother; this is a good Obligation.

Cro. Eliz. 886.

Memorandum, that I owe and promiſe to pay to A. 10 l. *at any Time after the Feaſt*, &c. *when thereto required, for the Payment whereof I bind myſelf to* J. H. *by theſe Preſents*; this is a good Bill to *A.* by the firſt Words, and the latter being Surpluſage are void, and to be rejected.

It

It is held in *Moor* and *Cro. Eliz.* that a Bill in this Form, *Be it known, &c. that I owe to* B. 14 l. *to be paid at the Feaſts*, &c. *together with* 6 l. *which I owe him upon Bills and Reckonings ſubſcribed with my Hand*, amounts only to a Bill for 14 l. but (*b*) *Dyer* holds it a good Obligation for the whole Debt of 20 *l.* Moor 537. *Parry* ver. *Woodward* adjudged. And that the Words together with 6*l.* which I owe by Bills, *&c.* are only an Explanation of the preceding Debt. Cro. Eliz. 537. S. C. adjudged, and that which comes after the *Solvendum* is void, as that which comes after an *Habendum*. (*b*) Dyer 22. b. in Margin.

* In Debt for 20 *l.* the Plaintiff declared, that the Defendant *conceſſit ſe teneri per Scriptum ſuum Obligatorium*, *&c.* and the Words of the Deed were, *I do acknowledge to* Edward Watſon *by me Twenty Pounds upon Demand, for doing the Work in my Garden*; and upon Demurrer to the Declaration, it was adjudged a good Bond. *Page 693 Vent. 238. *Watſon* ver. *Sneed.*

Theſe Words, *I am content to give to* W. 10 l. *at* Mich. *and* 10 l. *at our* Lady-day, amount to an Obligation, and an expreſs Engagement to pay, *&c.* 3 Leon. 119. 2 Rol. Abr. 146. S. P.

It hath been held in Variety of Caſes, that a ſeeming *Latin* Word, not properly expreſſing the Quantity of the Sum in which the Party intended to be bound, ſhould, notwithſtanding, be ſo conſtrued, as to anſwer the Intention of the Parties, rather than that the Obligation ſhould be void; as *Quinquageſſimis Libris*, for *Quinquaginta Libris*, has been held good; ſo *Trigintate* for *Triginta*, *Sexingenta* for *Sexaginta*; and it is ſaid in general, that in moſt Caſes where the *Gent* or *Gint*, or the *Sex* or *Sept* are right, the Obligation has been held well. But for this *vide* 10 Co. 133. a. Yelv. 96, 194, 206. Hob. 119. Cro. Jac. 290, 309, 355, 603, 607.

Cro. Car. 147. Brownl. 62. 2 Rol. Abr. 146. 5 Mod. 154. 2 Jon. 58. Comb. 60, 86, 187, 477. Ld. Raym. 335. 5 Mod. 287. 2 Salk. 462. pl. 2.

A Bond *in viginti nobilis* has been held a good Bond for 6 *l.* 8 *s.* for though *nobilis* be not a *Latin* Word, yet it being a Term ſignifying 6 *s.* and 8 *d.* it may properly be made uſe of. Cro. Jac. 203. 2 Rol. Abr. 146. *Burchin* ver *Vaughan.*

Debt brought upon a Bond for 60 *l.* the Bond was in *Italian*, and the Sum therein expreſſed was in theſe Words, *viz. in Ceſſanti Libris*, and adjudged to be good. Cro. Jac. 208. *Parker* ver. *Rennaday.*

In Debt upon a Bill Obligatory, demanding thirty-two Pounds four Shilling and ſeven Pence; the Defendant demanded Oyer of the Bill, and it was threty-two Ponds four Shillings and ſeven Pence, ſo threty for thirty, and Ponds for Pounds; and on Demurrer for this Cauſe, it was adjudged for the Plaintiff. Cro. Jac. 607. *Hulbert* ver. *Lang.*

So a Bill, in which the Party bound himſelf in the Sum of *Sewtene Pounds*, has been held a good Obligation for 17 *l.* in order to anſwer the Intention of the Parties. 10 Co. 133. a. in *Oſborn's* Caſe. 2 Rol. Abr. 147. S. P. cited.

(C) Of the Ceremonies requiſite to a Bond or Obligation; and herein of Signing, Sealing, Date and Delivery.

IT is ſaid, that there are only three Things eſſentially neceſſary to the making a good Obligation, *viz.* Writing in Paper or Parchment, Sealing 2 Co. 5. a. *Goddard's* Caſe.

Noy 21, 85 Moor 28. Styl. 97. (a) 2 Salk. 462. pl. 2. Ld. Raym. 335. 5 Mod. 281. *vide* Tit. *Miſnomer and Addition.*

ing and Delivery; but it hath been (a) adjudged not to be neceſſary, that the Obligor ſhould ſign or ſubſcribe his Name; and that therefore if in the Obligation the Obligor be named *Erlin*, and he ſigns his Name *Erlwin*, that this Variation is not material, becauſe Subſcribing is no eſſential Part of the Deed, Sealing being ſufficient.

Dyer 19. a. Cro. Eliz. 571, 737. Cro. Jac. 420. 2 Co: 5. Vent. 70. 3 Lev. 348. Ld. Raym. 330, 307, 1043.

And though the Seal be neceſſary, and the uſual Way of declaring on a Bond is, that the Defendant *per Scriptum ſuum Obligatorium Sigillo ſuo Sigillatum* acknowledged, &c. yet if the Word *Sigillat'* be wanting, it is cured by Verdict and pleading over; for when he ſaith *per Scriptum ſuum Obligatorium*, &c. all neceſſary Circumſtances ſhall be intended; and if it were not ſealed, it could not be his Deed or Obligation.

*Page 694 2 Co. 5. a. (b) So an Obligation is good, though it want *in cujus Rei Teſtimonium.* Moor 3. Leon. 25. 2 Co. 5. a.

* Alſo though Sealing and Delivery be eſſential to an Obligation, yet there is no Occaſion in the Bond to mention that it was (b) ſealed and delivered; becauſe, as my Lord *Coke* ſays, theſe are Things which are done afterwards.

2 Co. 5. *Goddard's* Caſe. Noy 21, 85, 86. Hob. 249. Styl. 97. Cro. Jac. 136, 264. Yelv. 193. Salk. 76. pl. 18. 2 Ld. Raym. 1076. 2 Salk. 498. pl. 3. 6 Mod. 244. (c) A Difference has been taken between *Gerens Dat'*, and *Cujus Dat'*, that the firſt refers to the expreſs Date, but that *Cujus Dat'* is always intended of the real Date, which is the Delivery. 5 Mod. 285. Comb. 477. 2 Salk. 463. Ld. Raym. 335.

An Obligation is good though it wants a Date, or hath a falſe or impoſſible Date; for the Date, as hath been obſerved, is not of the Subſtance of the Deed; but herein we muſt take Notice, that the Day of the Delivery of a Deed or Obligation is the Day of the Date, though there is no Day ſet forth; and if a Deed bear Date one Day, and be delivered at another, it was really dated when delivered, though the Clauſe of (c) *Gerens Dat'* be otherwiſe.

Cro. Eliz. 773. 3 Lev. 348. Salk. 141. pl. 7.

If a Man declare on a Bond, bearing Date ſuch a Day, but does not ſay when delivered, this is good; for every Deed is ſuppoſed to be delivered and made on the Day it bears Date; and if the Plaintiff declare on a Date, he cannot afterwards reply, that it was *Primo deliberat'* at another Day; for this would be a Departure.

Brownl. 104. Lev. 196.

But if a Bond bear Date ſuch a Day, but was really delivered at a Day after, the Obligee may declare on a Bond of ſuch a Date, but *Primo deliberat'* at a Day after; and if the Obligee declare on a Bond of ſuch a Date generally, the Obligor may plead it was *Primo deliberat'* on ſuch a Day after; but then he muſt traverſe that it was delivered on the Day of the Date.

2 Co. 4, 6. 3 Keb. 332.

If the Bond was delivered before the Date, on Iſſue, *Non eſt factum*, joined on ſuch a Deed, the Jury are not eſtopped to find the Truth, *viz.* that it was delivered before the Date, and it is a good Deed from the Delivery.

Vent. 9, 110. Salk. 274. pl. 1. 2 Ld. Raym. 803.

In Debt on an Obligation, the Defendant pleads that he delivered it as an Eſcrow, & *hoc Paratus eſt verificare*; this is ill, for he ought to ſhow to whom he delivered it, and conclude *iſſint nient ſon fait*; & *de hoc ponit ſe*, &c.

Hob. 246. Vent. 9.

So pleading that he delivered it to the Obligee as an Eſcrow, to be his Deed on certain Conditions, is ill; for by the Delivery of it to the Obligee, it is become his Deed abſolutely.

Co. Lit. 36. a. Cro. Eliz. 835.

A Bond or Deed may be delivered by Words, without any Act of Delivery; as where the Obligor ſays to the Obligee, go and take the ſaid Writing, or take it as my Deed, &c. ſo an actual Tradition, without ſpeaking any Words, is ſufficient; otherwiſe, a Man that is mute could not deliver a Deed;

Deed; but (*a*) where on an Iſſue of *non eſt factum*, the Jury found that the Defendant ſigned and ſealed the Obligation, and laid it on a Table, and that the Plaintiff came and took it up, this was held not to be the Defendant's Deed, without other (*b*) Circumſtances found by the Jury.

(*a*) Leon. 193. Cro. Eliz. 122.

(*b*) On an Iſſue *non eſt factum*, the Evidence was, that the Obligation was written in a Book, and that in the ſame Leaf the Defendant put his Hand and Seal thereto; and this was held to be ſufficient Evidence for the Jury to find it his Deed, which they having accordingly done, it was held good without Queſtion. Cro. Eliz. 613. *Fox* ver. *Wright*.

If an Obligation be delivered to another to the Uſe of the Obligee, and the ſame is tendered, and he refuſes, the Delivery has loſt its Force. 5 Co. 119 b.

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* (D) Of the Parties to the Obligation: And herein,

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1. Who may bind themſelves, or be Obligors.

ALL Perſons who are enabled to contract, and whom the Law ſuppoſes to have ſufficient Freedom and Underſtanding for that Purpoſe, may bind themſelves in Bonds and Obligations. 5 Co. 119. 4 Co. 124. Rol. Abr. 340.

But if a Perſon is illegally reſtrained of his Liberty, by being confined in a common Gaol or elſewhere, and during ſuch Reſtraint, enters into a Bond to the Perſon who cauſes the Reſtraint, the ſame may be avoided for Dureſs of Impriſonment. Co. Lit. 253. 2 Inſt. 482. *Vide* Tit. *Dureſs*.

So in reſpect of that Power and Authority which a Huſband has over his Wife, the Bond of a Feme Covert is *ipſo facto* void, and ſhall neither bind her nor her Huſband. *Vide* Tit. *Baron and Feme*.

So though an Infant ſhall be liable for his Neceſſaries, ſuch as Meat, Drink, Cloaths, Phyſick, Schooling, &c. yet if he bind himſelf in an Obligation, with a (*c*) Penalty for Payment of any of theſe, the Obligation is void. *Doct. & Stud.* 113. Co. Lit. 172. Cro. Jac. 494. 560. Sid. 112.

(*c*) For this Incapacity of an Infant ariſes from his being incapable of contracting for any Thing but for his Benefit; but it can never be for his Benefit to enter into a Penalty. Cro. Eliz. 920. *Vide* Head of *Infancy and Age*.

Alſo though a Perſon *Non compos mentis* ſhall not be allowed to avoid his Bond, by Reaſon of Inſanity and Diſtraction, becauſe no Man can be allowed to ſtultify himſelf, becauſe of the ill Conſequences that might attend counterfeit Madneſs; yet may a Privy in Blood, as the Heir and Privies in Repreſentation, as the Executor and Adminiſtrator, avoid ſuch Bonds; alſo if a Lunatick after Office found enters into a Bond, it is merely void. 4 Co. 124. *Beverly's* Caſe. *Vide* Head of *Ideots and Lunaticks*.

But if an Infant, Feme Covert, Monk, &c. who are diſabled by Law to contract and to bind themſelves in Bonds, enter together with a Stranger, who is under none of theſe Diſabilities, into an Obligation, it ſhall bind the Stranger, though it be void as to the Infant, &c. Rol. Rep. 41.

If a Servant makes a Bill in this Form, *Memorandum, that I have received of* Ed. Talbot, *to the Uſe of my Maſter Serjeant* Gaudy, *the Sum of* 40 *l. to be paid at* Michaelmas *following*, and thereto ſet his Seal, this is a good Obligation to bind himſelf; for though in the Beginning of the Deed the Receipt is ſaid to be to the Uſe of his Maſter, yet the Repayment is general, and muſt neceſſarily bind him who ſealed; and the rather, becauſe otherwiſe the Obligee would loſe his Debt, he having no Remedy againſt Serjeant *Gaudy*. Yelv. 137. *Talbot* ver. *Godbolt*.

2. Who

2. Who may take ſuch Security or be Obligees.

5 Co. 119. b. Co. Lit. 3. a. Infants, Ideots, as alſo a Feme Covert may be Obligees; and as to this the Huſband is ſuppoſed to aſſent, being for his Advantage; but if he diſagrees, the Obligation has loſt its Force; ſo that after the Obligor may plead *non eſt factum*; but if he neither agrees nor diſagrees, the Bond is good, for his Conduct ſhall be eſteemed a tacit Conſent, ſince it is a Turn to his Advantage.

But for this *vide* Tit. *Baron and Feme*, Letter (E). † But Bonds for ſecuring to intended Wives, certain Proviſions, after the Deaths of the intended Huſbands, where the Marriages have taken Effect, have been eſtabliſhed in a Court of Equity, after the Deaths of the Huſbands. But a Feme Covert can neither be Obligor nor Obligee to her Huſband, nor *vice verſa*, being but one Perſon in Law; alſo by the better Opinion, a Bond entered into, to a Feme Sole, by the Perſon whom ſhe afterwards marries, is, by the Marriage, at Law extinguiſhed †.

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Co. Lit. 129. b. Moor 431. Cro. Eliz. 142, 683. Cro. Car. 9. Salk. 46. pl. 1. Ld. Raym. 282. *Vide* Head of *Alien*. * An Alien may be an Obligee; for ſince he is allowed to trade and traffick with us, it is but reaſonable to give him all that Security which is neceſſary in his Contracts, and which will the better enable him to carry on his Commerce and Dealings amongſt us.

Cro. Eliz. 464. Dyer 48. a. Co. Lit. 9. a. 46. b. Hob. 64. Rol. Abr. 515. Sole Corporations, ſuch as Biſhops, Prebends, Parſons, Vicars, *&c.* cannot be Obligees, and therefore a Bond made to any of theſe ſhall enure to them in their natural Capacities; for no ſole Body Politick can take a Chattel in Succeſſion, unleſs it be by (*c*) Cuſtom; but a Corporation Aggregate may take any Chattel, as Bonds, Leaſes, *&c.* in its Political Capacity, which ſhall go in Succeſſion, becauſe it is always in being.

(*c*) As the Chamberlain of *London*, whoſe Succeſſor, by Cuſtom, may have Execution of a Bond or Recognizance acknowledged to his Predeceſſor for Orphanage Money. 4 Co. 65. Cro. Eliz. 464, 682.

3. Who ſhall be ſaid the Obligee; and therein of making ſeveral Obligees.

2 Rol. Abr. 148. *Franklin* v. *Turner*. If *A.* by his Bill obligatory, acknowledges himſelf to be indebted to *B.* in the Sum of 10*l.* to be paid at a Day to come, and binds himſelf and his Heirs in the ſame Bill in 20*l.* but does not mention to whom he is bound, yet is the Obligation good, and he ſhall be intended to be bound to *B.* to whom he acknowledged before the 10*l.* to be due.

Dyer 167. a. *Taw*'s Caſe. N. Bendl. 75. Co. Ent. 145. Rol. Abr. 148. and Salk. 301. S. C. cited. If *A.* enters into an Obligation to *B.* which he delivers to *C.* to the Uſe of *B.* though this immediately, upon the Execution and Delivery to *C.* becomes the Deed of *A.* yet, if after it is preſented to *B.* he (as he may) diſagrees to it *in pais*, by ſuch Refuſal the Obligation (*d*) loſes its Force.

(*d*) In 3 Co. 26. b. where my Lord *Coke* cites this Caſe, he ſays, that peradventure in an Action brought on the Bond, *A.* cannot plead *non eſt factum*, becauſe that it was once his Deed.—But in 5 Co. 119. b. he ſays, that in ſuch Caſe the Obligor may plead *non eſt factum*, in regard the Obligation, by the Refuſal of the Obligee, loſes its Force.

Dyer 350. a. pl. 20. Hob. 172. 2 Brownl. 207. Yelv. 177. Though there may be ſeveral Obligees, yet a Perſon cannot be (*e*) bound to ſeveral Perſons ſeverally; and therefore an Obligation of 200*l.* to two, *Solvend'* the one Hundred Pounds to the one, and the other to the other, is a void *Solvend'*.

(*e*) But a Man may covenant with two ſeverally, for that ſounds only in Damages. March 103.

A Bond

A Bond was worded in the Words following, *Be it known that I* A. *do acknowledge myſelf to owe and be indebted to* B. *and* C. *in the Sum of* 91 l. 12 s. 8 d. *for which Payment to be made I bind myſelf to* B. *in* 100 l. and whether *B.* alone ſhould bring the Action for the 100 *l.* or both ſhould join in an Action for the 91 *l.* 12 *s.* 8 *d. dubitatur & adjurnatur.* Cro. Jac. 251. *Foxall* ver. *Sands.*

If an Obligation be made to three to pay Money to one of them, they muſt all join in Suit, for they are but as one Obligee; and if he to whom the Money is to be paid dies, the others muſt ſue, although they have no Intereſt in the Sum contained in the Condition. Yelv. 177.

So if an Obligation be made to three, and two bring their Action, they ought to ſhew the third is dead. Sid. 238, 420. Vent. 34.

If *A.* bind himſelf in a Sum to *B. Solvendum* to *C.* who is a Stranger, a Payment to *C.* is a Payment to *B.* and in an Action upon it the Count muſt be upon a Bond *Solvend'* to *B.* Sid. 295. 2 Keb. 81.

* In Debt the Declaration was, that the Defendant became bound in a Bond of——for the Payment of—— to him, his Attorney or Aſſigns, and on Oyer of the Bond it appeared, that the *Solvendum* was to the Plaintiff's Attorney or Aſſigns, without Mention of himſelf; and on Demurrer for this Variance it was held good; and that the Declaration muſt not be according to the Letter of the Obligation, but according to the Operation of the Law thereupon. * Page 697. 6 Mod. 228. *Robert* ver. *Harnage.* Ld. Raym. 1043. 2 Salk. 659. pl. 5.

So if *A.* make a Bond to *B. Solvendum* to ſuch Perſon as he ſhall appoint; if *B.* does appoint one, Payment to him is a Payment to *B.* and if *B.* appoint none, it ſhall be paid to *B.* himſelf. 6 Mod. 228.

4. Where there are ſeveral Co-obligors or Sureties; and herein, where they ſhall be ſaid to be jointly and ſeverally bound, and of the Obligee's Remedy againſt all or any of them.

It is clearly agreed, that two or more may bind themſelves jointly in an Obligation, or they may bind themſelves jointly and ſeverally; in which laſt Caſe the Obligee may ſue them all jointly, or he may ſue any one of them, at his Election; but if they are jointly, and not ſeverally bound, the Obligee muſt ſue them jointly; alſo, in ſuch Caſe, if one of them dies, (*a*) his Executor is totally diſcharged, and the Survivor and Survivors only chargeable. 2 Rol. Abr. 148. Dyer 19, 310. 5 Co. 19. Daliſ. 85. pl. 42. Salk. 393. pl. 2. Carth. 61.

Lutw. 696. (*a*) If two are bound jointly, and one dies, the Survivor only is liable in Equity; but it is otherwiſe if they were bound jointly and ſeverally. 2 Vern. 99.

If three enter into an Obligation, and bind themſelves in the Words following, *Obligamus nos & utrumque noſtrum per ſe pro toto & in ſolido*, theſe make the Obligation joint and ſeveral. Dyer 19. b. pl. 114.

So where two bound themſelves, *or any of them, their Heirs, Executors, or either of their Heirs*, &c. and the Obligation was ſealed and delivered by both of them jointly; this was held to be a joint and ſeveral, and not a joint Bond only; and that the Word *vel* ſhould be underſtood the ſame as *et*; and that therefore the joint Delivery and Acceptance could not make that joint only, which by the Words was joint or ſeveral, at the Election of the Obligee. Cro. Jac. 322. *Haukinſon* ver. *Sandilans.*

If two jointly and ſeverally bind themſelves in an Obligation, which they ſeverally deliver at different Times and Places, yet is the Obligation joint or ſeveral, at the Election of the Obligee. 8 H. 6. 31. 2 Rol. Abr. 149.

If three are bound in a Bond by theſe Words, *Obligamus nos & quemlibet noſtrum conjunctim*; this is a joint Obligation, and one of them alone cannot be ſue; for the Word *Conjunctim* makes the Obligation joint, which the Moor 260. pl. 407. 3 Leon. 206. *Wigmore* ver. *Wells.*

the Word *Quemlibet* cannot make ſeveral; being inſerted; for no other Purpoſe, but to expreſs more ſtrongly that they ſhould be all bound, not that they were to be ſeverally bound.

2 Rol. Abr. 149. adjudged by three Judges againſt *Rolle*, who held it to be joint and ſeveral; and of that Opinion he ſays were divers of the Judges and Serjeants, at the Table in *Serjeants Inn* in *Fleet Street*, on its being propoſed to them.

If by Indenture between three on the one Part, and two of the other, the two covenant jointly and ſeverally to perform a certain Act, and the three likewiſe covenant jointly and ſeverally with the ſaid two, that, after the Performance of the ſaid Act, they would pay the ſaid two a certain Sum of Money, *&c.* and then follow theſe Words, *viz. Pro vera & reali performatione omnium articulorum & agreamentorum prædictorum alternatim una partium prædictorum obligavit ſe hæredes, executores, adminiſtratores & aſſignatos ſuos, in & ſubter penalitatem ſexaginta librarum ſterlingorum*; an Action of Debt for the 60*l.* on this laſt Clauſe, cannot be brought againſt one of the three only, being only joint, and not joint and ſeveral, like the precedent Covenant.

*Page 698 * Although two or more may bind themſelves jointly, or jointly and ſeverally, in which Caſe the Obligee may ſue them all jointly or ſeverally, at his Election; yet, if three or more bind themſelves jointly and ſeverally, the Obligee cannot ſue two of them (*a*) only jointly.

10 H. 7. 16. Yelv. 26. Sid. 238.

(*a*) Unleſs it appear to the Court that the other Perſons are dead. Hard. 198. Cro. Eliz. 494. Sand. 291. Sid. 238, 420. Allen 21, 41. Lutw. 696. Cro. Jac. 152. Keb. 840, 936.

Co. Lit. 285. a. 5 Co. 119. *Wbelpdale's* Caſe.

Alſo, if two be bound in a Bond jointly, and one is ſued alone, though he may plead this Matter in Abatement of the Writ, yet he cannot plead *Non eſt factum*; for it is his Deed, though not his ſole Deed.

Doct. Pl. 198. Cro. Jac. 152. Vent. 34. Poph. 161. 9 Co. 110.

Vent. 76, 135. 2 Keb. 795.

And therefore in Debt againſt one, on an Obligation wherein two are jointly bound, after Imparlance and Oyer, the Defendant cannot plead that the other ſealed and delivered; for as that muſt come on the Defendant's Side, and it is too late to plead it after Imparlance, it ſhall be taken, that the other did not ſeal, *&c.* nor will the Oyer help it, for it does not appear by it, without ſpecial Averment; but of (*b*) Records Oyer is ſufficient, without Averment.

(*b*) And therefore in a *Scire facias* brought againſt three Bailees or Sureties, upon a Recognizance acknowledged by them and the Principal jointly and ſeverally; on Demurrer the Writ abated, becauſe, this being founded upon a Record, the Plaintiff ought to ſet forth the Cauſe of the Variance from the Record; as that one was dead; But if an Action be brought upon Bond in the like Caſe, there the Defendants ought to ſhew that it was made by them and others in full Life not named in the Writ; becauſe the Court ſhall not intend that the Bond was ſealed and delivered by all that are named in it; and therefore the Defendants cannot demur upon it, though it be entered *in hæc Verba*. Allen 21. *Blackwell* ver. *Aſhton*.

Saund. 291. Sid. 420. *Cabel* ver. *Vaughan*.

So in Debt againſt one, on a Bond wherein two are jointly bound, after Oyer the Defendant demurred, and the Plaintiff had Judgment; for tho' another be named in the Bond, yet it does not appear, without Averment, that he ſealed, and then the Bond is ſingle; but it ought to have been pleaded in Abatement.

9 Co. 119. a. in *Wbelpdale's* Caſe.

Alſo, if two or more be jointly bound, though regularly one of them alone cannot be ſued, yet if Proceſs be taken out againſt all, and one of them only appears, but the other ſtand out to an Outlawry, he who appeared ſhall be charged with the whole Debt.

Hob. 59. Cro. Eliz. 648. 2 Sid. 12. Mod. 2.

If two are jointly bound, and there is Judgment againſt both, Execution likewiſe muſt be taken out againſt both, and muſt be of the ſame Nature: Alſo, if two are jointly and ſeverally bound, and there is Judgment in a joint Action againſt both, the Execution muſt be joint againſt both, and of the

the ſame Nature; ſo that you cannot take out a *Capias* againſt one, and an *Elegit*, &c. againſt the other; for though the Plaintiff might have ſued them ſeverally, yet by ſuing them jointly he has made his Election, and the Execution muſt enſue the Nature of the Judgment, and though they be ſeveral Perſons, yet they make but one Debtor, when *J. S.* ſues them jointly; but if the Obligee ſues them ſeverally, he may ſever them in their Kinds of Execution; for though the Obligation be but one, yet the Originals, Suits, Pleadings, Judgments and Executions, are as different as if they were upon ſeveral Obligations. Rol. Abr. 888. 9.

But if there be a joint Judgment againſt two, and one dies, a *Scire facias* lies againſt the other alone, reciting the Death; and he cannot plead, that the Heir of him that is dead has Aſſets by Deſcent, and demand Judgment, if he ought to be charged alone; for at (*a*) Common Law, the Charge upon a Judgment being (*b*) perſonal ſurvived; and the Statute of *Weſtm.* 2. 13 *Ed.* 1. *ſtat.* 1. *cap.* 45. that gives the *Elegit*, does not take away the Remedy of the * Plaintiff at the Common Law, and therefore the Party may take out his Execution which Way he pleaſes; for the Words of the Statute are, *Sit in electione*; but if he ſhould, after the Allowance of this Writ and Revival of the Judgment, take out an *Elegit* to charge the Land, the Party may have Remedy by (*c*) Suggeſtion, or elſe by *Audita Querela*. Raym. 26. Lev. 30. Keb. 92, 123. S. C. *Edſat* ver. *Smart.* (*a*) So adjudged 1 E. 3. 13. pl. 41. * Page 699 3 E. 3. pl. 37. & *vide* 29 Aſſ pl. 37. 29 E. 3. 29.

(*b*) For the Difference between a real and perſonal Execution, and that a perſonal Execution will ſurvive, though a real will not, *vide* 3 Co. 14. Yelv. 202. Raym. 153. 2 Keb. 3, 331. 4 Mod. 315. 3 Keb. 295. Salk. 319. pl. 3. Ld. Raym. 44. Comb. 441. 5 Mod. 338. Carth. 320, 404. Show. 402. (*c*) For this *vide* F. N. B. 166. 44 E. 3. 10.

If two are bound in an Obligation jointly and ſeverally, and Judgment given againſt each in two ſeveral Actions, one *in Banco*, the other *in Banco Regis*, and after one is taken in Execution *in Banco Regis*, and after an Execution is taken *in Banco* againſt the other by *Elegit*, and Lands and Goods (*d*) delivered in Execution thereupon; he, that is in Execution by his Body *in Banco Regis*, ſhall be delivered upon an *Audita Querela*, becauſe the Execution upon an *Elegit* is a Satisfaction. Hob. 2. Cro. Jac. 318. 2 Bulſt. 97, &c. Godb. 257. Rol. Rep. 8, 9, S. C. adjudged between *Crawley* and *Lidgeat*.

(*d*) But if, after Execution by *Elegit*, the Judgment *in Banco* is reverſed, perhaps the other ſhall not have an *Audita Querela*; *per Croke contra Doddridge*. 2 Bulſt. 100.—And my Lord *Coke* ſays, that if upon an *Audita Querela* the other be once diſcharged, although afterwards the Judgment *in Banco* be reverſed, yet he ſhall not be taken in Execution again. Rol. Rep. 10. 2 Bulſt. 101.

If *A.* and *B.* are bound in an Obligation jointly and ſeverally, and Judgment given againſt each upon ſeveral Actions brought, and both taken in Execution, and after *A.* eſcapes; yet *B.* ſhall not be delivered upon an *Audita Querela*; for though the Obligee may have an Action againſt the Sheriff for the Eſcape, yet, till he is actually ſatisfied, the other ſhall not have an *Audita Querela*, nor the Obligee be compelled, whether he will or no, to take his Remedy againſt the Sheriff, who may die or be inſolvent. 5 Co. 86. Cro. Eliz. 478, 479, 555. Co. Ent. 85. *vide* Ent. 85. *vide* Tit. *Eſcape.*

If ſeveral Obligors are bound jointly and ſeverally, and the Obligee make one of them his Executor, it is (*e*) a Releaſe of the Debt, and the Executor cannot ſue the other Obligor. 8 Co. 136. Salk. 300. & *vide* Jon. 345.

(*e*) But though it be a Releaſe in Law, in regard it is the proper Act of the Obligee, yet the Debt by this is not abſolutely diſcharged, but it remains Aſſets in his Hands, to pay both Debts and Legacies. Cro. Car. 373. Yelv. 160. & *vide* Tit. *Evidence*, Letter (G).

A. and *B.* were jointly bound to *J. S.* who made the Wife of *A.* Executrix, and died; *A.* and his Wife brought Debt againſt *B.* who pleaded this Matter in Abatement: It was argued by Serjeant *Turner*, for the Defendant, that by making the Wife of one of the Obligors Executrix, the other Obligor is diſcharged. *Hob.* 10. *Fryer* ver. *Gildrige.* 21 *E.* 4. 81. *b.* *Bro. Exec.* *Hamond & Ux'* ver. *Bendiſh*, Paſch. 26 Car. 2. Rot. 712.

Exec. 118. And that it would be ſo, if they were bound jointly and ſeverally. *Plow.* 38. *a. Platt's* Caſe. *Keilw.* 63. 8 *Edw.* 4. 3. *Bro. Debt.* 156. The Reaſon is, becauſe a Debt, or perſonal Thing, once ſuſpended is gone for ever; and here the Plaintiff, one of the Obligors, is diſcharged, for he and his Wife cannot ſue himſelf; and of that the other ſhall take Advantage. *Dyer* 140. *Co. Lit.* 264. *b.* It is a Releaſe in Law, of which his Companion ſhall take Advantage, notwithſtanding the Opinion 21 *H.* 7. 37. But if it was but ſuſpended for the Time of the Executorſhip, yet it is for the Defendant, having pleaded in Abatement. 11 *H.* 7. 4. *b.* 1 *Rol. Abr.* Tit. *Extinguiſhment* 940. *Moor* 855. *pl.* 1174. 1 *Cro. Dorcheſter* ver. *Webb* 272. *Yelv.* 160. *Flud* ver. *Ramſey.* 8 *Co.* 136. *Per. Cur':* The Plea being pleaded in Abatement, it is for the Defendant; for during the Coverture and Executorſhip there is a Suſpenſion of the Debt; but it was agreed, that this Debt due by the Baron was Aſſets in his Hands, and liable to the Creditors, though it ſhould be adjudged an Extinguiſhment; for as *North* ſaid, this is a Releaſe, but it is but by Will; and therefore in Nature of a Legacy, which ſhall not be preferred to a Debt; but it was doubted, if it had been pleaded in Bar, if it ſhould be for the Defendant; and *North Ellis* and *Windham* thought not; but that, after the Death of the Baron, it might be ſued for; for the Suſpenſion is but during the Coverture, and

* Page 700 * the Baron is Executor only in Right of his Wife; but of this *Atkins* doubted; but in the principal Caſe there was Judgment for the Defendant.

8 Co. 136. a. March 128. If a Feme Sole Obligee take one of the Obligors to Huſband, this is ſaid to be a Releaſe in Law of the Debt, being her own Act.

Hob. 10. If one Obligor makes the Executor of the Obligee his Executor, and leaves Aſſets, the Debt is deemed ſatisfied; for he has Power, by Way of Retainer, to ſatisfy the Debt; and neither he nor the Adminiſtrator *de bonis non, &c.* of the Obligee can ever ſue the ſurviving Obligor.

2 Lev. 73. But if two are bound jointly and ſeverally to *A.* and the Executor of one of them makes the Obligee his Executor, yet the Obligee may ſue the other Obligor.

Co. Lit. 232. a. If two are jointly and ſeverally bound in an Obligation, and the Obligee releaſes to one of them, both are diſcharged.

2 Lev. 220. *Seaton* ver. *Henſon.* 2 Show. 28. pl. 20. S. C. adjudged *niſi.* Three were bound jointly and ſeverally in an Obligation, and an Action was brought againſt one of them, who pleads, that the Seal of one of the others was torn off, and the Obligation cancelled, and therefore void againſt all. Upon Demurrer it was adjudged, that the Obligation, by the Tearing off the Seal of one of the Obligors, became void againſt all, notwithſtanding the Obligors were (*a*) ſeverally bound.

(*a*) Where ſeveral Merchants covenant *ſeparatim*, and the Seal of one of them being torn off, it was held, that this ſhould avoid the Covenant, as to him whoſe Seal was torn off only, but not as to the others. 5 Co. 23. *Matthewſon's* Caſe. March 126. S. C. cited, and a Difference there taken between a Bond and a Covenant.

March 125. *Bayley* ver. *Garford.* 2 Show. 29. S. C. cited, So where three were bound in a Bond jointly and ſeverally, and the Seals of two were eaten by the Rats; and the Court inclined that the Bond was void againſt all.

as adjudged to have been void.

Owen 8. *Michael's* Caſe. Dyer 59. pl. 12, 13. S. C. and S. P. But where two were bound jointly and ſeverally, and it was found by ſpecial Verdict, that after Iſſue joined, and before the *Niſi prius*, the Seal of one of the Obligors was taken off the Bond; it was held, that this being after Iſſue joined, the Bond was good.

where the Jury were directed to try, whether it was his Bond at the Time of the Plea pleaded.

If

If *A.* be bound in a Bond for Payment of Money, and *B.* be bound with him, as his Surety only, and the Bond happens to be loſt; Equity will ſet up the Bond, as well againſt the (*a*) Surety as againſt the Principal, becauſe the Bond was once a legal Charge againſt both. Abr. Eq. 93. *Sheffield* ver. *Lord Caſtleton.*

(*a*) Eſpecially if the Money was lent principally upon the Surety's Credit. Chan. Ca. 77. & *vide* 2 Chan. Ca. 22. Vern. 196.

In Equity, a Bond Creditor ſhall have the Benefit of all Counter-Bonds or collateral Securities given by the Principal to the Surety; as if *A.* owes *B.* Money, and he and *C.* are bound for it, and *A.* gives *C.* a Mortgage or Bond to indemnify him, *B.* ſhall have the Benefit of it to recover his Debt. Abr. Eq. 93. *Maure* ver. *Harriſon.*

A Bond made to ſecure a juſt Debt, payable with lawful Intereſt, ſhall not be avoided by reaſon of Uſury, or any corrupt Agreement between the Obligors, to which the Obligee was no Way privy; as where *A.* being indebted to *B.* in 100*l.* agrees to give him 30*l.* for the Forbearance of that 100*l.* for a Year, and gives him a Bond of 60*l.* for Payment of the 30*l.* and for the Payment of the 100*l.* enters into a Bond of 200*l.* together with *B.* for the Payment of a true Debt of 100*l.* due from *B.* to *C.* And. 121. Moor 752. pl. 1035. Cro. Jac. 32, 33. Yelv. 47.

5. Of their Remedies againſt each other.

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If one of the Sureties pays all the Bond, yet the Obligee is not compellable by Law to aſſign the Bond to him, but the Surety's Remedy muſt be in (*b*) Chancery.

(*b*) Or perhaps he may have Remedy by Writ *De plegiis acquietandis.* Lev. 72.

And on this Foundation, that there is a Remedy in Equity, it hath been adjudged, that if *A.* together with *B.* is bound to *C.* for the proper Debt of *B.* &c. and *A.* pays the Money, and *B.* dies, and makes *D.* his Executor, and *D.* in Conſideration that *A.* will forbear to ſue him till ſuch a Time, aſſumes and promiſes to repay him; this Conſideration is good, though *D.* was liable in Equity only †. Sid. 89. Lev. 71. *Scot* and *Stevens.* Rol. Rep. 27. S. P. *per Croke.*

† Why was not *D.* liable at Law as Executor, for Money paid by Plaintiff, for the Uſe of Teſtator?—I don't ſee any Reaſon for ſaying he was not.

Alſo it is held clearly in Equity, that one Surety may compel another to contribute towards Payment of a Debt, for which they were jointly bound. Chan. Ca. 246. Chan. Rep. 34, 120, 150.

Therefore it hath been held, that if the Obligee ſue in Chancery the Executor of one Obligor to diſcover Aſſets, he muſt make all the Obligors Parties, that the Charge may be equal; but it is made a *Quære*, whether he may not ſue the Principal, and leave out them which are bound only as Sureties. 2 Vent. 348.

But it is held, that if a Judgment be had at Law againſt one Obligor, you may ſue the Executor of him alone, to diſcover Aſſets, becauſe the Bond is drowned in the Aſſets. 2 Vent. 348.

If the Principal in a Bond, being arreſted, gives Bail, and Judgment is had againſt the Bail, and the Sureties are afterwards ſued on the original Bond, and are obliged to pay the Money; the Sureties ſhall have the Judgment againſt the Bail aſſigned to them, in order to reimburſe them what they had paid, with Intereſt and Coſts; and the Sureties in the original Bond are not to be contributory, for the Bail ſtands in the Place of the Principal. 2 Vern. 608. *Parſon* ver. *Priddock.*

(E) Of the Condition and Consideration of the Obligation: And herein,

1. Of possible and impossible Conditions.

BONDS, as hath been observed, are either single, as for the Payment of a certain Sum of Money, or with a Condition annexed, that under a certain Penalty, mentioned in the Bond, the Obligor shall perform such and such Acts, pay double the Sum if he neglects to pay the principal Sum by such a Day, &c. and herein we must take Notice, as to such Conditions being possible or impossible, that if the Condition of a Bond be impossible at the Time of the making thereof; as for the Obligor to go to *Rome* the next Day, the Bond is single, being the same as if there were no Condition at all.

Co. Lit. 206. Savil 96. 2 Leon. 189. Rol. Abr. 420.

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* So if the Condition be *quod debet pluere cras*, this is a good Condition; for though the Obligor is not certain thereof, yet if he will take this upon himself and run the Hazard, he may at his Peril; for this is not impossible of itself.

Rol. Abr. 420. Rol. Abr. 420.

So, for the same Reason, if the Condition be, that the Pope shall be at *Westminster* To-morrow, this is a good Condition.

Rol. Abr. 419.

So if the Condition of an Obligation be, that the Obligor shall assign to the Obligee a Commission of Bankruptcy; this is an impossible Condition, and therefore void, and the Obligation single, for it is impossible to assign the Commission.

Savil 96. *Wood* ver. *Avery*, adjudged. 2 Leon. 189. S. C. adjudged, because tied by his own Act; but the Law never binds Men to Impossibilities.

So if the Condition of an Obligation be to sustain and maintain a House in sufficient Repairs, and so to leave it at the End of the Term; if at the Time of the Entry into the Bond, the Timber was so rotten that it was impossible to sustain and maintain it in Repairs, yet the Obligation is good.

Co. Lit. 206. a.

But if the Condition of a Bond is possible at the Time of making, but before it can be performed becomes impossible by the Act of God, of the Law, or of the Obligee, the Obligation is saved.

Salk. 170. pl. 2.

But it hath been adjudged, that if the Condition of an Obligation be, that the Obligor shall make the Obligee a Lease for Life by such a Day, or pay him 100*l.* and the Obligee die before the Day, that his Executor shall have the 100*l.* and the Ground of (*a*) *Laughter's* Case was denied by *Treby* C. J. to be universal.

(*a*) 5 Co. 21. Where it is held, that if the Condition of an Obligation consists of two Parts in the Disjunctive, both possible at the Time of the making, and one of them becomes impossible by the Act of God; the Obligor is not bound to perform the other; the Condition being inserted for the Benefit of the Obligor, and he having it in his Election to perform which he pleases; & *vide* Raym. 373. where likewise this Doctrine laid down in *Laughter's* Case seems to be a little shaken.

Abr. Eq. 18. *Haltham* ver *Ryland*.

So where the Condition of a Bond was to settle certain Lands in such a Manor by such a Day, and the Obligor died before the Day, though the Bond was saved at Law, yet Chancery decreed an Execution in *Specie*.

2. Of repugnant Conditions.

2 Saund. 78. Sid. 456. Mod. 35.

If the Condition of an Obligation be made in this Manner, *viz. The Condition of this Obligation is such, that if the Obligor shall appear* coram Dom'

Dom' Rege apud Weſtmonaſterium, *ſuch a Day*, ad reſpondend', &c. *then the Condition of this Obligation ſhall be void, or elſe the ſame ſhall be in full Force and Virtue*; this is a good Condition; for the Senſe is perfect without theſe laſt Words, and they ſhall be rejected for their Abſurdity and Repugnancy. 2 Keb. 625. *Maleverer* ver. *Hauxby*. Ld. Raym. 38.

If the Condition of an Obligation be, that if the Obligor ſhould die without Iſſue, that then if he, by his laſt Will or otherwiſe in his Life-time, ſhall lawfully aſſign and convey certain Lands to the Obligee and his Heirs, that then the Obligation ſhall be void, &c. this Condition is not repugnant, but ſhall be conſtrued according to the Intention of the Parties to be collected out of the Words of the Condition. Jon. 180. Palm. 552. *Eaton* ver. *Butler*.

If an Obligation is conditioned for the Payment of 7*l.* by 2*s.* *per* Week, till 7*l.* is paid; and that if he fails of Payment of the 2*s.* at any of the Days on which it ought to be paid, that the Obligation ſhall be void, or elſe remain in Force; this Condition ſhall be taken diſtributively, *reddendo, ſingula ſingulis, viz.* that if he pays the 7*l.* the Obligation ſhall be void, but that if he fails in Payment of the 2*s.* at any of the Days, it ſhall be in full Force; for the Obligation ſhall not be taken to be of no Effect, if by * any Means it may be made good; and accordingly adjudged upon Demurrer to the Defendant's Plea, that he did not pay 2*s.* at one of the Days. * Page 703 Lev. 77. *Vern* ver. *Alſop*.

Raym. 68. S. C. adjudged; becauſe the Condition is ſenſeleſs, and therefore the Obligation is ſingle. Sid. 105. S. C. adjudged; and that the Obligation was ſingle, and the Condition repugnant and void. Keb. 356, 415, 451.

So in Debt on a Bond for 100*l.* Defendant demands Oyer of the Condition, which was, Whereas the Defendant is truly indebted to the Plaintiff in 50*l.* now the Condition is ſuch, that if the Defendant do not pay the ſaid 50*l.* on or upon, &c. then the Obligation to be void, &c. and pleads, that he did not pay the ſaid 50*l.* The Plaintiff demurred, and had Judgment; for when the Condition recites a Debt, and after lays an Obligation not to pay it, it is in that (*a*) repugnant and void. 2 Salk. 463. pl. 3. *Wells* ver. *Treguſon*.

(*a*) That it is juſt to ſupply Miſtakes in Conditions of Bonds. 2 Show. 16. & *vide* 39 H. 6. 10. Rol. Abr. 419.

3. Of lawful and unlawful Conditions.

A Condition to do any lawful Act is clearly good; as to make a Releaſe, perform a Covenant not to play at Cards, Dice, not to be Surety, &c. but a Condition againſt Law, or ſuch as obliges a Perſon to the Performance of a Thing which is *Malum in ſe*, or obliges him to omit or neglect what is his Duty, or encourages him in the Commiſſion of an evil Act, (*b*) is void: Alſo it is (*c*) ſaid, that, by the Law of Nature, all uſeleſs Agreements are void, as not to waſh one's Hands, &c. being for no Body's Advantage. Bro. *Obligation* 20. Co Lit 206. Perk. 139. Palm. 172. Hob. 12.

(*b*) But wherever there can be a Way found out to perform the Condition, without Breach of the Law, the Bond ſhall be eſteemed good. Perk. 778. Hob. 12. Cro. Eliz. 705. (*c*) *Puffendorf de Jur. Nat* lib. 5. c. 2.

A Bond, with Condition to rob or kill *J. S.* is void; but a Feoffment on like Condition is good, and veſts the Eſtate abſolutely in the Feoffee; and the Reaſon of the Difference is, leſt the Party ſhould have any Temptation to do the Act, the Law ſecures to him the Poſſeſſion of the Land, without performing the Condition, and in the other, frees him from the Penalty of the Bond; ſo that the Law has the ſame End in View in making the Feoffment good, and the (*d*) Bond void, *viz.* the Prevention of the Fact. Co. Lit. 206. Rol. Abr. 418.

(*d*) Alſo it is ſaid to be an Offence puniſhable in the Party who takes ſuch Bond. 2 Vent. 109

If

Cro. Eliz. 705. *Dobſon* ver. *Crow*, adjudged. If the Condition of an Obligation be, that the Obligor ſhall be always ready to give Evidence and to teſtify the Truth, in any of the King's Courts, in all Things which ſhall be demanded of him, and that he ſhall not hurt, endanger or moleſt the Obligee in his Lands or Goods, *relatione alicujus rei*; this is a good Condition, and not againſt Law; for as to the firſt Part, if he had not been obliged thereto, he had been compellable by Law; and by the laſt Part it ſhall be intended, that he ſhall not hurt tortiouſly, but not to reſtrain him from purſuing the Obligee for Felony, or other juſt Cauſe.

Vent. 109. *Maſon* ver. *Watkins*. But if *A.* is impriſoned for Felony, and *B.* bound by Recognizance to proſecute him; if *B.* after gives Bond to *C.* conditioned, that *B.* will not give Evidence againſt *A.* the Condition is againſt Law, and the Bond void.

18Ed. 4. 28. Rol. Abr. 417. So a Condition to do a Thing that will be Maintenance is void; as, to ſave harmleſs from ſuch an Appeal of Robbery as *B.* hath againſt him.

Carter 229. Allen 60. S. P.

Rol. Rep. 334. *per Coke*. If the Condition of an Obligation be, not to ſell the Apparel of the Wife, this is good; though it was objected it was againſt Law; (*a*) becauſe againſt the Liberty of the Huſband.

(*a*) A Bond that a Man ſhall not plough his Land, or that a Man ſhall not go out of his Houſe, are ſaid to be void; becauſe a Man muſt ſerve the King, and do his Duty with his Liberty and Labour. 7 E. 3. 64. March 191.

• Page 704 Rol. Rep. 334. Co. Lit. 206. * So if a Man gives Bond to a Stranger, conditioned for the (*b*) Payment of 20*l.* yearly to his Wife, this is good.

Co Lit. 206. (*b*) But a Condition to enſeoff the Wife is void, becauſe againſt a Maxim in Law.

Rol. Abr. 417. Cro. Jac. 248, 274. Cro. Car. 180. If a Parſon on his being preſented to a Living, gives a Bond conditioned to reſign; ſuch Condition may be lawful, and not againſt 31 *Eliz. cap.* 6. of Simony; as if the (*c*) Condition be to reſtrain the Incumbent from Non-reſidence, a vicious Life, or that he ſhall reſign when the Patron's Son, Kinſman or Friend, become qualified to take the Living.

Lit. Rep. 135. Hutt. 111. Jon. 220. 2 Keb. 445. Sid. 389. Raym. 175. Comp. Incumb. 40, 41. (*c*) So a Bond conditioned for the Payment of Money to the Son of the laſt Incumbent, ſo long as he ſhould continue a Student in *Cambridge* unpreferred, &c. is good. Noy 142.——So where a Patron took a Bond from his Preſentee to pay 5*l.* yearly to the Wife and Children of the laſt Incumbent; Earl of *Suſſex*'s Caſe, cited by *Foſter* Judge. Noy 142.——But *per* Comp. Incumb. 39. theſe charitable Reſolutions, if any ſuch there were, do not ſeem to be Law.

Comp. Incumb. 39. Comb. 394. But if the Condition be for a Leaſe of the Glebe or Tithes, or a Sum of Money; this is clearly Simony within the Statute, and therefore the Condition void, being againſt Law.

—That the Condition muſt be averred to have been entered into for a Simoniacal Purpoſe, *vide* Cro. Jac. 274. Hutt. 110. Moor 64.——And where a ſpecial Averment may be, that the Obligation was made for a Matter againſt Law. Leon. 73, 203. Godb. 29. Moor 158 ‡.

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‡ See the Caſe of *Collins* v. *Blantern*, 2 Wilſ. 341.—Condition of Bond to indemnify againſt a Note.—Plea, the Note given as a Conſideration to compromiſe a Proſecution for Perjury, adjudged on Demurrer, after two Arguments by the whole Court of C. P. that the Plea was good.

2 Chan. Ca. 399. Vern. 131. 411. Abr. Eq 86, 87. Alſo it hath been ruled in Equity, that where a Bond of Reſignation is general, as to reſign upon Requeſt, ſome ſpecial Reaſon muſt be ſhewn to require a Reſignation; for though ſuch Bonds may, in Strictneſs of Law, be good, yet if they are made an ill Uſe of, as to extort Money from the

the Incumbent, &c. Equity will grant a (a) perpetual Injunction againſt them. Preced. Chan. 182.

(a) Alſo the Ordinary may refuſe to accept of a Reſignation made by the Reſtraint of ſuch Bonds. Comp. Incumb. 31.

If the Sheriff of a County make *B.* his Under-Sheriff, and takes a Bond or Covenant from him, that he will not ſerve Executions above 20*l.* without his ſpecial Warrant; this is a void Covenant, becauſe it is againſt Law and Juſtice; in as much as, when he is made Under-Sheriff, he is liable by the Law to execute all Proceſs, as well as the Sheriff is. Rol. Abr. 417. Hob. 12. Moor 856. Godb. 212. Brownl. 65. 2 Brownl. 282.

But if an Under-Sheriff covenants with the High-Sheriff, to diſcharge and ſave him harmleſs from all Eſcapes of Priſoners arreſted by the Under-Sheriff, or any by him appointed; this is a good Covenant; for ſince the High-Sheriff transfers his Authority, it is but reaſonable he ſhould take Security for the faithful Execution of it; and there is nothing intended againſt Law, but rather to prevent than connive at Eſcapes. Hob. 12, 13. Moor 856. Godb. 212. Brownl. 65.

If *A.* being a Cuſtom-houſe Officer by Patent, makes *B.* his Deputy, and covenants *inter alia* to ſurrender the old Patent, and procure a new one to *B.* and himſelf before a Day, and that if *B.* dies before *A.* that *A.* ſhall pay 300*l.* to the Executors of *B.* and gives Bond for the Performance thereof; admitting theſe Covenants void (b) *per* 5 *Ed.* 6. *cap.* 16. the whole Bond is void, though ſome of the Covenants are not void or illegal. Cro. Eliz. 529. *Lee & Ux'* ver. *Colſhill.* 2 And 55. S.C. adjudged, becauſe the Obligation is one entire Act and Deed of the Party. 3 Co. 82. S. C. cited.

(b) So where a Sheriff takes a Bond for a Point againſt 23 H. 6. c. 9. and alſo for a juſt Debt; the whole Bond is void, according to the Letter of the Statute; for a Statute is a ſtrict Law; but the Common Law divides according to common Reaſon, and having made that void which is againſt Law, lets the reſt Stand. Hob. 14. Moor 856. pl. 1175. Godb. 213. 10 Co. 100. Latch 143. Mod. 35. 2 Brown. 282. Vent. 237. Carter 230.

* As to Bonds entered into in Reſtraint of Trade, it ſeems to have been always admitted, and hath been frequently adjudged, that a Bond reſtraining Trade in general; as that a Perſon ſhall not follow ſuch a Trade in any Part of the Kingdom, is void; the Reaſons whereof are, that ſuch Bond tends to a Monopoly, and is againſt the Public Good; deprives the Party of his Means of Livelihood; enables Maſters to lay Hardſhips upon their Servants, Apprentices, &c. tends to Oppreſſion; and is attended with immediate and apparent Damage to the one Side, only to free the other from the Fear of a diſtant Damage that may or may not happen: But it ſeems to be now agreed, that a Condition reſtraining Trade in a particular Place, if done fairly, and upon a good and lawful Conſideration, and with no ill Intention, is good. Alſo it ſeems to be now ſettled, that there is no (c) Difference between a Bond and a Promiſe in theſe Caſes, *viz.* That a Bond ſhould be void, and a Promiſe good; but that the true Diſtinction in theſe Contracts, whether by Bond, Covenant or Promiſe, is between thoſe entered into upon a juſt, fair and reaſonable Conſideration, and thoſe entered into upon no Conſideration, or a vitious one; that the former will be good, the latter void. * Page 705 Cro. Eliz. 872. Moor 115. pl. 259, 242, pl. 379. 2 Leon. 210. 3 Leon. 217. March 191. Owen 143. And there ſaid by *Anderſon*, that he might as well bind himſelf that he would not go to Church. 3 Lev. 241.

(c) The Difference formerly held was, that in Covenant or Promiſe, all being to be recovered in Damages, the Jury may aſſeſs them in regard to the Conſideration; but otherwiſe of a Bond, becauſe then the whole Sum muſt be recovered, be the Damages or Conſideration never ſo ſmall. 3 Lev. 242.

And therefore where *A.* and *B.* living in the ſame Town, and being both Mercers, *A.* deſired *B.* to buy his old Goods, which *B.* did, at ſuch a Price, upon Condition, that he would not follow his Trade within the ſaid Town; and this was held a lawful Contract; 1*ſt*, Becauſe it was a voluntary Reſtraint, and the Rule is *volenti non fit injuria.* 2*dly*, That it was made Cro. Jac. 596. Jon. 13. March 77. 2 Rol. Rep. 201. *Jolliffe* ver. *Bride.*

upon a valuable Conſideration, the Uſe of his Trade being compenſated by the Price given him for his old Goods. 3*dly*, That the Agreement was neither *Malum in ſe*, nor *Malum prohibitum*. 4*thly*, That a Man may bind himſelf not to live in ſuch a Place, and by Conſequence not to trade there. 5*thly*, That theſe Kind of Bonds are very frequent in *London*.

Ca. in Law and Eq. 27, 85, 130, &c. *Mitchel* ver. *Reynolds.*

So where the Condition of a Bond was, that whereas *A.* had taken the Shop of *B.* who was a Baker, for the Term of ſo many Years, and had given *B.* ſo much Money for it, the Condition of the Obligation was ſuch, that if, during the Term aforeſaid, *B.* ſhould not exerciſe the Trade of a Baker within the (*a*) Pariſh where the Shop was, that then the Bond ſhould be void, otherwiſe to remain in full Force; and this was held a good Bond.

(*a*) So of a Street.

Comb. 122.

Show. 2. Comb. 121. Holt 674. pl. 1. *Thompſon* ver. *Harvey.*

If the Condition of a Bond is, that the Obligor ſhall not buy any Sheeps-Trotters of any Perſon of whom the Obligee had or ſhould buy, nor above ſuch a Quantity; this is void, being in Reſtraint of Trade, and tending to a Monopoly.

6 Mod. 225. *Foxver. Tilly.* 2 Salk. 653. pl. 35. S. C. but not the S. P.

A Bond conditioned to ſave the Plaintiff harmleſs againſt all Eſcapes, which he had ſuffered, as Warden of the *Fleet* Priſon, was held good; and herein the Court took this Diverſity, that a Bond to ſave harmleſs againſt future † Eſcapes would be void, otherwiſe of a Bond to ſave harmleſs againſt paſt Eſcapes; and that though it were unlawful to ſuffer them, yet one may contract to indemnify one againſt a Penalty already incurred againſt Law.

† May not a Deputy be legally bound to his Principal to indemnify him againſt future Eſcapes, and is it not every Day's Practice, and does it not tend to prevent Eſcapes? *Vide ante* 704. laſt Paragraph but one.

Page 706 (F) Of the Breach and Performance of the Condition of an Obligation: And herein,

1. What ſhall be a Breach or a ſufficient Performance.

Bro. *Condition* 158. 17 E. 4. 3. Rol. Abr. 426.

IN the Performance of the Condition of an Obligation, the Intention of the Parties is chiefly to be regarded; and therefore a Performance in (*b*) Subſtance is ſufficient, though it differ in Words or ſome immaterial Circuſtance; as if one be bound to deliver the Teſtament of the Teſtator, if he plead that he had delivered *Literas Teſtamentarias*, it is ſufficient.

(*b*) A Man bound by Obligation to leave the Obligee the third Part of his Eſtate; making him and two others Executors, ſeems a good Performance. 2 Show. 69. pl. 54. 2 Jon. 133.

Keb. 739.

If the Condition of an Obligation be to procure a lawful Diſcharge, this muſt be by a Releaſe, or ſome Diſcharge that is pleadable, and not by Acquittance, which is but Evidence.

Hob. 304, Hut. 40. Rol. Abr. 429.

If the Condition of an Obligation be, that he ſhall not be aiding and aſſiſting to *E.* in any Action to be proſecuted againſt *L.* the Obligee, and after the Obligor joins in a Writ of Error with *E.* and another againſt *L.* upon a Judgment in Treſpaſs againſt them three, which is apparently erroneous; this is not any Breach of the Condition; for this is not properly an Action, but a Suit to diſcharge himſelf of a tortious Judgment, in which they ought all to join.

If

If the Condition of an Obligation be, that the Party ſhall not continue ſuch an Action, and he by his (*b*) Attorney, but without his Privity, continues; this is ſaid to be no Breach of the Condition. Cro. Jac. 525. 2 Rol. Rep. 63. by two Judges againſt one, who ſaid, that the Act of the Attorney was his own Act ‡. (*b*) So if a Man leaſe Land, upon Condition that the Leſſee ſhall not do Waſte, and after a Stranger does Waſte; yet this is not any Forfeiture, becauſe a Condition ſhall be taken ſtrictly. Rol. Abr. 428. Leon. 64. 4 Leon. 39.

‡ Which ſeems reaſonable, becauſe the Attorney, not having received Notice, acted under his orginal Authority, which ſhould have been countermanded.

If the Party, who is bound to perform the Condition, diſables himſelf, this is a Breach; as where the Condition is, that the Feoffee ſhall reinfeoff or make a Gift in Tail, *&c.* to the Feoffor, and the Feoffee, before he performs it, makes a Feoffment or Gift in Tail, or Leaſe for Life or Years *in præſenti* or *futuro* to another Perſon, or (*c*) marry or grant a (*d*) Rent-Charge, or be bound in a Statute or Recognizance, or become profeſſed; in all theſe Caſes the Condition is broken; for the Feoffee has either diſabled himſelf to make any Eſtate, or to make it in the ſame Plight or Freedom in which he received it, and being once diſabled he is ever diſabled, though his Wife ſhould die, or the Rent, *&c.* ſhould be diſcharged, or he ſhould be deraigned, *&c.* before the Time of the Reconveyance. Co. Lit. 221. 222. Poph. 110. Co. 25. a. Rol. Abr. 447. 5 Co. 21. a. (*c*) A Feme ſole enters into a Bond, conditioned that ſhe would from Time to Time, and at all Times upon Requeſt, do all ſuch Acts for the aſſuring of Lands, *&c.* at the Charge of the Obligee, and after marries; and whether this was a Breach, Hard. 463. *dubitatur*; it was ſaid, that by the Marriage her Huſband had a Poſſibility of being Tenant by the Curteſy, and that now an Aſſurance could not be made without Fine, and ſo the Obligee muſt be at greater Charge than intended ‖. (*d*) Though the Grantee brings a Writ of Annuity, by which the Land is diſcharged *ab initio*, Co. Lit. 222. a.

‖ But if the Huſband will not join in the Aſſurance, he and his Wife may be ſued on the Bond: and if the Huſband will join, he ought to bear the *extra* Expence.

If *A.* is bouud to *B.* in an (*e*) Obligation, conditioned that *A.* ſhall deliver to *B.* before ſuch a Day, an Obligation, in which *B.* is bound to *A.* if *A.* ſues *B.* upon the Obligation, and recovers, and after before the Day delivers it to *B.* this is no Performance of the Condition; for, notwithſtanding the Delivery of the Obligation, he may take Benefit of the Judgment, and ſo the Intent of the Condition is not performed. Cro. Eliz 7. Moor 709. Goulſ. 177. Leon. 52. (*e*) Like Point in Caſe of a Covenant.

Sid. 48. Raym. 25. Keb. 103.——So in Caſe of a Promiſe. Rol. Abr. 448.

* If *A.* being a common Brewer, covenants that *B.* ſhall have ſeven Parts of all his Grains made in his Brewhouſe for ſeven Years, and after *A.* puts in great Quantities of Hops into his Malt, of which the Grains were made, by Means whereof the Grains were ſpoiled; this is a Breach, becauſe in all Contracts the Intention of the Parties is to be conſidered; and here it was the Intention of the Parties, that *B.* ſhould have the Grains pure, and in ſuch a Manner as to be uſeful to his Cattle. *Page 707 Raym. 464. 2 Jon. 191. *Griffith* ver. *Goodland.*

So if a Perſon covenant to deliver ſo many Yards of Cloth, and he cut it in Pieces, and then deliver it, this is a Breach; for the Law regards the (*f*) real and faithful Performance of Contracts, and diſcountenances all ſuch Acts as are done *in fraudem Legis.*† Raym. 464. (*f*) Therefore if the Condition of a Bond be to pay 50 *l.* though it is not ſaid of Money, yet it muſt be ſo intended, and the Obligee cannot tender fifty Pounds Weight of Stone. Sid. 151. ſaid by *Twiſden*, that he remembered it to have been ſo adjudged.——But if a Man covenants that his Son, then *infra Annos nubiles*, ſhall marry the Daughter of *B.* before ſuch a Day, and he marries her accordingly, but at the Age of Conſent diſagrees to the Marriage, yet is the Covenant performed; for it was a Marriage, though ſubject to be defeated by Diſagreement, and no other could be had within the Time. Owen. 25. adjudged.——† So where a Tenant covenanted to leave, at the End of the Term, ſo many Acres

Cro. Eliz. 475, 665, 6 Co. 67. Poph. 55. If one be obliged to aſſure 20 Acres of Land, the Acres ſhall be accounted according to the Eſtimation of the County where the Land lies, and not according to the Meaſure limited by the Statute.

5 Co. 23. b. If one is bound to make to another a ſure, ſufficient and lawful Eſtate in certain Lands, by the Advice of *J. S.* if he makes an Eſtate to him according to the Advice of *J. S.* though it be inſufficient, and not a lawful Eſtate, yet is he excuſed from the Obligation.

2 Rol. Rep. 23. If by the Condition of an Obligation, the Obligor is to deliver a Releaſe to the Obligee, it is not enough to ſay, that it was writ, and Wax affixed to it, and that he was ready to ſeal and deliver it, and that the Obligee refuſed to accept, *&c.* but he ought to have done all that was in his Power, and ought to have put his Seal to it.

Cro. Eliz. 369. Owen 19. Rol. Abr. 432. *Bopwright* ver. *Harvey.* Cro. Eliz. 350. Cro. Car. 350. like Point. If *A.* and *B.* are bound in 60*l.* to *C.* and *A.* binds himſelf in another Obligation to *B.* upon Condition to acquit, diſcharge and ſave harmleſs the ſaid *B.* from the ſaid Obligation; and after *C.* ſues *B.* upon the Obligation of 60*l.* and hath Judgment againſt him upon *nihil dicit*, and after before Execution ſued, *A.* delivers to *B.* the 60*l.* for which, *&c.* yet his Obligation is forfeited; for he hath not acquitted *B.* as he ought, for he is damnified by the Suit and (*b*) Judgment, by which his Lands, Goods and Body are ſubjected to an Execution.

(*b*) So in Caſe *A.* aſſumes to ſave *B.* harmleſs from a Recognizance entered into by *B.* for the Appearance of *A.* if *A.* doth not appear, this is a Breach; for the Recognizance being forfeited, though not ſued, he is ſubjected to be ſued thereupon. Yelv. 287. & *vide* Brownl. 24.

5 Co. 24. *Broughton* ver. *Pretty*; & 2 Bulſ. 115. 3 Bulſ. 233. Vent. 261. S. P. So if the Condition of an Obligation be, that whereas the Obligee became bound for the Obligor in 200*l.* for the Payment of 100*l.* to *J. S.* if therefore the Obligor ſhall ſave and keep harmleſs the Obligee from all Suits Grants, Demands, touching and concerning the ſaid Bond of 200*l.* then this Obligation to be void; and at the Day of Payment of the 100*l.* the Obligee comes to the Place where the 100*l.* is to be paid, and perceiving no Body there preſent to pay the 100*l.* for the Obligor, he to ſave the Penalty pays it; the Counterbond is forfeited; for the Payment of the 100*l.* is a Damage and Harm, and if he had not paid it, greater Harm would have enſued, and it is not neceſſary the Obligee ſhould be ſued.

3 Keb. 336. Vent. 261. *Young* ver. *White.* In Debt upon an Obligation, conditioned to ſave the Plaintiff harmleſs from an Obligation, in which he was Surety for the Payment of ſuch a Sum ſuch a Day; the Defendant pleads *Non damnificatus*; Plaintiff replies, that the Defendant had not paid the Sum at the Day of Payment; Defendant rejoins, that he had tendered the Money at the Day; which was refuſed; *abſque hoc*, that the Plaintiff is *onerabilis* to the ſaid Obligation, and
* Page 708 * on Demurrer it was adjudged for the Plaintiff, though it was objected, that the bare Forfeiture of the Obligation, and the Fear of an Arreſt, was no Damnification, unleſs Proceſs were ſued out.

2. Where there are disjunctive Conditions, how to be performed.

2 Rol. Abr. 444. Where the Condition is in the Conjunctive, regularly both Parts muſt be performed; yet, to ſupply the Intention of the Parties it is held, that if a

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Acres of Hop-land, and having, during the Term, planted ſeveral Acres with Hops, and the Hop-land, in the Whole, amounting to many more Acres than contained in the Covenant, and having, towards the End of the Term, quarrelled with the Landlord, the Leſſee, from Motives of Revenge, grubbed the Hop-land in Patches, and left in Patches to the Amount of the Number of Acres ſpecified in the Covenant, yet this was clearly held a Breach, for it was contrary to the true Meaning of the Covenant, the original Intention of the Parties, and *in fraudem legis*.

Condition in the Conjunctive be not poſſible to be performed, it ſhall be taken in the Disjunctive; as if the Condition be, that he and his Executors ſhall do ſuch a Thing, this is in the Disjunctive, becauſe he cannot have an Executor in his Life-time; ſo if the Condition be, that he and his Aſſigns ſhall ſell certain Goods, this is in the Disjunctive, becauſe both cannot do it. Owen 52. Leon. 74. Goulſ. 71.

If the Condition of an Obligation be; that if the Obligor, within ſix Months after the Death of *B.* ſhall aſſure a Rent of 20 *l.* yearly to *C.* as the Counſel of *C.* ſhall adviſe, at the Coſts and Charges of *C.* if *C.* require the ſame; or if the Obligor ſhall not grant the Rent, if then he ſhall pay to *C.* 300 *l.* the Obligation ſhall be void, and *B.* dies, and *C.* tenders no Grant of the Rent within the Time, the Obligee is not bound to pay the 300 *l.* by three Judges againſt one, who ſaid the Condition is not disjunctive, till Requeſt to ſeal a Deed of Annuity, and that therefore the Obligator ought to pay the 300 *l.* Mod. 265. 2 Mod. 200. *Baſſet* ver. *Baſſet.*

If the Condition of an Obligation be to pay 30 *l.* or 20 Kine, within a Month after the Death of *K.* at the Election of the Obligee, he muſt at his Peril make his Election within the Time limited, for the Obligor is not bound to tender both; but in ſuch Caſe, or where the Condition is to pay ſuch a Day 10 *l.* in Gold or Silver at the Election of the Obligee, if he does not make his Election before the Day, yet the Duty remains payable, being Parcel of the Penalty. Leon. 69. Moor 241. Pl. 377.

If the Condition of an Obligation be, that the Obligor ſhall work out 40 *l.* at the uſual Prices in Packing, when the Obligee ſhall have Occaſion for himſelf or Friends to emply him therein, or otherwiſe ſhall pay 40 *l.* if the Obligee hath no Occaſion to make uſe of him in Packing, he muſt pay the 40 *l.* 2 Mod. 304. *Wright* ver. *Bull* adjudged.

If an Obligation be conditioned to pay *B.* or his Heirs annually 12 *l.* at *Midſummer* and *Chriſtmas*, or to pay him or his Heirs at any of the ſaid Feaſts 150 *l.* the Obligor hath Election to pay the 12 *l.* or the 150 *l.* though he may at any Time determine the Payment of the 12 *l.* by Payment of the 150 *l.* Cro. Jac. 594.

If *A.* covenants with *B.* that *A.* or his Son *C.* or either of them, ſhall work with *B.* at the grinding and poliſhing of Glaſs, *B.* paying to each of them ſo much, *&c.* and *B.* requeſts *C.* to work with him, *&c.* if he doth not, the Covenant is broken; for *B.* had the Election to require both, or any one of them, to work with him. 2 Sid. 107. Sir *Paul Neale* ver. *Reeve* adjudged.

If an Obligation be conditioned to pay Money if a Ship puts to Sea, or the Goods or the Obligor return ſafe, and the Obligor dies before his Return; yet the Money is payable, for all thoſe Things being contingent and uncertain which of them will happen, the Law ſupplies the Words *which ſhall firſt happen*, and foreclоſes the Election of the Obligor; and is not like the Caſe, where a Man is bound to pay Money at *Lady-day* or *Michaelmas*, and he dies after *Lady-day* and before *Michaelmas*. Lev. 54. *Sayer* ver. *Glean* adjudged.

So where the Condition of a Bond was, that the Obligor ſhould bring the Son and Daughter of *J. S.* at their full Age, to give ſuch Releaſes as a third Perſon ſhould require; the Defendant pleads, that the Son is alive and under Age; and on Demurrer to this Plea it was held, that the Force of the Bond was not ſuſpended till they are both of Age; becauſe it is to be taken not conjunctively, but reſpectively and diſtributively; for the Obligor undertakes, that the Daughter ſhall releaſe at her full Age as well as the Son, and if ſhe does not, the Condition is broken. Vent. 58. *Boſvile* ver. *Coats.* * Page 709

So if one enters into an Obligation on Contract to pay Money, *&c.* on two ſeveral Contingencies, the Obligee may have an Action of Debt on the happening of either of them; for the putting in, that he ſhall pay at the one or the other, muſt be taken to have been inſerted for the Benefit of the Obligee, and the rather, becauſe every Contract is to be conſtrued moſt ſtrongly againſt the Obligor. *Vide* Tit. *Election.*

3. By

3. By and to whom to be performed.

9 E. 4. 13. Perk. ſ. 785. Though regularly the Condition muſt be performed by, and to thoſe only who are ſpecified in the Contract; yet if there be no Specification, or it be doubtful who was meant, the Law will conſtrue it according to the Intention of the Parties; as (*a*) if the Condition of an Obligation be, that the Obligor ſhall make all the Linen the Obligee ſhall wear during his Life, the Obligee muſt deliver to the Obligor the Cloth of which it is to be made; for all Contracts are to be interpreted according to the Intent and the Subject Matter; and this ſeems the moſt genuine Interpretation in the preſent Caſe; eſpecially, as it did not appear that the Obligor was a Sempſtreſs, or ſuch Perſon that uſed to make Linen, and find the Materials.

(*a*) Lev. 93. *Oles* ver. *Thurnbill*, adjudged.

Lev. 93. *per Cur'*. So if a Taylor is bound, or promiſes to make a Suit of Cloaths, the Obligee ought to deliver him the Cloth; becauſe this is uſual, and not for him to find it.

Lev. 93. *per Cur'*. But if a Shoemaker is bound to make a Pair of Shoes, he is alſo bound to find the Leather, becauſe that is uſual.

2 H. 6. 3. b. Rol. Abr. 421. If the Condition of an Obligation be to pay a leſs Sum, if my (*b*) Servant by my Command tenders it to the Obligee, this is ſufficient.

(*b*) So if a Stranger tenders for, and by the Aſſent of an Infant above fourteen. Moor 222. pl. 137. *per Cur'*.

42 E. 3. 13. b. Rol. Abr. 421. So if the Condition of an Obligation be to pay 10 *l.* &c. it is a good Performance if he pays it to his Attorney, or the Perſon whom he has deputed to receive all Money due to him.

2 Mod. 309. 10 Mod. 110, 423. 11 Mod. 87. pl. 7. 12 Mod. 488, 564. Ld. Raym. 792. So if a Bond, conditioned for the Delivery of 40 Pair of Shoes at *Holbourn Bridge*, within a Month to *J. S.* a common Carrier, for the Uſe of the Obligee, and *J. S.* did not come to *London* within the Month, but the Obligor delivered them to his Porter; and it was adjudged a good Performance; for that the Delivery to the Man was a Delivery to the Maſter, within the Intent of the Condition.

Stra. 480, 505, 653.

Moor 68. pl. 183. If the Condition of an Obligation is to pay 20 *l.* to the Obligee and others, the Pariſhioners of *D.* (*c*) it may be paid to any two of them.

(*c*) Where the Condition is to pay Money to *Baron* and *Feme*, it may be pleaded to have been paid to the *Baron* only. Goulſ. 73, & *vide* 2 Sid. 41.

Hetl. 115. Lit. Rep. 156. If the Condition of an Obligation be to pay 10 *l. per Ann.* after the Death of the Obligee, to the Executors of the Obligee, for the Uſe of his Children, and he dies without making any Executors, the Money ſhall be paid to his Adminiſtrators.

Rol. Abr. 421. Lit. Rep. 173. Hob. 9. *Page 710 Godb. 192. But if a Man be bound in 20 *l.* upon Condition to pay 10 *l.* to ſuch Perſon as the Obligee ſhall name by his laſt Will, and after the Obligee names no Perſon by his Will, the Obligor is not bound to pay it to his Executors, becauſe the Condition hath Reference to his Nomination.

Moor 855. & *per Coke*, there is a Diverſity, where the Condition is to pay 10 *l.* to the Aſſignee of the Obligee, and where to the Obligee or his Aſſigns; for in the laſt Caſe it veſts as a Duty in the Obligee, and ſhall go to his Executors.

Rol. Abr. 421. Rol. Rep. 373. But if the Condition be to leaſe certain Lands for three Lives to the Obligee or his Aſſigns, and after the Obligee demands a Leaſe to be made to three Strangers for their Lives, he ought to make it them accordingly, or

otherwiſe

otherwiſe the Condition is broken; for here, by the Word *Aſſigns*, is intended Aſſigns by Nomination; for he cannot have other Aſſigns, in as much as the Eſtate is not aſſignable before he hath it. 3 Bulſ. 168. Bridg. 39.

4. At what Time to be performed.

If the Condition of an Obligation be to do a local Act to the Obligee, to which the (*a*) Concurrence of the Obligor and Obligee is neceſſary; as to make a Feoffment, and no Time is limited, the Obligor hath Time during his Life to perform it, if not (*b*) haſtened by Requeſt. Co. Lit. 208. b. 6 Co. 30. b.

(*a*) But though the Condition is legal, yet, if it may be performed for the Benefit of the Obligee in his Abſence, as the Acknowledgment of Satisfaction on Record, &c. it ought to be done in convenient Time. Co. Lit. 208. 6 Co. 30. b. Hard. 10. (*b*) But when by the Condition the Obligor, Feoffor, Feoffee or Stranger, are to do a ſole Act or Labour, which in no Manner concerns the Obligee, Feoffor, &c. nor their Benefit; as to go to *Rome*, &c. they ſhall have Time during Life, and cannot be haſtened by Requeſt. Co. Lit. 208, 209. b. 6 Co. 31. Leon. 125.

But when the Act, by the Condition of an Obligation to be done to the (*c*) Obligee, is of its own Nature tranſitory, as Payment of Money, Delivery of Charters, and the like, and no Time limited, it ought to be performed in (*d*) convenient Time. 6 Co. 31. Co. Lit. 208. Rol. Abr. 436. ſeveral

Caſes to this Purpoſe. (*c*) So if to be performed to a Stranger. Rol. Abr. 437. (*d*) Where the Condition was, in convenient Time to aſſure the Land for the Maintenance of a School, and the Party did not do it in eight Years, adjudged a Breach. Co. 25. b.

So if the Condition of an Obligation be to pay a leſs Sum, and no Day of Payment limited, he ought to pay it preſently, *ſcilicet*, within a convenient Time. Cro. Eliz. 798. Rol. Abr. 436.

If the Condition of an Obligation be to pay ſo much to the Obligee, or to a Stranger ſuch a Day, if he pays it before the Day, this is a good Performance; becauſe Payment before, contains Payment at the Day; and upon pleading *ſolvit ad Diem*, ſuch Payment may be given in Evidence. Co. Lit. 212. a. Rol. Abr. 440. Cro. Car. 284.

Cro. Jac. 435. Moor 367. pl. 502. Cro. Eliz. 142. And. 198. Savil 96. Owen 45. Dyer 222. Godb. 10. 2 Sid. 78.

But after a Breach the Defendant cannot plead his being ready to pay; as where in Debt on a Bond, conditioned to ſave a Pariſh harmleſs concerning a Baſtard Child, which the Obligor was forced to Father, he pleads *non damnificat'*; they reply that the Child was ready to ſtarve, and that therefore they put it out to nurſe, which coſt them 4 *l.* Defendant rejoins, that he was ready to repay the Money, and ſave the Pariſh harmleſs; upon this they demurred, and had Judgment, becauſe the Rejoinder is a Departure; for the Defendant ought to have taken Iſſue upon the Child's being ready to ſtarve; for if the Plaintiffs were once at Expence about the Child, and were actually damnified, the Defendant's being ready to pay the Money, will not ſave the Condition of the Bond. 2 Saund. 80. Sid. 444. Mod. 43. 2 Keb. 612. 619, *Richards* ver. *Hodges*.

*If the Condition of an Obligation be to do a Thing within a certain Time, the Obligor may perform it on any Part of the laſt Day, before Sunſet, of the Time appointed. *Page 711 8 H. 4. 14. But for this

vide Cro. Eliz. 14. Moor 122. pl. 266. Rol. Abr. 442.

If the Condition of an Obligation be to deliver to the Obligee 20 Quarters of Corn, the 29th of *February* next following the Date, and the next *February* hath but 28 Days, he is not bound to deliver it till a Leap-Year. Leon. 101. adjudged.

If

Cro. Jac. 646. adjudged, but a Writ of Error being brought, the Parties compounded.

If an Obligation bear Date the 1ſt of *May*, and the Condition is to pay a Sum of Money the 15th Day of *May* next enſuing, this ſhall have Relation to the Day, and not to the Month, ſo as to be payable the 15th Day of *May* following, and not to 15th of *May* next come Twelve-month, being (*a*) a Fortnight after the Date.

(*a*) But where being payable the next Day, the Court held, that it ſhould have Relation to the Month. Cro. Jac. 677.

Rol. Abr. 442. *Price* ver. *Coa.* 2 Rol. Abr. 251. S. C.

So where an Obligation was made the 17th Day of *November*, and the Condition was to pay 5 *l.* the 21ſt of *November* following, and 5*l.* the 20th of *December* next after, it was held, that the firſt 5 *l.* ought to be paid the 21ſt Day of *November* next enſuing, and that it referred to the Day, and not to the Month.

Hill. 5 Geo. 2. in *B. R. Kettle* ver. *Jones.*

But it hath been lately adjudged, that a Bond dated 12 *May*, with Condition to pay a certain Sum on the 13th of *May* next following, ſhould have Relation to the Month, and not to the Day; for it is ſaid, the Month following as well as the Day following, which the preſent Month cannot be, and therefore the Money not payable before the 13th of *May* come Twelve-month; for theſe Contracts are to be conſtrued *ſecundum ſubjectam Materiam*, and the Meaning of the Parties.

Co. Lit. 47, 292. b. 3 Co. 22. a. 128. b.

If a Man enters into a Bill obligatory, for the Payment of ſeveral Sums of Money at (*b*) ſeveral Days, an Action of Debt will not lie till the laſt Day is paſt.

Cro. Jac. 505. Cro. Car. 241. (*b*) If to pay 20 *l.* in Manner following, *viz.* 10 *l.* at one Day, and 10 *l.* at another Day, Debt lies not till after the laſt Day, becauſe one entire Duty; but if a Man binds himſelf to pay *J. S.* 10 *l.* at one Day, and 10 *l.* at another Day, after the firſt Day Debt lies for 10 *l.* becauſe it is in itſelf a ſeveral Duty. Owen 42.——So if *A.* makes a Bill to *B.* for the Payment of 20 *l viz.* 10 *l. &c.* and hereby covenants and grants with *B.* that if he makes Default in either of the ſaid Payments, that he will then pay what of the Whole ſhall be unpaid; after Default at the firſt Day, Debt lies for the Whole. Leon. 208. adjudged.

Co. Lit. 292. 3 Co. 22. 4 Co. 94. 5 Co. 51. S. P.

So upon a Contract, Debt lies not till all the Days of Payment are paſt; for where there is but (*c*) one Contract there can be but one Debt, and conſequently but one Action of Debt for the Recovery of it.

(*c*) But if a Recognizance be to pay Money at five ſeveral Days, after the firſt Day of Payment Execution lies for the Sum that then ought to be paid; for it is in the Nature of ſeveral Judgments. Co. Lit. 292. b. And the Law is the ſame of ſuch a Covenant or Promiſe to pay Money, *&c.* for as often as the Money is not paid according to the Covenant and Promiſe, ſo often is there a Breach of the Covenant, or Promiſe, and conſequently ſo often an Action lies. Co. Lit. 292. b.

Hob. 178. Rol. Abr. 785. Saund. 286, S. C. cited.

If a Bill of Debt be brought againſt an Attorney upon three ſeveral Obligations, and upon Demand of Oyer it appears by the Condition of one of the Obligations, that the Day of Payment thereof is not yet come; after a Verdict for the Plaintiff, upon Conditions performed, pleaded, and Coſts and Damages given, though the Plaintiff cannot have Judgment for this Obligation, of which the Day of Payment is not yet come; yet upon his Releaſe of Coſts, and Damages, he ſhall have Judgment for the other Obligations.

Mich. 7 Geo. 2. *Webb* v. *Divile.*

If by Bond, Money be payable by Inſtalments, and in ſuch Manner, that the Non-payment of a particular Sum, at a particular Day, makes

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*a Forfeiture of the whole Bond; and accordingly, for the Non-payment of ſuch Sum, there is a Verdict for the Plaintiff, finding it the Deed of the Party; though in Strictneſs the whole Bond is forfeited; yet upon the Defendant's bringing into Court all that the Maſter ſhall hold to be due, and letting the Verdict ſtand as a Security for future Payment, the Court will by Rule ſtay all further Proceedings on the ſaid Bond†.

† *Vide* Statute 8 & 9 W. 3. c. 11. ſ. 8. *poſt* 717. n.

5. At

5. At what Place to be performed.

If by the Condition of the Obligation Money be to be paid to the Obligee at or before the 29th of *September*, at ſuch a Place, it cannot be tendered at the Place before the laſt Day, unleſs the Obligee is there ready to receive it; but if the Obligor meet the Obligee at a Place before the Day, he may there tender it, and the Obligee ought to receive it. Cro. Eliz. 14. Moor 122. *Hawley* ver. *Simpſon*, adjudged. Co. Lit. 211. Salk. 140. S. P.

If an Obligation be conditioned to be at *A.* at a certain Day, there to chuſe two Arbitrators, to be joined to two others to be choſen by the Obligee, to arbitrate all Matters between them, he ought to be there in ſuch a Time, that the Arbitrators may be choſen and all ended that Day; and therefore his Pleading, that he was there the laſt Inſtant to make his Choice, is not ſufficient. Moor 545. *Marſh* ver. *Edmunds*. Cro. Eliz. 549. S. C. adjudgedth t the Plea was naught; becauſe he ſhewed not what Hour of the Day he came, or how long he continued there, nor that his Arbitrators were preſent there alſo.

If the Condition of an Obligation be to pay a ſmall Sum, and no Place is limited, he ought to ſeek the Obligee wherever he may be found; but if the Condition be to deliver twenty Quarters of Wheat, or twenty Load of Timber, *&c.* to the Obligee, the Obligor is not bound to carry the ſame about and ſeek the Obligee; but the Obligor, before the Day, muſt go to the Obligee, and know where he will appoint to receive it, and there it muſt be delivered. 21 Ed. 4. 6. b. Co. Lit. 210. b. 3. Leon. 260.

If a Place be limited and agreed on by the Parties where the Condition is to be performed, the Party, who is to perform it, is not obliged to ſeek the Party to whom, *&c.* elſewhere; nor is he, to whom it is to be performed, (*a*) obliged to accept of the Performance elſewhere. Rol. Abr. 445.

(*a*) But he may accept it at another Place and it is good. Moor 367. pl. 502.

If the Condition of an Obligation be to pay 10*l.* at *D.* ſuch a Day, or 10*l.* at *S.* ſuch a Day, if he tenders it at *D.* the firſt Day, the Condition is ſaved. 21 E. 4. 52. Bro. *Condition* 174.

If the Condition of a Bond be to make a Feoffment, it is ſufficient to tender it upon the Land, becauſe the Eſtate muſt paſs by Livery. Co. Lit. 210. b. Allen 24, 25. Style 61.

If the Condition of an Obligation be, to appear *coram Juſticiariis apud Weſtmonaſterium*, he ought to appear in *C. B.* and not in *B. R.* for this is not the Stile of the King's Bench. Rol. Abr. 545. *Muſgrave* ver. *Robinſon*.

If a Man is bound to pay 20*l.* at any Time during his Life, at a Place certain, the Obligor cannot tender the Money at the Place when he will, for then the Obligee ſhould be bound to perpetual Attendance; and therefore the Obligor, in reſpect of the Uncertainty of the Time, muſt give the Obligee Notice, that on ſuch a Day, at the Place limited, he will pay the Money, and then the Obligee muſt attend there to receive it. Co. Lit. 211. a. Dyer 354. pl. 32. Latch 158. 8 Co. 92. b. Salk. 214. pl. 1.

* By the Condition of an Obligation, a Maſter is bound to make his Apprentice free, on Requeſt, at the End of ſeven Years; and in Debt on this Obligation the Maſter pleads, that *ad finem* of the ſaid ſeven Years, or after, till the Time of Action brought, he was not requeſted; and it was held, that in this Caſe the Requeſt was material, being Part of the Condition; and *Holt* held, that the Requeſt here ought to have been on the moſt convenient Ld. Raym. 28. *Page 713 6 Mod. 227, 259. *Fitz. Hugh* ver. *Dennington*. 2 Salk. 585.

S.C. adjudged *per totam Curiam*, on a Writ of Error of a Judgment in the Marſhal's Court for the Plaintiff, and the Judgment there reverſed. 2 Ld. Raym. 1094. 3 Salk. 309. pl. 1.

venient Time of the laſt Day of the ſeventh Year, and that it would come too late the next Day; but *Powell* inclined, that a Requeſt in a Day or two after the ſeven Years would do well.

6. What the Obligee muſt do in order to intitle him to take Advantage of the Breach; and herein of Notice, Requeſt, *&c.*

Brownl. 13. Hob. 10. 2 Saund. 33. 6 Mod. 227.

Herein we muſt take Notice of a Diverſity in the Books between a Bond for doing a collateral Act and a Bond which creates a Duty of itſelf; that in the firſt Caſe, Notice or Requeſt muſt be averred, though not in the laſt: Alſo, whenever the Condition is to do a Thing when thereunto required, or if thereunto required, there the Requeſt is Part of the Condition, and to be averred.

Bro. *Notice* 13. Cro. Jac. 391. 8 Co. 92. b.

As if the Condition of an Obligation be, to account before ſuch Auditors as the Obligee will aſſign; the Obligee, upon his aſſigning Auditors, ought to give Notice to the Obligor; ſo where a Man is obliged to account when he ſhall be thereunto required; there muſt be a reaſonable Time and Place appointed upon the Requeſt.

8 E. 4. 15.

So if one be bound by Obligation to enfeoff ſuch Perſons as the Obligee ſhall name; the Obligee is bound to name the Perſons, and give Notice thereof to the Obligor.

Vent. 35, 78. Sid 442. 2 Keb. 529. *King* ver. *Atkins.*

In Debt upon a Bond conditioned to ſave harmleſs from twelve Bonds entered into to the King's Majeſty for Cuſtoms; and ſo Debt againſt an Under-Sheriff, upon a Bond conditioned to ſave harmleſs the High Sheriff; and a ſmall Breach alledged; reſolved, that it was not requiſite that the Defendant ſhould have Notice of the Damage, for he muſt ſave harmleſs at his Peril.

Rol. Abr. 458.

If the Condition of an Obligation be, to pay a Sum at a certain Day, the Obligor muſt tender it without any Demand; ſo if a Perſon be bound to be attendant on another at all Times when he comes to his Manor of *D.* he is bound to take Notice when he comes to his Manor of *D.* at his Peril.

5 Co. 21. Moor 452. pl. 619. Cro. Eliz. 450, 479.

Alſo, where the Obligor or Covenantor has diſabled himſelf to perform the Act, though before Notice and Requeſt were neceſſary, yet hereby are they diſpenſed with, and the Obligation forfeited.

Poph. 109. Hutt. 48. Winch 29, 30.

5 Co. 20, 21. *Sir Anthony Maine* ver *Scott.* Cro. Eliz. 450. Poph. 109. Moor 452. pl. 619. S. C. adjudged, that Covenant lay, without making any Requeſt, though by the Covenant the new Leaſe was to be made upon Requeſt.

As if *A.* leaſes to *B.* for twenty-one Years, and covenants, at any Time during the Life of *B.* upon Surrender of the old Leaſe, to make a new Leaſe, for the Reſidue of the Term; and after *A.* leaſes to a Stranger; though *B.* by the Words of the Indenture, ought to do the firſt Act, yet, becauſe *A.* hath diſabled himſelf to make a new Leaſe, *B.* ſhall not be obliged to ſurrender his old Leaſe, without Poſſibility of a new Leaſe; but may bring Covenant, without making any Surrender.

5 Co 21. *per Cur'.*

So if *A.* covenants to enfeoff *J. S.* upon Requeſt, and after enfeoffs another, *J. S.* may have Covenant, without making any Requeſt.

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Rol. Abr. 422, 458. S. P. *cont.* 48. Winch 30. an Original.

* If the Condition of an Obligation be (*a*) to levy a Fine to the Obligee, he is not bound to levy it, if the Obligee does not ſue a Writ of Covenant againſt him.

If

(*a*) So if the Condition be, that a Stranger ſhall levy a Fine to the Obligee. Hutt. ——So if the Condition be to acknowledge a Judgment to *J. S.* he muſt ſue out Winch 30. Hutt. 48.

If the Condition of an Obligation be, to pay all ſuch Coſts as ſhall be ſtated by two Arbitrators, by the Obligor and Obligee to be choſen; the Obligee (*b*) muſt chuſe an Arbitrator before he can ſhew any Fault in the Obligor. Vent. 71.

(*b*) So if the Condition be to inrol a Deed in *Guild-hall*, he is not bound to do it before Requeſt made by the other. 39 E. 3. 3. Rol. Abr. 458.

If the Condition of an Obligation be, that whereas the Obligor is Leſſee for Years from the Obligee of certain Lands, if he renders up the Poſſeſſion of the Land at the End of the Term to the Leſſor, his Heirs or Aſſigns, upon Requeſt, then the Obligation ſhall be void, *&c.* and after the Leſſor aſſigns over his Reverſion, and the Aſſignee, at the End of the Term, requeſts him to render up the Poſſeſſion to him; he is bound to do it, without any Notice given him that he is Aſſignee; for he ought to take Notice thereof at his Peril, in as much as he hath bound himſelf to render it up to the Aſſignee. Rol. Abr. 465. Bridg. 128. *Lingben* ver. *Pain*, adjudged.

If the Condition of an Obligation be, that if the Obligor, with two others, make, and upon Requeſt ſeal to the Obligee an Obligation of 40*l.* then, *&c.* it is ſufficient for the Obligee to make Requeſt only, without tendering any Writing to them, for he ought to do it at his Peril. Rol. Abr. 465. *Stook*'s Caſe. Cro. Jac. 652. like Point adjudged.

7. How the Breach muſt be aſſigned and ſet forth, and the Manner of pleading Performance, and in Bar.

The uſual Way of declaring and ſetting forth the Breach on a Bond is, that the Defendant *per ſcriptum ſuum obligatorium ſigillo ſuo ſigillatum* acknowledged, *&c.* and therein to lay a Place where it was made, that it may receive Trial, in caſe it be denied; alſo it is uſual to ſay that the Bond was ſealed and delivered; but this has been held not to be of Neceſſity, and to be cured by pleading over, the calling it *ſcriptum ſuum obligatorium* implying ſo much; but it hath been held, not to be ſufficient for the Plaintiff to declare *quod reddat ei* ſo much, without adding *quas ei debet & injuſte detinet* †. Cro. Jac. 420. Cro. Eliz. 773. 3 Lev. 348. 6 Mod. 306. Ld. Raym. 336, 763. 2 Ld. Raym. 1043.

† A *Profert* is neceſſary, which is uſually in this Form in *B. R.* at the Beginning of the Declaration, where it's by Bill, after mentioning Defendant to have become bound by ſuch a Bond or Writing obligatory, Plaintiff adds, *Which Bond or Writing obligatory, ſealed with the Seal of the Defendant, he the Plaintiff now brings into Court here*, &c.—In C. P. or by Original in *B. R.* Plaintiff at the End of his Declaration ſays, *And the ſaid Plaintiff now brings into Court here the ſaid Bond*, &c.

(*c*) In an Action of Debt for Part of a Debt upon Contract or Obligation, the Plaintiff muſt acknowledge Satisfaction of the Reſidue; for there muſt be no Variance from the Specialty; but (*d*) in Debt upon two Bonds, the Plaintiff in his Declaration may acknowledge the Payment of 10*l.* in Part, without ſhewing upon which Bond it was paid; for it is immaterial, and can no way prejudice the Defendant; alſo the Money might have been paid generally, without any Application to either Bond. (*c*) Cro. Jac. 499. Cro. Car. 436 Allen. 57. 2 Vern. 129. (*d*) 3 Bulſt. 244. Rol. Rep. 423.

In Debt on a Bond with Condition, the Plaintiff may declare generally ‡, and it is on the Defendant's Part to ſhew the Condition, which goes by Way of Defeaſance; and if he demand Oyer and demur, the Plaintiff ſhall have Judgment. Lev. 88. Salk. 326.

‡ That is on the Bond alone, without taking Notice of the Condition.

Error upon a Judgment in Debt, upon an Obligation of 600*l.* the Error aſſigned was, that there was not a ſufficient Breach alledged; for the Condition being that he ſhould enjoy ſuch Lands without Eviction, the Breach Cro. Jac. 315 *Kirby* ver. *Hanſaker*.

• Page 715 •was assigned in the Recovery by Verdict in Ejectment, upon a Lease made by one *E.* and does not shew what Title *E.* had to make the Lease, but avers, that *E.* had a good Title; and it might have been, that he had Title from the Plaintiff himself after the Obligation made; and therefore he ought to have shewed a good and *Eigne* Title before the Lease made; & *per Cur.* The Replication is ill; for it ought to (*a*) comprehend a full and manifest Breach, otherwise it is not good.

Mod 298. S. C. cited, and allowed to be Law; and so in 3 Mod. 135. Vent. 84.

2. Lev. 37. but 3 Lev. 325. Mod. 66. seems *contra*; and there said by *Jones*, that, since this Case, the Statutes 21 Jac. 1. c. 13. and 16 & 17 Car. 2. c 8. have greatly strengthened Verdicts. (*a*) That in Debt upon a Bond to perform Covenants, the Replication must shew a certain Breach; but in Covenant, it is sufficient to assign a general Breach. Salk. 139. pl. 5. Ld. Raym. 478.

Salk. 140. pl. 6. Ld. Raym. 620. 12 Mod. 421.

If the Condition of an Obligation be to deliver, before the 5th of *Jan.* twenty Quarters of Corn out of a Sip into a Barge, to be brought by the Plaintiff to receive the said Corn; and he assigns for Breach, that he did not deliver it 5 *Jan.* it is good; for when one is obliged to deliver, and the other to accept, it shall be presumed, that the Plaintiff was there before the Time, ready to accept the Corn with his Barge.

Sid. 307. *Champion* ver. *Shipweth*; but the Reporter says that this was held ill.

If the Breach be assigned after the Action brought, it is ill; as if in Debt on an Obligation for Non-performance of Covenants, the Plaintiff replies, and assigns a Breach in Non-Payment of Rent the 20th of *June* 17 *Car.* 2. and the Bill was filed *Trin.* 17 *Car.* 2. which Term ended the 14th of *June*;

If the Obligation be for Payment of Money, and the Money becomes payable pending the Action, this makes the Action good; *secus* where the Condition is for Performance of Covenants; *vide* Cro. Eliz. 325. 4 Leon. 98. Keb. 106.

Sid. 30. *Jenkins* ver. *Hancock*. Cro. Eliz. 132.

It is said, that in an Obligation for Performance of Covenants, the Breach ought to be more precise and particular than in Actions of Covenant; but that yet if what is material, and the Substance, is alledged, it is sufficient; as where the Condition of an Obligation was, that the Defendant, a Bailiff, should not let at large any Prisoner arrested, without Licence of the Plaintiff an Under-Gaoler; and the Breach assigned was, that the Defendant had let at large such a one, whom he had arrested at *Westminster*, without Licence, &c. this was held sufficient, though the particular Time and Place were not set forth, the Escape being the material Part of the Covenant or Condition.

Cro. Jac. 264. Sand. 116, 226.

If the Replication be repugnant to the Declaration, it makes the Declaration ill, because the subsequent Pleading falsifies the Declaration; as if a Man declares on a Bond made 1 *Martii*, if the Plaintiff replies, that the Bond was delivered 30 *Martii*, this falsifies the Declaration; because it could not be made the first; so if the Rejoinder falsifies the Bar, the Bar is vitious.

2 Vent. 156.

In Debt on a Bond, with Condition for Performance of several Things, the Defendant pleads *quod conditio ejusdem facti nunquam infracta fuit per se ipsum*, &c. and held an ill Plea; because, for saving the Bond it is necessary for the Defendant to shew how he hath performed the Condition; and this Sort of Pleading was never admitted.

Lev. 302.

So if he had pleaded *performavit omnia* †, it had been ill; for the Particulars being expressed in the Condition, he ought to plead to each particularly; but if the Condition were for Performance of Covenants in an Indenture, Performance generally were a good Plea ‡. Debt

† Wherever Defendant pleads Performance, Plaintiff must assign an absolute Breach; but this is not necessary, if he pleads a collateral Matter as a Release. *Tryon* v. *Carter*. M. 8 Geo. cited and agreed to, *Fletcher* v. *Hennington*, P. 33 Geo. 2. 2 Bur. 944.——‡ Defendant cannot plead *Conditions performed*, to a Bond for Performance of Covenants, without *Oyer* of the Deed, which contains the Covenants. R. 1 Sid. 50, 97, 425. 1 Vent. 37. R. Al. 72.——

An

Debt on a Bond conditioned to deliver Goods on ſuch a Day; the Defendant pleads, that he delivered them according to the Form of the Condition; the Plaintiff demurred, becauſe he ought to have pleaded expreſly, according to the Words of the Condition, that he delivered them on the Day; and the Court inclined to that Opinion.——(*a*) So in Debt on a Bond conditioned to pay a Sum of Money at *D.* ſuch a Day, the Defendant pleads Payment at the Day *ſecundum effectum conditionis*; the Plaintiff demurred ſpecially, becauſe he does not ſay where he paid it; and it was * held to be Form at leaſt; the Plaintiff having demurred ſpecially had Judgment; (*b*) and generally, where Performance is pleaded, it ought to be pleaded in the Words of the Condition. Lev. 145. Nelſ. Lutw. 268. (*a*) 3 Lev. 245. * Page 716 (*b*) 2 Salk. 520. pl. 22.

2 Ld. Raym. 1138. Salk. 208. pl. 8. 6 Mod. 157, 197.

In Debt on an Obligation for Payment of Money, &c. the Defendant pleads, that at the Time and Place *paratus fuit* to pay the Money, but that no Body was there to receive it; and held ill, on a general Demurrer, for want of an *obtulit ſolvere*; for the Tender only is traverſable, not the *Paratus*. 3 Lev. 104.

In Debt on an Obligation by a Maſter of a Ship againſt a Merchant, for performing of Agreements in a Charter-party; the Declaration was, *& ad performationem conventionum ex parte dicti mercatoris obligaſſet ſe dicto magiſtro, &c.* Adjudged inſufficient, for want of the Word *Ipſe*, or *Ipſe prædict' mercator obligaſſet, &c.* Vent. 196. Cro. Eliz. 913. Salk. 26. pl. 13. *& vide* Tit. *Amendment and Jeoffails.*

In Debt on a Bond with Condition, the Defendant pleads a collateral Plea, which is inſufficient; the Plaintiff demurs, and had Judgment without aſſigning a Breach; for the Defendant by pleading a defective Plea, by which he would excuſe his Non-performance of the Condition, ſaves the Plaintiff the Trouble of aſſigning a Breach, and gives him Advantage of putting himſelf on the Judgment of the Court, whether the Plea be good or not; but if the Plaintiff had admitted the Plea, and made a Replication which ſhewed no Cauſe of Action, it had been otherwiſe; but if the Replication were idle, and the Defendant demurred, yet the Plaintiff ſhould have Judgment, without aſſigning a Breach. Lev. 55, 84. 3 Lev. 17, 24.

And in all Caſes of Debt on an Obligation with Condition, (that of a Bond to perform an Award only excepted) if the Defendant pleads a ſpecial Matter, that admits and excuſes a Non-performance, the Plaintiff need only anſwer, and falſify the ſpecial Matter alledged; for he that excuſes a Non-performance admits it, and the Plantiff need not ſhew that which the Defendant hath ſuppoſed and admitted. Salk. 138. pl. 2. *vide* Tit. *Arbitrament.*

But if the Defendant pleads a Performance of the Condition, though it be not well pleaded, the Plaintiff in his Replication muſt ſhew a Breach; for then he has no Cauſe of Action, unleſs he ſhew it; and this Difference will give the true Reaſon, and reconcile the Caſes in the (*c*) Margin. Salk. 138. pl. 2. (*c*) Lev. 55, 84, 226.

Saund. 102, 159, 317. 3 Lev. 17, 24. Vent. 114. Cro. Eliz. 320. Yelv. 78.

In Debt on an Obligation to pay for what Goods an Apprentice ſhall waſte; the Plaintiff in Pleading need not ſhew what the Goods were, for he is to recover the Penalty of the Bond; otherwiſe in Covenant. Lev. 194.

Pleading the Breach of a Condition of a Bond, *eo quod* it was not paid, &c. is a good Affirmation; as in Avowry, *& quia* the Rent was Arrear, is good; Saund. 116. 2 Vent. 278. Lev. 194.

—And he muſt make a *Profert in Cur'* of the Deed, otherwiſe it will be bad on a ſpecial Demurrer. R. 1 Saund. 9.——If the Condition of the Bond be to do ſeveral Things, the Defendant canno plead Performance generally, tho' all are in the Affirmative, but ſhall anſwer ſpecially to eve Particular. R. 1 Lev. 303. R. Kel. 95. b. R. 1 Sid. 215. *Vide* alſo, Mo. 591. 2 Mo

good; ſo in all *Aſſumpſits* on collateral Promiſes to pay on Requeſt, *licet* ſuch a Day and Place be requeſted, is an Affirmation, and traverſable.

2 Lev. 12, 75. Saund. 275. Pleading a Bond by a *Teſtatum exiſtit* is not good, though it be with a *hic in Curia prolat'*.

3 Lev, 50. Debt on an Obligation conditioned to perform Articles; the Defendant demands Oyer, and then pleads the Articles and Performance; the Plaintiff prays they may be entered *in hæc verba*, and then demurs; becauſe the Defendant in pleading the Articles omitted Part; and the Plaintiff had Judgment; for perhaps he might have aſſigned the Breach in thoſe omitted, of which Advantage he is by this Means deprived.

Salk. 172. pl. 4. In Debt on a Bond, with Condition to exhibit an Inventory to the Eccleſiaſtical Court before ſuch a Day, it is not enough for the Defendant to plead, that there was no Court held, but he muſt plead alſo that he was there ready; for he muſt ſhew that he has done all that could be on his Side toward a Performance. So if the Condition were to levy a Fine *in Oct. Hill.* by which the Obligee is to ſue out the Writ of Covenant; it is not enough for the Defendant to plead, that no Writ of Co-

*Page 717 * venant was ſued out, but he muſt plead that he was there ready at the Day, and no Writ of Covenant was ſued out; ſo if the Condition were to pay Money to *J. S.* at a certain Time and Place, it is not enough for the Defendant to ſay that the Obligee came not, without ſaying that he was there ready and offered, *&c.*

Salk. 180. pl. 9. 2 Ld. Raym. 1121. 7 Mod. 24. 11 Mod. 34. pl. 5. In Debt on a Bond, the Defendant may have ſeveral Pleas in Bar; as if the Plaintiff ſue as Executor, the Defendant may plead the Releaſe of the Teſtator for Part, and for the Reſidue the Releaſe of the Plaintiff; ſo he may plead Payment as to Part, and as to the Reſt an Acquittance.

Noy 56. Cro. Eliz. 773. 2 Jon. 184. In Debt on an Obligation, if Not guilty be pleaded, and there be a Verdict for the Plaintiff, it is aided by the 16 & 17 *Car.* 2. *cap.* 8. becauſe being an ill Plea, and a falſe one, the Plaintiff ought to have his Judgment, both for the Badneſs of the Plea, and for its Falſhood; but though the Verdict had been for the Defendant, yet the Plaintiff ſhould have Judgment, becauſe the Declaration is not anſwered by the Plea.

Cro. Jac. 585. Cro. Car. 593. In Debt on a Bond conditioned for the Payment of 105 *l.* the Defendant pleads Payment of 100 *l. ſecundum formam & effectum Conditionis*; the Plaintiff replies, *non ſolvit prædict'* 105 *l.* this is an immaterial Iſſue not aided by the Statute; for the Plaintiff has not traverſed the ſame Payment that is in the Defendant's Plea.

Cro. Jac. 549. Saund. 282, 286. In Debt on an Obligation, the Defendant pleads Payment of 50 *l.* 14 *Junii* 11 *Jac.* according to the Condition; the Plaintiff replies, *quod non ſolvit* 50 *l. prædict'* 14 *Aug' anno* 11 *ſupradict'*, *quas ad eundem diem ſolviſſe debuiſſet, & hoc, &c.* the Verdict found, *quod non ſolvit prædict* 14 *Junii*, *prout* the Defendant had alledged. The Objection here was, that no Iſſue was joined; becauſe they do not meet in the Time the Money was paid, but the Word *Auguſt* being plainly Surpluſage; for when he ſaid *quod non ſolvit prædict'* 14 *die*, it is a ſufficient Traverſe, without the Word *Auguſt*; and *Auguſt* is plainly repugnant to the Word *prædict'* for *prædict'* refers to *June*; and ſuch Surpluſage, being a Repugnancy to what was before material, was idle and void.

Cro. Jac. 264. Sand. 116, 226. If one declare on a Bond made 1 *Martii*, if the Plaintiff replies, that the Bond was delivered 30 *Martii*, this falſifies the Declaration, becauſe it could not be made the firſt, and is therefore vitious.

Hard. 332. Hob. 218. In Debt on an (*a*) Obligation the Defendant cannot plead *Nilil debet*, but muſt deny the Deed by pleading *Non eſt factum*; for the Seal of the Party continuing, it muſt be diſſolved *eo Ligamine quo Ligatur.*

(*a*) But if the Debt be due by ſimple Contract, then he may plead *Nil debet*; for it does not appear that there is any Debt Continuing. 2 Inſt. 651. Hob. 218.

If

If the Condition of an Obligation be, that the Defendant ſhall diſcharge or acquit, or free the Plaintiff of or from ſuch a Bond, or Rent or Action, or from any other particular Thing aſcertained in the Condition, there the Negative Plea *Non damnificatus*, is not good, becauſe the Defendant hath undertaken to do an Act in Diſcharge of the Plaintiff; but where the Condition is only to free, or to diſcharge or indemnify the Plaintiff from any Damage, or Coſt or Trouble which ſhall or may happen by Reaſon of ſuch Bond, Rent or Action, or other particular Thing therein mentioned; in ſuch Caſe the Negative Plea is ſufficient, becauſe it doth not appear that any Damage hath happened to the Plaintiff; and if no Damages have happened, then it is impoſſible tha the Defendant ſhould ſhew in the Affirmative the Manner how he had freed or diſcharged the Plaintiff; therefore it lies on the Part of the Plaintiff, by way of Reply to ſhew wherein he was damnified †. Carth. 375.

†In Actions on Bonds for Non-performance of Covenants, Plaintiff may aſſign as many Breaches as he thinks fit. 8 & 9 W. 3. c. 11. ſ 8.——Jury may aſſeſs Damages.—Defendant paying Damages Execution ſhall be ſtayed, but Judgment to remain to anſwer any further Breach, and Plaintiff may have a *Scire facias* againſt Defendant. *Ibid.*

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* Offices and Officers.

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(A) Of the Nature of an Office, and the ſeveral Kinds of Offices. 718.
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(K) Of

(K) Of the Manner of executing them; and herein of Offices that are incompatible, and where an Office may be executed by two or more Persons. 736.

(L) Of the Execution of an Office by Deputy; and herein of Superiors being answerable for their Deputies. 738.

(M) Of the Forfeitures of an Office. 741.

(N) Where for Corruption and oppressive Proceedings Officers are punishable; and herein of Bribery and Extortion. 743.

(A) Of the Nature of an Office, and the several Kinds of Offices.

Carth. 478. (a) Signifies a Place of Trust, and therefore the Statute 3 Jac. 1. c. 5 enacts, that

IT is said, that the Word *Officium* principally implies a Duty, and in the next Place the (a) Charge of such Duty; and that it is a Rule, that where one Man hath to do with another's Affairs against his Will, and without his Leave, that this is an Office, and he who is in it is an Officer.

no Popish Recusant shall exercise any Office or Charge. 5 Mod. 431.

* Page 719 * There is a Difference between an Office and an Employment, every Office being an Employment; but there are Employments which do not come under the Denomination of Offices; such as an Agreement to make Hay, plough Land, herd a Flock, &c. which differ widely from that of Steward of a Manor, &c.

2 Sid. 142.

2 Inst. 32, 456. By the antient Common Law, Officers ought to be honest Men, legal and sage, & *qui melius sciat & possit officio illi intendere*; and this, says my Lord *Coke*, was the Policy of prudent Antiquity, that Officers did ever give Grace to the Place, and not the Place only to grace the Officer.

Carth. 479. Officers are distinguished into Civil and Military, according to the Nature of their several Trusts.

Carth. 479. Offices are distinguished into those which are of a public, and those which are of a private Nature; and herein it is said, that every Man is a Public Officer; who hath any Duty concerning the Public; and he is not the less a Public Officer, where his Authority is confined to narrow Limits; because it is the Duty of his Office, and the Nature of that Duty, which makes him a Public Officer, and not the Extent of his Authority.

Sid. 94, 152. Lev. 75. Keb. 349. Raym. 64. *Hurst*'s Case. It hath been held, that the Commissioners for purging Corporations could not take Notice of or remove an Attorney of a Court, it not being a Public Office in which the Government was concerned.

5 Mod. 431. Carth. 478. 7 *Le Kingver.* *Dr Burnell.* It hath been doubted whether the Censor of the College of Physicians, be such an Officer as is compellable to take the Oaths prescribed by the Statute 25 *Car.* 2. *cap.* 2. *(post.* 726.) it being urged, that the Over-sight and Inspection of Medicines was of a private Nature; and that no Offices were within the Intent of that Statute, but such as related to the Revenue, or to the Conservation of the Peace; and that particular Powers created for particular Purposes were not within that Statute.

Also

Alſo Offices are diſtinguiſhed into ancient Offices, and thoſe which are of (*a*) new Creation; and herein it is obſervable, that conſtant Uſage hath not only ſanctified the firſt Eſtabliſhment of ſuch antient Offices as have exiſted Time out of Mind, but alſo hath preſcribed and ſettled the Manner in which they have and are to continue to exiſt, in what Manner to be exerciſed, how to be diſpoſed of, *&c.* 9 Co. 97. Cro. Eliz. 636. 2 Rol. Abr. 182. Cro. Car. 513. 2 Co. 16.

Show. 436. (*a*) No Officer, that is conſtituted by Act of Parliament, hath more Authority than the Act that creates him, or ſome ſubſequent Act of Parliament, doth give him; for he cannot preſcribe as an Officer at Common Law may do. 4 Inſt. 267.

There is alſo another Diſtinction of Offices into ſuch as are Judicial, and ſuch as are Miniſterial Offices only; the firſt, relating to the Adminiſtration of Juſtice, or the actual Exerciſe thereof, muſt be executed by Perſons of ſufficient Capacity, and by the Perſons themſelves to whom they are granted; and herein alſo ancient Uſage and Cuſtom muſt govern. Jon. 109. Dav. 35. 9 Co. 97.

(B) Offices by what Authority created.

THE King is the univerſal Officer and Diſpoſer of Juſtice within this Realm, from whom all others are ſaid to be (*b*) derived; but yet he cannot create any new Office inconſiſtent with our Conſtitution, or prejudicial to the Subject. 12 Co. 116. Rol. Rep. 206. Carth. 478.

(*b*) Offices are ſaid to be in the King, where the King may grant or nominate to the Office, but hath not the Office in him to uſe or execute. Co. Lit. 3. b. 2 Vent. 270.

*There are three Things, ſays my Lord *Coke*, which have fair Pretences, yet are miſchievous; 1*ſt*, New Courts; 2*d*, New Offices; 3*d*, New Corporations for Trade; and as to new Offices, either in Courts or out of them, theſe, he ſays, cannot be erected without Act of Parliament; for that under the Pretence of the common Good, they are exerciſed to the intolerable Grievance of the Subject. * Page 720 2 Inſt. 540.

An Office granted by Letters Patent for the ſole making of all Bills, Informations and Letters miſſive in the Council of *York*, was held unreaſonable and void. Jon. 231. *Mounſon* ver. *Lyſter*.

One *Chute* petitioned the King to erect a new Office for regiſtering all Strangers within the Realm, except Merchant Strangers, and to grant the ſaid Office to the Petitioner with or (*c*) without a Fee; and it was reſolved by all the Judges at *Serjeants-Inn*, that the Erection of ſuch new Offices, for the Benefit of a private Man, was againſt all Law of what Nature ſoever. 12 Co. 116. and ſeveral Caſes there cited to this Purpoſe.

(*c*) It hath been held clearly, that in the Conſtitution of a new Office or Officer, it is not neceſſary that an annual or caſual Fee ſhould at firſt be annexed to ſuch Office. Moor 809.

King *E.* 4. by his Letters Patent bearing Date 10 *Oct. Anno* 15. of his Reign, reciting, that whereas there was no Office of the Chancellor of the Garter, that there ſhould be ſuch an Office of the Chancellor of the Garter, and that none ſhould have it but the Biſhop of *Saliſbury* for the Time being, we will and ordain, that *Richard Beauchamp*, now Biſhop of *Saliſbury*, ſhall have it for his Life, and after his Deceaſe, that his Succeſſors ſhall have it for ever; and amongſt divers other Points it was reſolved unanimouſly, that 4 Inſt. 200. *Paſch.* 6 Jac. 1. Biſhop of *Saliſbury*'s Caſe. Moor 808. S. C.

(b) So if the King grants an Office by the Name of an Office *cum feodis inde ſpectantibus*, and it appears to the Court to be new, the Grant is void. 9 E. 4. 10. 2 Sid. 141.

that this Grant was void; (b) for that a new Office was erected, and it was not defined what Juriſdiction or Authority the Officer ſhould have, and therefore for the Uncertainty it was void.

Hob. 63. The King cannot grant to any Perſon to hold a Court of Equity, though he may grant *tenere placita*; for the Diſpenſation of Equity is a ſpecial Truſt committed to the King, and not by him to be intruſted with any other, except his Chancellor.

(C) Who hath a Right of granting or aſſigning an Office; and herein of one Office's being incident to another.

4 Co. 32. *Mitton's* Caſe. (c) If a Houſe or Land belong to an Office, by the Grant of the Office by Deed the Houſe or Land paſſeth, as belonging thereunto. Co. Lit. 49. a. Vaugh. 178. cited.

WHere-ever one Office is (c) incident to another, ſuch incident Office is regularly grantable by him who hath the principal Office; and on this Foundation it hath been held, that the King's Grant of the Office of County-Clerk was void, it being inſeparably incident to the Office of Sheriff, and could not by any Law or Contrivance be taken away from him.

2 Salk. 439. pl. 3. Ld. Raym. 611. 12 Mod. 434. *Per Holt* C. J. Leon. 320, 321. Like Point.

So the Office of Chamberlain of the King's Bench Priſon is inſeparably incident to the Office of Marſhal; and therefore a Grant of the Office of Marſhal with a Reſervation of the Office of Chamberlain, is void.

* Page 721 Dyer 175. a. pl. 25. And. 152. & *vide* Show. Par. Ca. Sir *Rowland Holt's* Caſe.

*So it hath been reſolved, that the Office of Exigenter of *London* and other Counties in *England*, is incident to the Office of Ch. Juſt. of *C. B.* and that therefore a Grant thereof by the King, though in the Vacancy of a Chief Juſtice, is null and void.

2 Inſt. 425. 4 Mod. 173. cited.

My Lord *Coke* ſays, that the Juſtices of Courts did ever appoint their Clerks, ſome of which after by Preſcription grew to be Officers in their Courts; and this Right which they had of conſtituting their own Officers, is further confirmed to them by *Weſtm.* 2. 13 *Ed.* 1. *cap.* 30. the Reaſons whereof are twofold. *1ſt.* For that the Law doth ever appoint thoſe who have the greateſt Knowledge and Skill, to perform that which is to be done. *2dly*, The Officers and Clerks are but to enter, inrol, or effect that which the Juſtices do adjudge, award or order; the inſufficient Doing whereof maketh the Proceeding of the Juſtices erroneous, than the which nothing can be more diſhonourable and grievous to the Juſtices, and prejudicial to the Party.

(D) Of the Grant of Offices by Eccleſiaſtical Perſons.

HERE it will be proper to take Notice how far Biſhops, and other Eccleſiaſtical Perſons, may grant Offices to bind their Succeſſors, and how far not: wherein the Rule is, that ſuch Offices as are ancient, and of Neceſſity to be exerciſed by ſome other Perſon, they may grant, together with the antient Fee for exerciſing thereof; and as theſe Offices are not within 32 *H.* 8. *cap.* 28. to be granted by the Biſhops or other Eccleſiaſtical Perſons ſolely; ſo neither are they conſtrued to be within the Reſtraint of 1 *Eliz. cap.* 19. & 13 *Eliz. cap.* 10. and therefore remain perfectly at the Common Law, and by Conſequence, to bind the Succeſſors, muſt be confirmed in the ſame Manner as all other Grants or Alienations of Eccleſiaſtical Perſons at Common Law muſt have been; and theſe Grants appear generally to have been made for the Life of the Grantees; for it were too ſevere and rigid a Conſtruction, to confine them to be made determinable on the Death, Tranſlation, or other Promotion of the Biſhop, Dean, &c. who made them; and would diſcourage Men of Ability and Capacity to undertake the Exerciſe thereof; and to grant ſuch Offices for twenty-one Years, or any other Term of Years, would introduce many Inconveniencies, by letting in Executors, Strangers, and other unqualified Perſons to the Exerciſe thereof; and therefore any Grant of ſuch Offices for Years, ſeems againſt the Policy of the Common Law and the Benefit of the Succeſſors, which thoſe Statutes intended to provide for, and by Conſequence will not bind them. Co. Lit. 44. a. Co. 58, 61. Biſhop of *Sarum*'s Caſe. Cro. Car. 49. Lev. 71, 78.

But if ſuch Offices have been anciently granted to one for Life, this induces no Neceſſity of their being granted to two for their Lives; and therefore ſuch grant to two for their Lives, will not bind their Succeſſor, though one of the Grantees ſhould die in the Life of the Grantor, ſo as there were but one Life in being againſt the Succeſſor; becauſe by ſuch Grant to two the Grant was faulty in its Foundation, and therefore ſhall not be helped by any Accident after: So if the Office hath been antiently granted to one with an antient Fee, and after a Grant is made to another in Reverſion, after the Death of the firſt Grantee; this ſhall not bind the Succeſſor, for there can be no Neceſſity urged to juſtify this; beſides that, the Grantee in Reverſion, by Sickneſs or other Accident, may become incapable to exerciſe ſuch Office before it comes into Poſſeſſion, and if the Biſhop, or other Spiritual Perſon, might grant ſuch Offices to two, or grant them in Reverſion, they might abuſe that Power, and grant them to twenty, or for twenty Lives in Reverſion one after another, which as they cannot be juſtified from any Neceſſity, ſo they would be inconvenient, by tying up the Succeſſor's Hands from chooſing ſuch Officers as he thought neceſſary and proper for the Diſcharge of ſuch Offices; and therefore no Confirmation will make good ſuch Grants againſt the Succeſſor. 10 Co. 61. Cro. Car. 49. 11 Co. 4. * Page 722

The Biſhop of *Norwich* having the Office of High Steward of his Courts, to which a Fee of 10 *l. per Annum* appertained, and alſo the Office of Under-Steward of the ſame Courts, to which a Fee of 4 *l. per Annum* appertained, granted the Office of Under-Steward to three for their Lives, whereof one was within Age, and the other two being dead, the Infant grants over the Office to the Defendant, and then the Biſhop grants both theſe Offices to the Plaintiff with the Fees; and by the Books, both theſe Grants ſeem to be void; the firſt, becauſe it was granted to three, where the Cuſtom warranted a Grant thereof only to one; and alſo, becauſe the ſurviving Grantee was an Infant, and ſo not capable of a judicial Office, as the Steward of a Court is: The 2*d*, becauſe both were granted to one Perſon, Cro. Eliz. 636. *Scambler* ver. *Watts.* 10 Co. 61. Cro. Car. 50. Ley 74. Dyer 80. b. in Margine.

Perſon, where they had uſually been granted to two ſeverally, with diſtinct Fees, and therefore the Grant of both to one Perſon neither neceſſary nor convenient, and by Conſequence not binding againſt the Succeſſor; alſo ſuch Grant of either the ſaid Offices in Reverſion would not bind the Succeſſor, for the Reaſons before given.

10 Co. 61. b. Cro. Car. 48. 2 Brownl. 137. Biſhop of *Ely*'s Caſe. Ley 78, 80.

But although the Biſhoprick, Deanery, *&c.* were founded but of late Times, yet the Grant of ſuch Offices as are neceſſary, and cannot be exerciſed by the Biſhop, Dean, *&c.* in Perſon, may be granted, together with a reaſonable Fee for the Exerciſe thereof; (the Reaſonableneſs whereof the Court where the Cauſe depends is to be Judge); for theſe cannot be ſaid to tend to the Impoveriſhment of the Succeſſor, but rather for his Benefit, by providing Officers fit and qualified to take Care of the Revenues; and therefore ſuch Grants are not within the Reſtraint of 1 *Eliz. cap.* 19. & 13 *Eliz. cap.* 10. but not being warranted by 32 *H.* 8. *cap.* 28. they muſt be confirmed by all Perſons intereſted therein; becauſe they remain at Common Law, untouched by any of the Statutes.

2 Lev. 136. 3 Keb. 472, 506. *Ridley* ver. *Pawnal.* † It is ſaid the Office of Regiſter of a Biſhop may be granted in Reverſion. 2 Rol. Abr. 154. l. 20. Jon. 264. Cro. Car. 259, 279. Jon. 311. But *vide poſt* 724. (*a*) Cro. Car. 258, 279. Jon. 311. March 38. *accord*, that ſuch Grant before 1 Eliz. is a Badge of their having been antiently ſo granted.

In an Action upon the Caſe, for diſturbing him in his Office of Regiſter† to the Biſhop of *Briſtol*, which was a new Biſhoprick taken out of the Biſhoprick of *Sarum*, and founded in the Time of *H.* 8. and which had been granted *ſeparalibus temporibus* after the Founda ion to one, and his Aſſigns for three Lives, *&c.* theſe Differences were taken and agreed to by the Court. 1*ſt*, That the Biſhop of a new Biſhoprick may grant Offices of Neceſſity for Life. 2*dly*, If an Office hath been uſually granted by the Biſhop of a new Biſhoprick, for three Lives, with the Conſent or Confirmation of the Dean and Chapter, (*a*) before 1 *Eliz. cap.* 19. it may be now granted accordingly. 3*dly*, Be the Biſhoprick new or old, if it was not ſo granted, but granted always before 1 *Eliz. cap.* 19. for one or two Lives, it cannot be granted by the Biſhop after 1 *Eliz. cap.* 19. for three Lives. 4*thly*, If it was granted before 1 *Eliz. cap.* 19. for three Lives, and after the Statute but for one Life, yet this ſhall not abridge the Power of the Biſhop, but he may grant it for three Lives, *&c.* And in the principal Caſe, the Verdict, finding that it had been granted *ſeparalibus temporibus* after the Foundation to one and his Aſſigns for three Lives, was held defective, becauſe it might be ſo granted after the Foundation, and yet be after 1 *Eliz. cap.* 19. and therefore a *Venire facias de novo*, was awarded to ſupply that Defect.

Bridg. 30, 32. Cro. Car. 47. * Page 723 Ley 71. Biſhop of *Chicheſter* ver. *Freedland.* Cro. Car. 16. *Cook* ver *Younger.* Ley 75.

The Biſhop of *Chicheſter* was ſeiſed in Fee of a Park in Right of his Biſhoprick, and had the Office of Park-keeper, which he by Deed 44 *Eliz.* *grants to the Defendant for his Life, *& ulterius conceſſit pro executione officii prædict'* five Marks, with a Clauſe of Diſtreſs, *una cum a Livery*, or 13*s.* 4*d.* *per Annum, nec non paſturam pro duobus equis* in the ſaid Park yearly, *una cum* the Windfalls, with Clauſe of Diſtreſs for the ſaid Rent, or Annuity of five Marks, and Livery, or 13*s.* 4*d.* and this Grant was confirmed by the Dean and Chapter; and for Non-payment of the five Marks the Defendant diſtrains, and avers the Office and Fee of five Marks to be antiently granted, but makes no Averment for the Reſidue. The Plaintiff, in Bar of the Avowry, pleads the Statute 1 *Eliz. cap.* 19. and ſays, that the Paſturage was never granted before, and derives a Title to himſelf under the preſent Biſhop, Succeſſor to the Grantor; and in this Caſe it ſeems to be agreed by all, that if the new additional Fees had been in another Clauſe, diſtinct from the Grant of the Office and five Marks; or had been granted for another Conſideration; or if the Biſhop had granted the Office and five Marks for him and his Succeſſors, and had granted the Paſturage, and other additional Fees, during his own Life only; that in theſe Caſes the Grant had been good, for the antient Office and Fee, to bind the Succeſſor, but

not

not for the additional Fees; or if the Grant of the Office had been with a Fee of 5 *l.* where the antient Fee was but five Marks; there the Grant being intire would have been void *in toto* againſt the Succeſſor; but whether theſe Grants were diſtinct or intire ſeems the only Diſpute in the Caſe; wherein the Court was divided; two Judges holding that they were ſeveral and diſtinct, and two, that they were intire and depending on each other, and therefore void in the Whole againſt the Succeſſor; but a Variation in the Days of Payment of the antient Fee, as if it were formerly payable at one Day, and is now reſerved payable at two, will not vitiate the Grant.

In Replevin, Defendant avows upon a Grant to him by the Dean and Chapter of, *&c.* of the Office of Caterſhip of the Church for Life, with an Annuity of 6 *l. per Annum*, for the exerciſing thereof, and a Clauſe of Diſtreſs; and avows for the Annuity, and avers, that it was an antient Office pertaining to the Dean and Chapter, *&c.* but does not aver that the Annuity was an antient Annuity; the Defendant pleads 13 *Eliz. cap.* 10. *&c.* and ſhews the Death of the Dean Grantor, and the Election of another, *&c.* and upon Demurrer adjudged, that the Grant was void. Brownl. 182. *Humphry* ver. *Parſel.*

The Biſhop of *Landaff* in 1672, granted the Office of Chancellor of his Dioceſe to *A.* and *B.* and the Survivor of them for Life, and this was confirmed by the Dean and Chapter; and now *A.* being dead it became a Queſtion, whether this Grant to two were good againſt the Succeſſor. And the Court held, that if it had been antiently ſo granted, it would bind the Succeſſor; and to prove it antiently ſo granted, four Grants were produced, three of which were made in the Time of one Biſhop, and the laſt in the Year 1620. from which Time to this preſent Grant in 1672. no ſuch Grant to two had been made, and the firſt of theſe Grants was about 50 Years after 1 *Eliz. cap.* 19. yet the Court held this ſufficient Evidence to prove this Office antiently grantable to two before the Statute 1 *Eliz. cap.* 19. (as the Preſcription muſt be to warrant it;) and one *Ridley*'s Caſe was mentioned of the Office of Regiſter of *Briſtol*, wherein my Lord *Hale* was of Opinion, that if it could be ſhewn, that ſuch Grants were made ſome Time after the firſt *Eliz. cap.* 19. it would be an Evidence that ſuch were alſo made before the Statute; and upon a ſpecial Verdict finding this Matter, the Court gave Judgment accordingly, that the Grant was ſufficiently warranted by antient Uſage, and had no great regard to the Objection of its being a judicial Office, which cannot by Law be granted to two, being ſupported by ſuch Uſage, and no Diminution of the Succeſſor's Revenue, which thoſe Statutes were made to ſecure. 4 Mod. 16, 17, 18. *Jones* ver. *Bean.* Show. 288. 12 Mod. 10. 2 Salk. 465. pl. 1. Carth. 213.

* Some hold, that when ſuch antient Office and antient Fee are granted together, with ſome new additional Fees, yet if the Diſtreſs and Avowry be only for the antient Fee, that the Avowant need only make Averment, for that Fee for which he diſtrains, that it was antient; and the Plaintiff, if the other Fees were new, ought to ſhew it in Avoidance of the Grant; for the Avowry, being only for the antient Fee, needs meddle with no more, that being only in Queſtion. * Page 724. 10 Co. 58, 9. But *Quære*; for others hold, that the Avowant ought to make Averment for all, becauſe he is in the Nature of a Plaintiff, and is to make a Title. *Vide* Cro. Car. 48-9, 50. Ley 73, 77.

In an Action upon the Caſe, for diſturbing him in the Exerciſe of the Office of Commiſſary of the Biſhop of *Lincoln*, and of Official to the Archdeacon of *Leiceſter*, upon Not guilty pleaded, it was found that theſe were antient Offices of Judicature, always granted to one Perſon for Life, the one by the Biſhop, and the other by the Archdeacon, till 1609, when they were granted by the Biſhop and Archdeacon ſeverally to *A.* and *B.* for their two Lives: and after 1614, were likewiſe granted to *B.* and *C.* with Confirmation of the Biſhop's Grant, by the Dean and Chapter, and of the Arch- Cro. Car. 258. Jon. 263. *Walker* ver. Sir *John Lamb.*

Archdeacon's Grant by the Biſhop, Dean and Chapter; and that after the Death of that Biſhop and Archdeacon, their Succeſſors ſeverally granted both the ſaid Offices to the Plaintiff; who being diſturbed by *C.* brought this Action and had Judgment; for all the Court held theſe Offices Parcel of the Poſſeſſions of the Biſhoprick and Archdeaconry, and expreſly within the Word *Hereditamenets* in the 1 *Eliz. cap.* 19. & 13 *Eliz. cap.* 10. and therefore being uſually granted in Poſſeſſion, the Grant thereof in Reverſion is without Warrant, and no Neceſſity can be urged for ſo doing; and the Acceptance by *B.* of the ſecond Grant, where *C.* was joined, was no Surrender of the firſt, and by Conſequence the reſpective Succeſſors were not bound by theſe Grants, but might lawfully, as they have done, grant both theſe Offices to the Plaintiff for his Life; and therefore he had Judgment.

Cro. Car. 279, 555. Jon. 310. 2 Rol. Abr. 153. *Young* ver. *Stowel.* March 38. 3 Leon. 31. 4 Mod. 279. See Ld. Raym. 49, 51, 853.

But where the Office of Regiſter of a Biſhop hath been uſually granted as well in Reverſion as in Poſſeſſion, there a Grant to one of ſuch Office for Life, where by the Death or Surrender of the preſent Officer it ſhall become void, is good, and ſhall bind the Succeſſor, and is not within the Reſtraint of either of the ſaid Statutes; becauſe, being uſually ſo granted, it might proceed at firſt from a Reaſon of Convenience and Neceſſity, that the Office might always be kept full, and a Perſon always ready to execute it, for the Benefit of the King's Subjects; for though there is no Reverſion of an Office, unleſs it be an Office of Inheritance, yet it may well be granted in Reverſion, *Habend'* after the Death of the preſent Officer; which is no more than a Proviſion of a Perſon to ſupply it, when it becomes void; and if ſuch Proviſion has been uſually made, the Cuſtom and Uſage gives Sanction to it; but then ſuch Grant muſt be confirmed, as is ſaid before; and therefore where ſome Books hold ſuch Grant of Offices in Reverſion not good, it muſt be taken with this Diverſity, that they have not uſually been ſo granted, but only in Poſſeſſion, and then to grant them in Reverſion is not warranted by the Cuſtom, nor ſhall bind the Succeſſor.

Cro. Car. 279, 555, 557. Jon. 310. 2 Rol. Abr. 123.

But in the laſt Caſe, where the Office of Regiſter was granted by the Biſhop to an Infant, then about eleven Years of Age, *Habend'* after the Death or Surrender of the preſent Officer, *exercend' per ſe vel ſuffic' Deput' ſuum cum vadiis, &c.* and when the Tenant for Life died, the Grantee in Reverſion was then thirty Years of Age; all the Court held his Infancy, at the Time of the Grant, no Cauſe to avoid it; becauſe, at the Time it fell into Poſſeſſion, he was of ſufficient age to execute it; and though it had fallen vacant during his Minority, yet as this Caſe is, the Grant would have been good, becauſe it is to be exerciſed *per ſe vel per ſuffic' Deputat'*, *&c.* and therefore though he were not capable of exerciſing * Page 725 * it himſelf, (as Writing and a little *Latin* would ſufficiently qualify him for; it being only to write and regiſter Acts done in Court,) yet he might have put in a ſufficient Deputy; and therefore they denied the Opinion *Co. Lit.* 3. *b.* that the Grant of the Office of Steward of the Court of a Manor, either in Poſſeſſion or Reverſion, to an Infant was void, as incapable, and wanting Knowledge to exerciſe it, unleſs it were to be underſtood that there was no Clauſe of exerciſing it *per ſe vel ſuffic' Deputat'*, and that the Infant himſelf was of ſuch tender Age, that by no Intendment he was capable of exerciſing it himſelf; but they held, that (*a*) if there were ſuch Clauſe, then it would be good, and he might appoint a ſufficient Deputy; and if he did not, it would be a Forfeiture of his Office, notwithſtanding his Infancy; and of the Sufficiency of the Deputy the Lord of the Manor, or Judge of the Court, were to be Judges; and if the Deputy ſhould miſdemean himſelf, or prove unſkilful in his Office, it would be a Forfeiture at the Infant's Peril; and this ſeems to be the Diverſity taken in the Books. Beſides, if the Caſe in *Co. Lit.* be meant of the Office of Steward of a Court-Leet, it may be good Law, becauſe that is a Judicial Office, which perhaps

(*a*) *Vid.* Cro. Jac. 18. Hob. 148. 11 Co. 87. 8 Co. 44.

haps cannot be executed by Deputy; but if it be meant of a Court-Baron, then the general Opinion of the (*b*) Books is againſt it, which hold, that the Steward of a Court-Baron may make a Deputy, though there were no expreſs Power given him for that Purpoſe; for that it is an Office purely miniſterial, (for the Suitors are Judges in the Court-Baron) and conſiſts in entering Plaints, Surrenders, Admittances, &c. in the Nature of a Regiſter; and though an Infant ſhould have the Stewardſhip of both Courts, *viz.* the Court-Leet and Court-Baron together, and that he ſhould be incapable to exerciſe that of the Court-Leet, and therefore the Grant thereof to him ſhould be void; yet for the Court-Baron the Grant would continue good, and he might either exerciſe it in Perſon, or by a ſufficient Deputy; and perhaps upon this Diverſity the Books may be reconciled; for they agree, that if an Office of Judicature or Learning be given to a Man utterly incapable of it, no Clauſe of exerciſing it by Deputy, or otherwiſe will mend the Caſe, or make the Grant good; for it muſt radically veſt in the Grantee before it can go in Title of Procuration, or Deputation, to another.

(*b*) *Vide* 9 Co. 48, 49. 2 Lev. 245. 2 Jon. 126. Hob. 148. 11 Co. 87. Cro. Jac. 18.

But where the Dean of *Windſor*, having Ordinary Juriſdiction, by Deed made ſuch a one his Commiſſary, which was confirmed by the Dean and Chapter, yet after his Death it was held the Succeſſor was not bound thereby, becauſe this was a Judicial Office and Authority; which though it may be exerciſed by a Subſtitute, yet it is in Law in the Ordinary himſelf; and Excommunication, Probate of Teſtaments, and ſuch like, they may be tranſacted by the Commiſſary, yet it muſt be in the Name of the Ordinary, and if the Ordinary offends, the Subſtitute ſhall be puniſhed; and therefore this Grant can continue no longer than the Ordinary himſelf who grants it; for if it ſhould bind the Succeſſor, then he could not remove him, though he were anſwerable for his Acts and Offences; which would be hard; therefore this Grant determines with the Death or Remotion of the Ordinary, and then no Confirmation can make it good after; and the Archbiſhops in their ſeveral Provinces, have the Ordinary Juriſdiction *cede vacante*; and the Archbiſhop, Dean and Chapter, cannot grant the Juriſdiction of Guardian of the Spiritualities after the Death of the Biſhop; which is a ſtronger Caſe.

Noy 153. Prebend of *Hatcherley*'s Caſe.

17 E. 3. 23.

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* (E) Of the Ceremony requiſite to a compleat Creation or Grant, and of the Oaths required by Statute.

* Page 726

WHere-ever the Right of granting and erecting new Offices is veſted in the King as the Head and Fountain of Juſtice, he muſt uſe proper Words for that Purpoſe; as in the Erection of a new Office the Words *erigimus conſtituimus*, &c. muſt be made uſe of; and it hath been adjudged, that the Word *Conceſſimus* is not ſufficient, unleſs there be an Office already in Being, and then a Grant by the Word *Conceſſimus* is good.

Rol. Abr. 152. Co. 121. 2 Sid. 137. Dyer 200. b. pl. 62. Hard. 351.

If an Officer be created by Letters Patent, he is a compleat Officer before he is ſworn, and before any Inveſtiture.

Mod. 123.

But if a Perſon be created Herald at Arms, Inveſtiture is neceſſary before he is a compleat Officer.

Leon. 248. Mod. 123. See 10 Mod. 66, 74, 290. 12 Mod. 199. Fitzgib. 293. Ld. Raym. 51, 158, 163, 563. *Cont.* Rol. Abr. 154. 2 Salk. 467. pl. 4. 5 Mod. 386. Carth. 426.

An

Leon. 219. 3 Mod. 147. 5 Mod. 388. Ld. Raym. 159, 163, 853. Co. Lit. 61. b. (a) That a Corporation may make a Bailiff without Deed, Title *Corporations*, Letter (E).

An Office, being a Thing which lies in Grant, cannot regularly be granted or transferred from one to another, but by Deed duly executed, which is an Inſtrument the Law hath appointed inſtead of Livery.

But it is ſaid, that one may retain (*a*) a Steward to keep his Court-Baron and Court-Leet without Deed, and that ſuch Retainer ſhall continue until he be diſcharged.

Carth. 426. 2 Salk. 467. pl. 4. 5 Mod. 386. *Sanders* ver. *Owen*.

Alſo it hath been adjudged, that a Parol Appointment of Clerk of the Peace by the *Cuſtos Rotulorum*, by the Words following, ſpoken in open Court, is good, *I do nominate the ſaid* Philip Owen *to be Clerk of the Peace, according to the Act of Parliament*; but in *B. R.* though the Parol Appointment was held good, yet that Court reverſed the Judgment; becauſe the Form of the Words uſed in the Nomination were inſufficient; for he did not name any certain County of which he ſhould be Clerk of the Peace, nor diſtinguiſh which Statute he intends; for there are two Statutes which concern this Matter, *viz.* 37 *H.* 8. *cap.* 1. *ſect.* 3. and 1 *W. & M. ſtat.* 1. *cap.* 21. *ſect.* 5. and moreover by his adding this Word, *viz.* ſaid *Philip Owen*, it is altogether inſenſible; but the Judgment of *B. R.* was reverſed in the Houſe of Lords.

By the 13 *Car.* 2. *ſt.* 2. *cap.* 1. it is enacted, "That no Perſon ſhall "be placed, elected or choſen to any Office or Place of Mayor, Alderman, "Recorder, Bailiff, Town-Clerk, Common-Council Man, or other Office "of Magiſtracy, Place of Truſt, or other Employment relating to the "Government of any City, Corporation, Borough, Cinque-Port or other "Port-Town, who ſhall not have received the Sacrament according to the "Rites of the Church of *England*, within one Year next before ſuch Elec-"tion; and that every Perſon ſo placed or elected ſhall take the Oaths of "Allegiance and Supremacy at the ſame Time when the Oath for the due "Execution of the ſaid Office, &c. ſhall be adminiſtered; and that the "ſaid Oath ſhall be adminiſtered and (*b*) tendered by thoſe who adminiſter "the Oath of Office; and in Default of ſuch, by two (*c*) Juſtices of Peace "of the Corporation; and that in Default hereof every ſuch Election, "Placing and Choice, ſhall be void."

(*b*) It hath been adjudged, that it is no Excuſe that the Oaths were not tendered. 5 Mod. 316. 2 Jon. 121. Salk. 428. (*c*) Which makes it neceſſary in a Return to a *Mandamus*, ſetting forth that the Party did not take the Oaths before the Mayor, &c. to add, that he did not take them before two Juſtices of Peace. 5 Mod. 317. 2 Salk. 428. pl. 3.

By the 25 *Car.* 2. *cap.* 2. (commonly called the Teſt-Act) it is enacted, "That all Officers Civil and Military, (except thoſe of Inheritance appoint-
* Page 727 "* ing ſufficient Deputies,) and all who have any Fee, &c. by Patent from "the King, (except ſuch as ſhall be granted for valuable Conſideration for "Life or Years, and not relate to any Office or Place of Truſt) and alſo "all who have any Place of Truſt or Employment in the King's Houſhold, "ſhall take the Oaths of Allegiance and Supremacy, and Teſt, the next "Term, (in the King's Bench or Chancery, or Quarter-Seſſions,) and re-"ceive the Sacrament within three Months, and give in a Certificate there-"of, proved by two Witneſſes, to the Court wherein they take the ſaid "Oaths; and in Caſe of Neglect ſhall be diſabled to hold the ſaid Offices, "&c. and (*d*) forfeit five hundred Pounds, except Feme Coverts, &c."

(*d*) It hath been adjudged, that the Perſons ſo diſabled loſe only their Right to the Profits of their Offices from the Time of ſuch Diſability, but that they loſe nothing veſted in them before. Lutw. 910.

But

But it is provided by the last mentioned Statute, "That the said Act "shall not extend to Constables or Churchwardens, or (*b*) such like inferior "Civil Officers, or to a Bailiff of a Manor or Lands, or such like private "Officers."

(*b*) It hath been made a *Quære*, whether it extends to the Censor of the College of Physicians. 5 Mod. 431.——[See *ante* 719.

Though the Words of the first of these Acts are so very strong, as to make such Election, *&c.* void, and those of the second, to make such Persons disabled in Law to all Intents and Purposes whatsoever to have, occupy or enjoy the said Offices; yet it hath been strongly holden, that the Acts of one under such a Disability, being intailed in such an Office, and executing the same without any Objection to his Authority, may be valid as to Strangers; for otherwise, not only those who no way infringe this Law, but even those whose Benefit is intended to be advanced by it, might be Sufferers for another's Fault, to which they are no Way privy; and one Chasm in a Corporation, happening through the Default of one Head Officer, would perpetually vacate the Acts of all others, whose Authority in respect of their Admission into their Offices, or otherwise, may depend on his.

2 Jon. 81, 137. 2 Lev. 184, 242. 2 Mod. 193. 3 Keb. 606, 665, 682, 721 Hawk. P.C. 10. 10 Mod. 185. Ld. Raym. 299.

(F) Of the Offence of Buying and Selling an Office, and what Offices are prohibited to be thus disposed of.

THE taking or giving of a Reward for Offices of a public Nature is said to be Bribery; and surely, says *Hawkins*, nothing can be more palpably prejudicial to the Good of the Public, than to have Places of the highest Concernment, on the due Execution whereof the Happiness of both King and People doth depend, disposed of, not those who are most able to execute them, but to those who are most able to pay for them; nor can any Thing be a greater Discouragement to Industry and Virtue, than to see those Places of Trust and Honour, which ought to be the Rewards of those who by their Industry and Diligence have qualified themselves for them, conferred on such who have no other Recommendation, but that of being the highest Bidders; neither can any Thing be a greater Temptation to Officers to abuse their Power by Bribery and Extortion, and other Acts of Injustice, than the Consideration of the great Expence they were at in gaining their Places, and the Necessity of sometimes straining a Point to make their Bargain answer their Expectations.

3 Inst. 148. Hawk. P. C. 168-9.—— It is said to be *Malum in se*, and indictable at Common Law. Noy 102. Moor 781.

* For which Reasons, among many others, it is expresly enacted by 12 *Ric.* 2. *cap.* 2. "That the Chancellor, Treasurer, Keeper of the Privy "Seal, Steward of the King's House, the King's Chamberlain, Clerk of "the Rolls of the Justices of the one Bench and of the other, Barons of the "Exchequer, and all other that shall be called to ordain, name or make "Justices of the Peace, Sheriffs, Escheators, Customers, Comptrollers, or "any other Officer or Minister of the King, shall be firmly sworn that they "shall not ordain, name or make any of the above-mentioned Officers for "any Gift or Brokage, Favour or Affection, nor that none that sueth by "himself, or by others, privily or openly, to be in any Manner of Office, "shall be put in the same Office, or in any other, but that they make all "such Officers and Ministers of the best and most lawful Men, and sufficient to their Estimation and Knowledge.

* Page 728 For the Exposition hereof, *vide* the Earl of *Macclesfield's* Trial. [State Trials, 6 Vol. 477.]

And by the 4 *H.* 4. *cap.* 5. it is enacted, That no Sheriff ſhall let his " Bailiwick to farm to any Man for the Time that he occupieth ſuch " Office.

But the principal Statute relating to this Matter is the 5 & 6 *E.* 6. *cap.* 16. which is *verbatim* as follows, *Sect.* 1. " For avoiding of Corruption " which may hereafter happen to be in the Officers and Miniſters in thoſe " Courts, Places or Rooms, wherein there is requiſite to be had the true " Adminiſtration of Juſtice, or Services of Truſt, and to the Intent that " Perſons worthy and meet to be advanced to the Place where Juſtice is to " be miniſtred, or any Service of Truſt executed, ſhall hereafter be pre- " ferred to the ſame, and no other :

Sect. 2. " Be it therefore enacted, That if any Perſon or Perſons at any " Time hereafter bargain or ſell any Office or Offices, or Deputation of any " Office or Offices, or any Part or Parcel of any of them, or receive, have " or take any Money, Fee, Reward or any other Profit, directly or indi- " rectly, or take any Promiſe, Agreement, Covenant, Bond, or any Af- " ſurance to receive or have any Money, Fee, Reward or other Profit, di- " rectly or indirectly, for any Office or Offices, or for the Deputation of " any Office or Offices, or any Part of any of them ; or to the Intent that " any-Perſon ſhould have, exerciſe or enjoy any Office or Offices, or the " Deputation of any Office or Offices, or any Part of any of them, which " Office or Offices, or any Part or Parcel of them, ſhall in any wiſe touch " or concern the Adminiſtration or Execution of Juſtice, or the Receipt, " Controlment or Payment of any the King's Highneſs Treaſure, Money, " Rent, Revenue, Account, Aulneage, Auditorſhip, or Surveying of any " of the King's Majeſty's Honors, Caſtles, Manors, Lands, Tenements, " Woods or Hereditaments, or any the King's Majeſty's Cuſtoms, or any " Adminiſtration or neceſſary Attendance to be had, done or executed in " any of the King's Majeſty's Cuſtom-Houſe or Houſes, or the Keeping of " any the King's Majeſty's Towns, Caſtles or Fortreſſes, being uſed, occu- " pied or appointed for a Place of Strength and Defence ; or which ſhall " concern or touch any Clerkſhip to be occupied in any Manner of Court " of Record wherein Juſtice is to be miniſtred ; that then all and every ſuch " Perſon and Perſons, that ſhall ſo bargain or ſell any of the ſaid Office or " Offices, Deputation or Deputations, or that ſhall take any Money, Fee, " Reward or Profit, for any of the ſaid Office or Offices, Deputation or " Deputations, of any of the ſaid Offices, or any Part of any of them, or " that ſhall take any Promiſe, Covenant, Bond or Aſſurance for any Money, " Reward or Profit, to be given for any of the ſaid Office or Offices, De- " putation or Deputations of any of the ſaid Office or Offices, or any Part " of any of them, ſhall not only loſe and forfeit all his and their Right, " Intereſt and Eſtate, which ſuch Perſon or Perſons ſhall then have of, in " or to any of the ſaid Office or Offices, Deputation or Deputations, or " any Part of any of them, or of, in or to the Gift or Nomination of " any the ſaid Office or Offices, Deputation or Deputations, for the which
*Page 729 " * Office or Offices, or for the Deputation or Deputations of which Office " or Offices, or for any Part of any of them, any ſuch Perſon or Perſons " ſhall ſo make any Bargain or Sale, or take or receive any Sum of Money, " Fee, Reward or Profit, or any Promiſe, Covenant, Bond or Aſſurance " to have or receive any Reward, Money or Profit ; but alſo that all and " every ſuch Perſon or Perſons that ſhall give or pay any Sum of Money, " Reward or Fee, or ſhall make any Promiſe, Agreement, Bond or Af- " ſurance for any of the ſaid Offices, or for the Deputation or Deputa- " tions of any the ſaid Office or Offices, or any Part of any of them, ſhall " immediately, by and upon the ſame Fee, Money, or Reward given or " paid, or upon any ſuch Promiſe, Covenant, Bond or Agreement had or " made for any Fee, Sum of Money or Reward, to be paid as is aforeſaid,

" be

" be adjudged a diſabled Perſon in the Law to all Intents and Purpoſes to " have, occupy or enjoy the ſaid Office or Offices, Deputation or Deputa- " tions, or any Part of any of them, for the which ſuch Perſon or Perſons " ſhall ſo give or pay any Sum of Money, Fee or Reward, or make any " Promiſe, Covenant, Bond, or other Aſſurance to give or pay any Sum of " Money, Fee or Reward.

Sect. 3. " It is further enacted, That all and every ſuch Bargains, Sales, " Promiſes, Bonds, Agreements, Covenants and Aſſurances, as be before " ſpecified, ſhall be void to and againſt him and them by whom any ſuch " Bargain, Sale, Bond, Promiſe, Covenant or Aſſurance ſhall be had or made.

Sect. 4. " Provided always, that this Act, or any Thing therein con- " tained, ſhall not in any wiſe extend to any Office or Offices whereof " any Perſon or Perſons is or ſhall be ſeiſed of any Eſtate of Inheritance; " nor to any Office of Parkerſhip, or of the keeping of any Park-houſe, " Manor, Garden, Chaſe or Foreſt, or to any of them; any Thing in " this Act heretofore mentioned to the contrary thereof in any wiſe not- " withſtanding

Sect. 5. " Provided alſo, that if any Perſon or Perſons do hereafter offend " in any Thing contrary to the Tenor and Effect of this Act, yet that " notwithſtanding, all Judgments given, and all other Act or Acts, exe- " cuted or done, by any ſuch Perſon or Perſons ſo offending by Authority " or Colour of the Office or Deputation, which ought to be forfeited, or " not occupied, or not enjoyed, by the Perſon ſo offending, as is aforeſaid, " after the ſaid Offence ſo by ſuch Perſon committed or done, and before " ſuch Perſon ſo offending for the ſame Offence be removed from the " Exerciſe, Adminiſtration and Occupation of the ſaid Office or Depu- " tation, ſhall be and remain good and ſufficient in Law to all Intents, " Conſtructions and Purpoſes, in ſuch like Manner and Form as the ſame " ſhould or ought to have remained and been, if this Act had never been " had or made.

" Provided alſo, that this Act ſhall not extend to be prejudicial or hurt- " ful to any of the Chief Juſtices of the King's Courts, commonly called " the King's Bench or Common Pleas, or to any of the Juſtices of Aſſiſe that " now be, or hereafter ſhall be; but that they and every of them may do in " every Behalf, touching or concerning any Office or Offices to be given or " granted by them or any of them, as they or any of them might have done " before the making of this Act; any Thing above mentioned to the con- " trary in any wiſe notwithſtanding."

In the Conſtruction of the laſt mentioned Statute the following Opinions have been holden:

1. That the Offices of Chancellor, Regiſter and Commiſſary in Eccleſiaſtical Courts are within the Meaning of the Statute, in as much as thoſe Courts do not only determine Matters which are brought before them *pro ſalute animæ*, but alſo have the Deciſion of Diſputes concerning the Lawfulneſs of Matrimony, and Legitimation of Children, which touch the Inheritance of the Subject; and alſo hold Plea of Legacies and Tithes, *&c.* in which Reſpects they are Courts of Juſtice. Cro. Jac. 269. 3 Inſt. 148. 12 Co. 78. Salk. 468. pl 6. 3 Lev. 289. 2 Vent. 187, 267. * Page 730

2. It hath been adjudged, That Offices in Fee are out of the Statute; ſo if the King be ſeiſed in Fee of a Bailiwick, and he demiſe the ſame to *A.* who demiſes to *B.* rendring Rent, the Demiſe to *B.* is not within the Statute; for Offices in Fee being excepted out of the Statute, under Leaſes of ſuch Offices are alſo excepted incluſively. 2 Lev. 151. *Ellis* ver. *Ruddle.*

3. It hath been reſolved, that the Place of Cofferer is within this Statute, and a Perſon having once purchaſed this Place is for ever diſabled to enjoy the ſame; and that the King is bound by this Statute. 3 Bulſt. 91. Sir *Arthur Ingram's.*

Caſe. Co. Lit. 234. S. C. and there ſaid, that the King could not diſpenſe with this Statute by any *Non obſtante.* Cro. Jac. 385. S. C. cited.

4 Leon. 33. *Godbol's* Caſe. 4 Mod. 223. S. C. cited.

4. It hath been agreed, that the Sale of a Bailiwick of a Hundred is not within the Statute, for ſuch an Office doth not concern the Adminiſtration of Juſtice, nor is it an Office of Truſt.

2 And. 55, 107. *Smith* ver. *Cotteſbill.*

5. If *A.* being Surveyor of the Cuſtoms, agrees with *B.* that *B.* ſhall be his Deputy, and that in Conſideration thereof *B.* ſhall pay *A.* 600*l.* and 100*l.* annually, and it is further agreed, that *A.* will ſurrender his Patent, and procure a new one in the Names of *A.* and *B.* which is done accordingly, and *B.* gives *A.* a Bond for Performance of the whole Agreement; the Bond is void, as being within this Statute; for though Part of the Condition, ſuch as procuring a new Patent, *&c.* may not be void within the Statute, yet being joined with that which is ſo, it makes the Whole void.

Paſch. 26. Car. 2. in *C. B.* *Sparrow* ver. *Reynold.*

6. It hath been adjudged, that a Seat in the Six-Clerks-Office is not within the Statute, being a miniſterial Office only; and they are but Under Clerks, who have ſo much a Sheet for Copying, *&c.* But one Judge held it not ſaleable at Common Law, for the following Reaſons; 1*ſt*, Diſcouragement of Merit and Induſtry. 2*dly*, It's being the Occaſion of Extortion and Exaction of exceſſive Fees. 3*dly*, From its being a great Charge to Suits. 4*thly*, It exempts the Perſons, who enter by theſe Means, in a great Meaſure from the due Regulations under which they ought to be; for they are not ſo eaſily removed, as if they were at the Will of him who hath the Diſpoſal of them.

Preced. Chan. 199.

7. It hath been held, that this Statute doth not extend to Military Officers; and that the 7 *W. & M.* which requires, that every Commiſſion Officer, before his Commiſſion is regiſtred, ſhould take the Oath there mentioned, that he had not directly or indirectly given any Thing for procuring the Commiſſion, but the uſual Fees extend only to Horſe, Foot and Dragoons, but not to the Marines.

4 Mod. 222. See 2 Ld. Raym. 1245. 2. Salk. 411. pl. 11. *Blankark* ver. *Caldy.*

8. It hath been adjudged, thas the Sale of the Deputation of the Office of Provoſt Marſhal of *Jamaica*, is not within this Statute; (*a*) becauſe this Statute does not exteud to the Plantations.

(*a*) 2 Mod. 45. S. P. undetermined, and there ſaid *arguendo*, that ſo good a Law ſhould have as extenſive a Conſtruction as poſſible.

Trin. 9 Geo. 2 in *B. R.* *Maccarty* ver. *Wickford.*

9. In a Writ of Error on a Judgment in *Ireland*, it was held clearly, that the Office of Clerk of the Crown, and Clerk of the Peace, was within the Statute; but that this Law did not extend to *Ireland*, not being enacted there.

Hob. 75. Co. Lit. 234. Cro. Car. 361 Cro. Jac. 386

10. It hath been held, that one who makes a Contract for an Office, contrary to the Purport of this Statute, is ſo far diſabled to hold the ſame, that he cannot at any Time during his Life be reſtored to a Capacity of holding it by any Grant or Diſpenſation whatſoever.

* Page 731 2 Salk. 468. pl. 6. 6 Mod. 234. *Godolphin* ver. *Tudor.* Comb. 356. S. P. See 2 Ld. Raym. 1245. Vern. 98. Prec. Chan. 199. 3 Will. Rep. 391. pl. 109, 393. Caſ. Temp. Talb. 97, 140. 12 Mod. 90, 521. Fitzgib. 45.

* 11. It is held, that where an Office is within the Statute, and the Salary is certain, if the Principal make a Deputation, reſerving a leſſer Sum out of the Salary, it is good; ſo if the Profits be uncertain ariſing from Fees, if the Principal make a Deputation, reſerving a certain Sum out of the Fees and Profits of the Office, it is good; for in theſe Caſes the Deputy is not to pay, unleſs the Profits ariſe to ſo much; and though a Deputy by his Conſtitution is in Place of his Principal, yet he has no Right to his Fees, they ſtill continue to be the Principal's; ſo that, as to him, it is only reſerving a Part of his own, and giving away the Reſt to another; but where the Reſervation or Agreement is not to pay out of the Profits, but to pay generally a certain Sum, it muſt be paid at all Events; and a Bond for Performance of ſuch Agreement is void by the Statute.

12. It

12. It hath been held, that this being a public Law, the Judges *ex officio* are to take Notice of it; but yet it ſeems the more regular and ſafe Way to plead it; but it hath been reſolved, that a Perſon in pleading this Statute need not alledge, that the Party againſt whom it is pleaded is not within any of the Proviſo's or Exceptions in the Statute; but that if he be, it muſt come on his Side to ſhew it. Trin. 9 Geo. 2. in *B. R. Maccarty* ver. *Wickford.*

(G) What Remedies a Perſon having a Right to an Office muſt purſue, to be ſet into the Enjoyment of it, and how a Diſturbance is puniſhable.

IT is held clearly, that an Aſſiſe lay at Common Law for an Office, and that therefore though the Statute of *Weſt.* 2. 13 *Ed.* 1. *ſtat.* 1. *cap.* 25. ſpeaks only of Offices in Fee, yet an Aſſiſe lies for an Office in Tail or for Life; but this is to be underſtood of Offices of Profit; for of an Office of Charge and no Profit an Aſſiſe does not lie. 8 Co. 47. a. *Jebu Webb's* Caſe. 2 Inſt. 412. S. P.

But a Man ſhall not have an Aſſiſe of the whole Office, unleſs he be diſſeiſed of the Whole; but if a Man be diſſeiſed of Parcel of the Profits of an Office, he may have an Aſſiſe of that Parcel only. 8 Co. 49. b. 2 Inſt. 412

In an Aſſiſe for an Office newly erected and conſtituted, the Demandant in his Plaint muſt ſhew what Fee or Profit is granted for the Exerciſe thereof; for this Office cannot have a Fee or Profit appurtenant to it, as an antient Office may, and for an Office without Fee or Profit no Aſſiſe lies. 8 Co. 49. *Webb's* Caſe.

But in an Aſſiſe for an antient Office, the Demandant in his Plaint need not ſhew what Fee or Profit is belonging to it, for it ſhall be intended there is ſome Fee or Profit. 8 Co. 49.

In an Aſſiſe for an Office, the Demandant muſt ſhew a Seiſin; but it hath been held, that the taking of 3 *d.* for a *Capias* againſt *B.* is a ſufficient Seiſin of the Office of Filizer *de Banco.* Rol. Abr. 270.

So if one be committed by the Houſe of Commons to *A.* who before and long after was in Poſſeſſion of the Office of *Serjeant at Arms* to the Houſe, and the Priſoner compounds with *B.* for his Fees, and gives him twenty Shillings; this is a good Seiſin of the Office by *B.* for he cannot be diſſeiſed thereof, but at his Election; and it was likewiſe held, that proving that *B.* being in the *Lobby* of the *Houſe of Commons*, took hold of the Door of the Houſe, and laid his Hand upon the Mace, then being in the Hands of *A.* to take it, but hindered by *A.* was good Evidence both of a *Seiſin* and *Diſſeiſin.* 2 Lev. 108. *Cragg.* ver. *Norfolk* adjudged.

* But where the Serjeant of the Mace to the *Houſe of Commons*, in an Action upon the Caſe for a Diſturbance, recovered Damages; and whether this was a ſufficient Seiſin, the Damages being recovered in Satisfaction of the Fees, and he then being out of Poſſeſſion of his Office, was doubted; ſome of the Judges inclining one Way and ſome the other; and it was intended to have been found ſpecially, but the Plaintiff being unwilling to ſtand to it was nonſuit. *Page 732 Lev. 108. *& vide* Mod. 122. where ſuch Recovery is held to be a ſufficient Seiſin.

Alſo in an Aſſiſe for an Office, the Demandant in his Plaint muſt ſet forth a Title. 3 Mod. 273. An *Savier* ver. *Lentbol*; by which Book it appears, that the Demandant not being ready to ſet forth a Title, the Aſſiſe was adjourned till the next Day, when he appeared and ſet forth a Title, and Proceſs was prayed againſt the Defendant.——But by Salk. 82. S. C. the Demandant was nonſuited the ſecond Day for not counting; and the Court told him, he might bring a new Aſſiſe. Comb. 173. S. C. and the Plaintiff nonſuited; *& vide* Dyer 114. pl. 63, 149, pl. 81, 152. pl. 9. 8 Co. 45. b.

8 Co. 47. 2 Inſt. 412. 11 Co. 99 b. Dyer 152. An Aſſiſe lies for the Office of Regiſter of the (*a*) Admiralty; for though their Proceedings are according to the Civil Law, yet the (*b*) Right of their Offices is determinable at the Common Law; ſo of the Maſterſhip of an Hoſpital being a Lay Fee.

(*a*) So the Right of the Office of Regiſter to a Biſhop is to be determined at Common Law, and not to be tried in the Spiritual Court, though the Subject Matter is Spiritual; becauſe the Office itſelf being Matter of Freehold, is for that Reaſon of Temporal Cognizance.——For this *vide* Rol. Abr. 285. 4 Mod. 27, 28. Carth. 169. (*b*) So Chancellors, Regiſters, Proctors, &c. being Officers of Temporal Profit, are to ſue for their Fees in the Temporal Courts.——For this *vide* Title *Fees*, Letter (D).

Mod. 122. A Man may bring an Action on the Caſe (*c*) for the Profits of an Office, *per Hale* C. J. though he never had Seiſin.

(*c*) An Action on the Caſe for diſturbing a Perſon in the Exerciſe of the Office of Pariſh Clerk. 2 Salk. 468. pl. 7. But not ſo adviſeable as an Aſſiſe; becauſe a Jury may not well compute the Damages in Proportion to the Loſs of a Man's Livelihood. Carth. 169.

2 Mod. 160. adjudged, upon a ſpecial Verdict between *Arris* ver. *Stukely*. If the King grant the Office of Comptroller of the Cuſtoms to *A.* and *B. durante bene placito*, and *A.* dies, and afterwards the King grants the ſaid Office to *C.* and yet *B.* under Pretence of Survivorſhip exerciſes the ſaid Office, and receives the Profits thereof; *C.* may have an *Indebitatus Aſſumpſit* for ſo much Money had and received to his Uſe.

2 Jon. 126. 2 Lev. 245. S. P. between *Haward* ver. *Wood*; where the Defendant, under Pretence of Title, received the Fees belonging to the Plaintiff as Steward of a Court Baron.

(H) Of the Nature of Offices as to their Duration and Continuance: and herein of their being grantable in Fee, for Life, Years, at Will and Reverſion.

9 Co. 97. OFFICES, in reſpect to their Duration and Continuance, are diſtinguiſhed into thoſe which are of Inheritance, or in Fee, or Fee-tail, thoſe of Freehold or for Life, thoſe for Years or a limited Time, and thoſe which are at Will only; and here we muſt again obſerve, that though all Offices, in relation to the Adminiſtration of Juſtice, are originally and inherently lodged in the Crown, yet cannot the King himſelf grant theſe in any other Manner than warranted by antient Uſage, or ſo as to be injurious or inconvenient to the Public.

*Page 733 * But where no Inconvenience can enſue to the Public, there Offices are allowed to deſcend as Inheritances; as the Offices of (*d*) Earl Marſhal of *England*; ſo of Park-keeper, Foreſter, Gaoler, (*e*) Sheriff, &c.

Dyer 285. 7 Co. 33. Plow. 2.

2 Inſt. 382. 2 Rol. Abr. 153. (*d*) So the Office of Seneſchal of *England* formerly belonged to the Earldom of *Leiceſter*, and came afterwards to the *Staffords*, and Dukes of *Buckingham*, and the laſt who had it in Fee was *Edward* Duke of *Buckingham*, who was attainted 13 H. 8. but now it is never granted to any Subject only *pro hac vice*. 4 Inſt. 127. 7 Mod. 125. cited. (*e*) The Mayor and Citizens of *London* have the Sherivalty of *London* in Fee, and the Sheriffs of *London* are Guardians under them, and removeable from Year to Year. 2 Inſt. 382.

Plow 379. b. 381. a. 9 Co. 48, 97. And if one hath the Office of Park-keeper, Foreſter, Gaoler, Sheriff, &c. to him and his Heirs, he may grant theſe Offices to one for Life, Remainder to another for Life, &c. for *Omne majus continet in ſe minus*; and as they are grantable over in Fee, ſo may they be granted in Succeſſion to one for Life, with Remainders over.

So

So Offices may be intailed; as the Office of Earl Marſhal of *England*, or the Office of Steward, Bailiff or Receiver of a Manor, may be intailed; becauſe theſe are demandable in a *Præcipe ut tenementa*, and being exerciſeable within the Manor, are therefore looked upon as Members or Branches of it. 7 Co. 33. Co. Lit. 20. a. Rol. Abr. 838.

So a Woman may be endowed of an Office; as of the Office of the *Marſhalſea* to have the third Part of the Profits, and in ſuch Caſe ſhe ſhall be contributory to a third Part of the Charge; ſo ſhe may be endowed *de tertia parte exituum provenient' de cuſtodia gaolæ abbathiæ Weſton'*, or of the third Part of the Profits of Courts, Fines, Heriots, *&c.* Perk. ſ. 315. Co. Lit. 32. Rol. Abr. 676. Plow. 379. b. F. N. B. 149.

It is ſaid, that, at Common Law, all Officers of Juſtice had Eſtates in their reſpective Offices during Life, and could not be removed but for Miſdemeanors; ſo was the Office of Clerk of the Crown in *B. R.* and in Chancery; ſo are the Clerks in the Exchequer, and the Philazers in *C. B.* and in this Reſpect the Wiſdom and Policy of the Law was very great; becauſe, when Men held their Offices for Life, it was an Encouragement to the faithful Execution of their Duties; it was then alſo they endeavoured to acquire Knowledge and Experience in their Employments, having a durable and fixed Eſtate therein, and not liable to be diſplaced at the Pleaſure of thoſe who put them in. 4 Mod. 169. Show. 428. ſaid *arguendo*.

If an Office be granted to a Man to have and enjoy ſo long as he ſhall behave himſelf well in it; the Grantee hath an Eſtate of Freehold in the Office; for ſince nothing but his Miſbehaviour can determine his Intereſt, no Man can prefix a ſhorter Time than his Life; ſince it muſt be his own Act (which the Law does not preſume to foreſee) which only can make his Eſtate of ſhorter Continuance than his Life; ſo if the Office had been granted to a Man *quamdiu ſe bene geſſerit tantum*, his Eſtate had not been leſs for the Word *tantum*; for a Grant to a Man for ſo long Time as he ſhall behave himſelf well, are of equal Extent, and his Miſbehaviour in each Caſe determines his Intereſt. Co. Lit. 42. Rol. Abr. 844. Show. *Parl. Caſes* 161.

Therefore where by the Statutes † directing in what Manner the *Cuſtos Rotulorum* ſhall be appointed, *&c.* it is among other Things provided, that the *Cuſtos* ſhall appoint and nominate the Clerk of the Peace, when void, who may execute it by himſelf or Deputy, for ſo long Time only as he ſhall demean himſelf well; in the Conſtruction of which Words it was held that the Clerk had an Office for Life, and that it did not determine with the *Cuſtos* ‡. 4 Mod. 167. Show. 426 to 536. *Harcourt* ver *Fox*. Show. *Parl. Caſes* 158. Ld. Raym. 158, 166, 853, 1245.

12 Mod. 42. See Ld. Raym. 161.——† 37 H. 8. c. 1. ſ. 3. 1 W. & M. Stat. 1. c. 21. ſ. 5.——‡ He may be be diſcharged by the Juſtices. 1 W. & M. c. 21. ſ. 6.

The Judges of the ſeveral Courts at *Weſtminſter* held formerly their Places *durante bene placito*, but now by the 12 *W.* 3. their Commiſſions are *quamdiu ſe bene geſſerint*, by which they hold their Offices for Life; but upon the Addreſs of both Houſes of Parliament it may be lawful to remove them ‖. 4 Inſt. 74. 117.

‖ The Judges are to continue during good Behaviour, notwithſtanding the Demiſe of the Crown. 1 Geo. 3. c. 23.

* It hath been determined, that at Common Law the Patents of the Judges, (*a*) Sheriffs, Eſcheators, Commiſſioners of Oyer and Terminer, Gaol-Delivery and of the Peace, and of the Attorney and Solicitor General, are determined by the Death of the King, in whoſe Name they are made. It *Page 734 And 44. Dyer 165. Cro. Car. 1, 2. N. Bendl. 79.

(*a*) But the Office of Sheriff in ſuch Places where he is choſen by a Corporation, having by its Charter the Inheritance of the Office, does not determine by the Demiſe of the King. 7 Co. 30. b.——Nor the Authority of a Coroner or Verderor. Daliſ. 15. Dyer 165. 2 Inſt. 175. Lev. 120.

9 Co. 97. Rol. Abr. 847. 2 Rol. Abr. 153. Cro. Car. 587. Jon. 563. Hob. 153. 3 Mod. 145. Prec. Ch. 199. Comyns 1. pl. 1. Will. Rep. 101. pl. 23. 3 Will. Rep. 391. pl. 109. Caſ. *Temp.* Talb. 97, 140.

It hath been adjudged in Sir *George Reynolds's* Caſe, that the Office of the King's Bench Priſon † could not be granted for Years, for that being an Office of great Truſt concerning the Adminiſtration of Juſtice, in keeping of Priſoners till they pay their Debts, if it ſhould be granted for Years, might be injurious to the Public, in that it would go to Executors or Adminiſtrators, or might be in Suſpence till Probate of the Will, or Adminiſtration taken out; and if the Officer ſhould die indebted, that none would prove his Will, or take out Adminiſtration, then there would be no Officer at all, and Executors or Adminiſtrators would be in by Act of Law, without Allowance of the Court; alſo it might be a Queſtion, if ſuch Office ſhould not be forfeited by Outlawry, or be Aſſets in the Executor's Hands; and many other Inconveniencies would follow if ſuch Grant for Years were allowed; for the ſame Reaſons it was held likewiſe, that the Offices of *Cuſtos Brevium*, Chirographer, Clerk of the Pipe of the King's Silver, or of the Crown, Remembrancer, or Chamberlain of the Exchequer, Prothonotaries, and other Officers in the ſeveral Courts of Juſtice, could not be granted for Years.

Ld. Raym. 49, 158, 163. 2 Ld. Raym. 853, 1038, 1245. 12 Mod. 10, 42, 77, 79, 80, 90, 199.—† The Power of appointing the Marſhal of the King's Bench Priſon, reveſted in the Crown, by 27 Geo. 2. c. 17 which *vide*.

Hard. 46, 353. *Jones ver. Clerk.*

But ſuch Offices as do not concern the Adminiſtration of Juſtice, but only require Skill and Diligence may be granted for Years, becauſe they may be executed by Deputy, without any Inconvenience to the Public; therefore, where a Grant for Years was made of the Office of Garbler of Species in *London*, it was adjudged to be a good Grant, or at leaſt a good Appointment for Years within the Intent of the Statute of 1 *Jac.* 1. *cap.* 19.

Hard. 351, &c. Hob. 146. Dyer 303. 3 Keb. 80. 1 Vern. 11, 12.

The Office of Regiſter of Policies of Aſſurance in *London* concerning Merchants, was granted by the King for Years, and adjudged to be a good Grant, becauſe it did not concern the Adminiſtration of Juſtice in any Court, but required only the Skill of Writing after a Copy; ſo the Office of making and Sealing *Subpœna's* was granted for Years, and allowed to be good; and there ſeveral Precedents are cited of Offices granted for Years; as firſt, Offices in which the Safety of the Realm was concerned; as the Office of Warden of a Haven or Port by *H.* 6. of Gunpowder, 1 *Car.* 1. of making Gunpowder by *Car.* 2. Alſo Offices concerning the Trade of the Realm have been granted for Years; as 1 *H.* 7. of the Exchange of Money; 18 *H.* 8. of Gager; 17 *R.* 2. of Aulnager though a Seal belongs to it, with which the Officer is intruſted; of the Letter-Office, 13 *Car.* 1. Alſo Offices in Courts of Juſtice have been granted for Years; as the Office of Surveyor of the Green-Wax; of the 6*d.* Writs in Chancery and *Subpœna's*; of Comptroller and Cuſtomer, and making out Proceſs in *C. B.* All theſe and ſeveral others have been granted for Years; but no Diſpute having been made of the Validity of them, how far ſome of them would hold at this Day may be a Queſtion.

2 Lev. 245. 2 Jon. 126. 6 Mod. 57. 2 Ld. Raym. 1005. *Page 735

But where one made a Grant for Years of the Stewardſhip of a Court-Leet and Court-Baron, this was held void as to the Court-Leet, being a Judicial Office, but good as to the Court-Baron, being only Miniſterial, and the Suitors Judges thereof; but the Grant appearing afterwards to be * for Years, determinable on the Death of the Leſſee, it was held good for both; becauſe there was no Danger of its coming to Executors or Adminiſtrators.

120.——Nor does any Corporation Officer, who by the Charter is inveſted with Judicial Authority, loſe it by ſuch Demiſe. 2 Hawk. P. C. 3. & *vide* the Statutes 7 & 8 W. 3. c. 27. and 1 Ann. c. 1. for continuing all Patent Officers for ſix Months after ſuch Demiſe, Title *Courts*, Letter (C) ——[See 1 Geo. 3. c. 23. *ante* 733. laſt n.]

The

The King may grant the Office of Sheriff † (*a*) *durante bene placito*; and although he may determine the Office at his Pleaſure, yet he cannot determine it for Part, as for a Vill, *&c.* nor can he abridge the Sheriff of any Thing incident or appurtenant to his Office. 4 Co. 33. a.

(*a*) Where a Sheriff may grant to his Under Sheriff to hold at Will only, for he is his Deputy, and according to the Nature of a Deputation muſt be removeable, as an Attorney is. Hob. 13. Noy 55.——† See the Stat. 24 Geo. 2. c. 48.

The King may grant the Office of Chirographer of the Common Pleas *quamdiu nobis placuerit*, and it is good. Deer 176. pl. 28.

The Office of the King's *Marſhalſea* ‡ may be granted at Will. 9 Co 97. 3 Mod. 149.

‡ See 27 Geo. 2. c. 17.

If the King grants an Office at Will, and grants a Rent to the Patentee for his Life, for the Exerciſe of his Office, this is no abſolute Eſtate for Life; becauſe the Rent being granted on Account of the Office, and in Diſcharge of the Duty of the Place, whenever his Intereſt in the Office ceaſes, the Rent is determined; becauſe it was firſt granted for the Exerciſe of the Office, which he is no further concerned in. Co. Lit. 42. a.

A (*b*) Judicial Office cannot be granted in Reverſion; for though the Grantee be never ſo fit at the Time of the Grant, he may become unfit when it takes Effect. Co. Lit. 3. b.

(*b*) So an Office partly Miniſterial and partly Judicial, cannot be granted in Reverſion; as the Office of Auditor of the Court of Wards. 11 Co. 4. 2 Rol. Abr. 152.

The King may grant an Eſtate in an Office to commence *in futuro*, or upon a Contingency, which Eſtate ſhall ariſe out of the Inheritance he hath in the Office itſelf, for ſuch he may have in Point of Intereſt, though not in Execution.

But for the Difference between the King's Grant of an Office in Reverſion, and ſuch a Grant in Reverſion by a Subject, *vide* Dyer 80. pl. 58, 259. pl. 18. 3 Leon. 31. Hob. 150. 2 Rol. Abr. 154. Cro. Car. 279. 11 Co. 4. 8 Co. 55. b. Carth. 350. 2 Salk. 465. pl. 2. 4 Mod. 275. Ld. Raym. 49. 12 Mod. 77. 10 Mod. 258, 354. Fitzgib. 90, 92, 290, 308. Stra. 43.

It hath been adjudged, that the Office of Regiſter being uſually granted as well in Reverſion as Poſſeſſion, a Grant to one of ſuch Office for Life, when by the Death or Surrender of the preſent Officer it ſhall become void, is good; for though there is no Reverſion of an Office, unleſs it be an Office of Inheritance, yet it may well be granted in Reverſion, *Habend'* after the Death of the preſent Officer; which is no more than a Proviſion of a Perſon to ſupply it when it becomes void; and if ſuch Proviſion has been uſually made, the Cuſtom and Uſage (*c*) give Sanction to it. Cro. Car. 279, 555. Jon. 310. 2 Rol. Abr. 153. March 38. 3 Leon. 31.

(*c*) But unleſs there have been ſuch Uſage, it is not grantable in Reverſion. 2 Vent. 188.

(I) Offices, by whom to be executed, and who are incapable thereof.

IF an Office, either of the Grant of the King or Subject, which concerns the Adminiſtration, Proceeding or Execution of Juſtice, or the King's Revenue, or the Commonwealth, or the Intereſt, Benefit or Safety of the Subject, or the like; if theſe or any of them be granted to a Man that is unexpert, and hath no Skill and Science to exerciſe or execute the ſame, the Co. Lit. 3. b.

Grant

Page 736 Grant is merely void, and the Party disabled by Law, and incapable to take the same *pro commodo Regis & Populi*; for only Men of Skill, Knowledge and Ability to exercise the same, are capable to serve the King and his People; an (*a*) Infant therefore is not capable of an Office of Stewardship of the Court of a Manor †, either in Possession or Reversion.

(*a*) That an Infant cannot be a Steward, for he cannot by Intendment execute it; much less may he assign it over. Cro. Eliz. 636-7. *per Popham.*——But a Ministerial Office may be granted to an Infant, in Possession or Reversion, for he may exercise it by a Deputy. 11 Co. 4. a.——As where the Office of Register to the Bishop of *Rochester* was granted to *J. S.* who was an Infant of twelve Years of Age at the Time of the Grant, *Habend'* after the Death of *J. D.* (who was the Register in Possession) for his Life, to be exercised by him or his Deputy, and afterwards *J. D.* died, *J. S.* being of the Age of thirty; this was held a good Grant at the Time of making of it, the Office being to be exercised by him or his Deputy. Cro. Car. 279. 2 Rol. Abr. 153. *Young* ver. *Stowel.* Cro. Car. 555-6. March 38. S. P. adjudged. 4 Mod. 279. 2 Vent. 188. Pollexf. 136. S. P. cited, and adjudged to be Law.——† See an excellent Comment on this Proposition, (which is taken from Lord *Coke*) *ante* 725.

Dyer 150. b. Cro. Car. 557. S. C. cited. 2 And. 118. S. P.

Lord *Broke* gave the Office of Chief Prothonotary to *G.* but he appearing unfit, he revoked it, and granted it to *W.* and a Precedent was shewn, where the Office of the Clerk of the Crown was granted by the King to one *Vintner*, who exhibited his Patent and desired to be admitted; and the Justices of the King's Bench refused to admit him, (*b*) because he never had exercised that Office, nor ever was brought up in it; and recommended a fit Person, to whom the King *ore tenus* commanded to be admitted, and was

(*b*) If an Office of Learning be given to a Man utterly insufficient, it is void; and though it be to him and his Assigns, or to be exercised by a sufficient Deputy ‡, it mends not the Case, but it must radically vest in the first Grantee, before it can go in Procuration or Deputation to any other. Hob. 148.——If the King should grant an Office in *B. R.* the Judges may remove such an Officer for Insufficiency, because they are proper Persons to judge of his Abilities. 4 Mod. 30.

‡ *Vide ante* 725. and *post* 738, &c.

Car. 95. Latch 228. Noy 91. Palm. 450.

The Bishop of *Glouceſter* granted the Officer of Chancellor of his Diocese to one *S.* who, because he was unskilful in the Civil and Canon Law, was adjudged incapable.

And in 4 Mod. 27. S. P. was argued, where the Grant was to him or his Deputy; in which Case it was insisted, that Insufficiency did not create an original Incapacity, so as to avoid the Grant; because that he might appoint a Deputy learned in those Laws, and that if he appointed one who was unskilful, it would be a Forfeiture of the Office. 12 Mod. 10.

Cro. Jac. 17. Lady *Russel's* Case.

If the King by his Letters Patent grants the Office of Custody of the Castle of *Dunnington* to a Woman, to be exercised by her, or her sufficient Deputy, the Grant is good, and it shall not be intended a Castle of War rather than a private House.

(*c*) How far Dissenters from the Chuch are rendered incapable or excused from serving any public Office, *vide* 2 Mod. 299. 2 Vent. 247. 2 Lev. 151, 184, 242. 2 Jon. 81, 137. 4 Mod. 269. Salk. 167. pl. 1. Skin. 574. Carth. 306. 5 Mod. 431. Comb. 315. 10 Mod. 101, 179. 11 Mod. 132. pl. 11. 12 Mod. 67. 2 Stra. 1193. Ld. Raym. 29.

By the 3 *Jac.* 1. *cap.* 5. it is enacted, "That no (*c*) Popish Recusant "convict shall exercise any Public Office or Charge in the Common-"wealth, but shall be utterly disabled to exercise the same by himself or "his Deputy.

(K) Of the Manner of executing them; and herein of Offices that are incompatible, and where an Office may be executed by two or more Persons.

OFFICES are said to be incompatible and inconsistent, so as to be executed by the same Person, when from the Multiplicity of Business in them they cannot be executed with Care and Ability; or when * their being subordinate and interfering with each other, it induces a Presumption they cannot be executed with Impartiality and Honesty; and this my Lord *Coke* says is of that Importance, that if all Offices Civil, Ecclesiastical, &c. were only executed each by a different Person, it would be for the Good of the Commonwealth, Advancement of Justice, and Preferment of deserving Men. 4 Inst. 100. * Page 737

And hence it is, that the King himself, though he may grant an Office, yet cannot execute it himself; (a) nor can the Ch. Just. of *B. R.* be Prothonotary nor Clerk of the Papers, though he may dispose of those Places. Inst. 100. (a) Sid. 305.

So if a Forester, by Patent for his Life, is made Justice in *Eyre* of the same Forest *hac vice*, the Forestership is become void, for these Office are incompatible; because the Forester is under the Correction of the Justice in *Eyre*, and he cannot judge himself; the same Law of a Warden of a Forest, and of a Justice in *Eyre* of the same Forest. 4 Inst. 310.

Upon a *Mandamus* to restore one to the Place of Town-Clerk, it was returned, that he was elected Mayor and sworn, and therefore they chose another Town-Clerk; and the Court were strongly of Opinion that the Offices were incompatible, because of the Subordination; a Coroner made Sheriff ceases to be Coroner; so a Parson made a Bishop; a Judge of *C. B.* made a Judge of *B. R.* and the Town-Clerk's Office is to be attendant on the Mayor; in Re-disseisin the Sheriff is Minister and Judge, but that is by Act of Parliament; and by the (b) Customs of some Places the Mayor has other Offices annexed to his Place of Mayor, but here they are distinct; and the Court recommended the Case to the Town for an amicable Composure. Sid. 305. 2 Keb. 92. *Rex* ver. *Pergam.*

(b) Where upon a Writ of Error upon a Judgment in *Northampton*, and the Error assigned was, that the *Venire facias* was awarded to the two Bailiffs, and the Court was held before the Mayor and the two Bailiffs, so that the Bailiffs being Judges of the Court could not be Officers; but the Court conceived it might be good by Custom, and not Error; for the Judges are not the Bailiffs only, but the Mayor and Bailiffs; and it is a common Course in many of the antient Corporations, where the Bailiffs are Judges, or the Mayor or they be Judges, yet in respect of executing Process they be the Officers also. Cro. Car. 138, *Crane* ver. *Holland*, 4 Mod. 66. S. C. cited.

Ministerial Offices may be granted to two, and so may also some Judicial Offices, which are established by Act of Parliament; but antient Offices cannot regularly be granted to two, nor otherwise than they have been; but it seems to be in the Discretion of the Judges, if they see an Office in their Courts comprehend too much for one Man to execute it, to put in more; but this must be where it is granted to several as one Office; for if divided to two or three, the Prescription is interrupted, and it is not a Grant of the antient Office. 4 Mod. 17. 4 Inst. 146. Lev. 1. Keb. 1. Sid. 40. & *vide* Cro. Car. 138, 259. Jon. 263. Hob. 214.

Therefore a Grant of the Office of Chief Prothonotary of the Common Pleas to two hath been held void. 2 Rol. Abr. 152. Hob. 153.

3 Mod. 145. and see the Authorities to the second Paragraph of *P.* 734. 4 Mod. 17, cited.

So

2 Rol. Abr. 152. 11 Co. 3. So a Grant to two to be Chief Juſtices of any of the Benches hath been held void; but a Grant to two to be Clerks of the Crown is good.

11 Co. 2. *Auditor Curl's* Caſe. 2 Rol. Abr. 152. 4 Mod. 18. S. C. cited. If a Grant be made to two of the Office of one of the Auditors of the Court of Wards, it is good; yet it is but one Office, and partly Judicial; but this is by the 32 *H.* 8. *cap.* 46.

Dyer 167. a. The Office of Foreſter of *Waltham* Foreſt was granted to two, and held good.

Vent. 296. 2 Mod. 95. 12 Mod. 10. *Caſ. Temp.* Talb. 97, 127, 143. *Page 738 The Clerk of the King's Bench Office had granted the Office of Clerk of the Papers to *A.* and *B.* and the longeſt Liver of them; *B.* makes a parol Surrender, and prays that *C.* ſhould be admitted in his Room, which was done accordingly; *B.* dies, *A.* commenced a Suit againſt *C.* ſuppoſing that he had no Right; but upon the Trial it appeared that the Plaintiff agreed that *C.* ſhould be admitted, which was looked upon as a Surrender of the former Grant, and the Taking of a new one; and it was ruled accordingly.

2 Mod. 260. *Arris* ver. *Stukely.* The King granted the Office of Comptroller of the Cuſtoms in the Port of *Exeter, durante beneplacito* to two; one died; and the Queſtion was whether the other ſhould have the whole by Survivorſhip; *et per Cur.* he ſhall not, for there ſhall be no Survivorſhip of an Office of (*a*) Truſt, if it is not granted to them and the Survivor.

(*a*) It is ſaid in general, *per Cur.* that if an Office be granted to two, and one dies, the Office does not ſurvive, but determines; as if two Sheriffs, and one dies, the other cannot act; otherwiſe, if granted to two and the Survivor of them. 2 Salk. 465. pl. 1.

Carth. 213. *Jones* ver. *Bew.* Show. 289. 4 Mod. 16. 2 Salk. 465. pl. 1. 12 Mod. 10. S. C. The Biſhop of *Landaff* by Deed granted the Office of Chancellor or Commiſſary of his Dioceſe to Doctor *Loyd* and Doctor *Jones*, to hold the ſame *conjunctim & diviſim* to them and to the *Survivor of them*; Doctor *Loyd* died, and the Succeſſor of the Biſhop granted the Office to another, who ſued *Jones*; it was agreed by Counſel on both Sides, that this Office had been antiently and uſually granted in this Manner; and on a Caſe ſtated out of Chancery, and referred to the Judges of *B. R.* the only Queſtion was, whether this was ſuch a Judicial Office as could be granted in this Manner; and after ſeveral Arguments it was adjudged, that this was a good Grant; and the principal Reaſon of the Judgment was, becauſe of the long and conſtant Uſage; and it was ſaid, that the Offices of moſt of the Biſhopricks in *England* are and have been conſtantly ſo granted.

(L) Of the Execution of an Office by Deputy; and herein of Superiors being anſwerable for their Deputies.

AS to the Execution of an Office by (*b*) Deputy, we muſt obſerve, that there are ſome Offices which in their Nature and Conſtitution imply a Power or Right of exerciſing them by Deputy; ſome that in their Nature cannot be exerciſed by Deputy; and ſome, that by having ſuch a Power annexed to the Grant or Inſtitution may be ſo exercised, though without ſuch an expreſs Proviſion they could not.

(*b*) A Deputy is ſaid to be one who occcupieth in Right of another, and for whom regularly his Superior ſhall anſwer. Perk. ſ. 100.——The Difference, ſays my Lord *Coke*, between a Deputy and an Aſſignee is, that an Aſſignee is a Perſon who has an Eſtate or Intereſt in the Office

Offices

Offices of Inheritance for Years, and thoſe which require only a Superintendency, and no particular Skill, may regularly be exerciſed by Deputy; ſuch as that of (*a*) Earl Marſhal of *England*, Foreſter, Park-keeper, &c. 2 Inſt. 382. Plow. 380. 9 Co. 47. Style 357.

(*a*) The Office of High Conſtable of *England* may be exerciſed by Deputy. Keilw. 171. a.—*John Wilſhire* held Lands in *Heyden* in *Eſſex* by Grand Searjeanty, to hold a Towel when the King ſhould waſh his Hands before Dinner the Day of the Corronation; but he having no Dignity was allowed to make a Deputy. Co. Lit. 107. b.—*Anne* Wife of the Earl of *Pembroke*, held Lands of the King to perform the Office of Napery at his Coronation; but becauſe a Woman could not do it in Perſon, ſhe was allowed to make a Deputy: So the Heir of the ſaid Earl was by Tenure to carry the Gold Spurs before the King at his Coronation; but becauſe he was not of Age, he was allowed to make a Deputy. Co. Lit. 107. b.

*A Sheriff, though he is an Officer made by the King's Letters Patent, and though it be not ſaid that he may execute his Office *per ſe vel ſufficientem Deputatum ſuum*, yet he may make a Deputy, which is the Under-Sheriff againſt whom Actions may be brought by the Parties grieved. *Page 739 Rol. Rep. 274. *Phelpe* ver. *Winſcombe*. 9 Co. 49.

And it is ſaid in general, that when an Officer hath Power to make Aſſigns, he may (*b*) implicitly make a Deputy.

(*b*) A Biſhop on his Creation hath Power of appointing Deputies. 2 Sid. 138. The Office of Clerk of the Outlawries of the Common Pleas belongs to the Attorney General, who exerciſeth it by Deputy. 4 Inſt. 101.

A Judicial Officer cannot it is ſaid make a Deputy, unleſs he hath a Clauſe in his Patent to enable him; becauſe his Judgment is relied on in Matters relating to his Office, which might be the Reaſon of the Making of the Grant to him; neither can a Miniſterial Officer depute one in his Stead, if the Office be to be performed by him in (*c*) Perſon; but when nothing is required but a Superintendency in the Office, he may make a Deputy. 3 Mod. 150. cited *arguendo*.

(*c*) Therefore the Eſquire of the King's Perſon cannot aſſign his Office; for the Law ſuppoſes it to have been given him in Conſideration of his Diligence, Fidelity and Skill. 11 E. 4. 1. 2 Rol. Abr. 154 ——The Office of Carver being a Perſonal Truſt cannot be aſſigned. Dyer 7. b.

It is clear, that the Judges of *Weſtminſter-Hall*, as well as all (*d*) others having Judicial Authority, muſt hold their Courts in their proper Perſons, and cannot act by Deputy, nor any (*e*) way transfer their Power to another. 9 E. 4. 30, 31. a. Bro. Title *Judges*, 11. Perk. f. 101.

(*d*) But the Judges of the Eccleſiaſtical Courts may act by Deputy, as the antient Cuſtom hath been, Latch. & *vide ſupra* Letter (D). (*e*) And therefore where the Council of the Marches of *Wales* referred a Suit to certain Perſons to hear and determine it; this was held to be illegal, and a Prohibition awarded to the Court, to ſtay their Proceeding againſt the Party for refuſing to obey the Order of the Referees. Col. Abr. 382. March 102.——So Juſtices of the Peace cannot delegate a certain Number of themſelves, and inveſt them with a Power to make Rates and Orders. 6 Mod. 87.

A Coroner cannot make a Deputy, nor an Eſcheator; becauſe theſe are Judicial Offices, which they muſt exerciſe in Perſon; but it is ſaid, that the King by ſpecial Commiſſion may appoint a Deputy Eſcheator, to inquire by Office of the Death of a Nobleman, or, as the Book ſeems to hold, of any other Perſon, though under that Degree. Lill. Reg. 446. Rol. Abr. 591.

It is held, that the Office of Conſtable being wholly Miniſterial, and no way Judicial, he may appoint a Deputy to execute a Warrant directed to him. Moor 845. Crompt. 222.

Office itſelf, and does Things in his own Name, for which his Grantor ſhall not anſwer, unleſs in ſome ſpecial Caſes; but a Deputy has not any Eſtate or Intereſt in the Office, but is as Servant to the Officer, and does every Thing in the Name of the Officer, and nothing in his own Name, and for whom the Grantor ſhall anſwer. 9 Co. 49.—But *per Holt* C. J. it is ſaid, that a Deputy cannot regularly have leſs Power than his Principal, cannot be reſtrained from exerciſing any Part of the Office by Covenant, or otherwiſe, muſt regularly act in his own Name, unleſs it be in Caſe of an Under-Sheriff, who acts in the Name of the High-Sheriff, becauſe the Writs are directed to him. Salk. 95. Ld. Raym. 658. Comyns 84. pl. 52. 12 Mod. 467, 470, 690.

3 Bulſt. 77. Dalt. c. 1. Rol. Rep. 274. Sid. 355. Lev. 233. March 30. 2 Keb. 309.

him, when by Reaſon of Sickneſs, Abſence or otherwiſe, he cannot do it himſelf; for the Public Good requires, that there ſhould be always ſome Officer ready at Hand to execute ſuch Warrants; and the too rigorous Reſtraint of the Service of them to the proper Officer could not but ſometimes cauſe a Failure of Juſtice; but it is ſaid, that a Conſtable cannot make a Deputy, without ſome ſuch ſpecial Cauſe.

Keb. 639. *per Windham* Juſtice; *vide* 1 Lev. 76.

It ſeems the better Opinion, that a (*a*) Recorder of a Town cannot make a Deputy, without a ſpecial Grant or Cuſtom for that Purpoſe, being a Judicial Office relating to the Adminiſtration of Juſtice.

(*a*) A Bailiff of a Liberty may have a Deputy. Cro. Jac. 241-2. adjudged.

Rol. Abr. 752, 754. Style 183, 191, 203, 219. 2 Keb. 385.

And therefore, where a Writ was directed to the Mayor, Aldermen and Recorder of *Lancaſter*, and the Record was certified by the Mayor, Aldermen and Deputy Recorder, without ſhewing that the Recorder had Power to make a Deputy; the Return was held naught.

39 H. 6. 34. 2 Rol. Abr. 154. *Page 740

It is held, that the Marſhal † of the King's Bench, having the Inheritance of the Office, with Power to grant the ſame for Life, cannot notwithſtanding give Power to ſuch Grantee for (*b*) Life to make a Deputy.

(*b*) That neither Tenant at Will nor Tenant for Life can make a Deputy, if, in the very Grant made to them, there is not an expreſs Clauſe for the Execution of the Office *per ſe vel ſufficientem Deputatum ſuum.* 3 Mod. 147. —— † See the Stat. 27 Geo. 2. c. 17. whereby the Power of appointing the Marſhal, is reveſted in the Crown.

Cro. Eliz. 187. *Watkins* ver. *Johns.*

The Office of Aulnage, or Sealing of Cloths, cannot be exerciſed by Deputy, being an Office of Truſt, unleſs there be a Clauſe in the Patent for that Purpoſe.

Salk. 95. Ld. Raym. 658. *Parker* ver. *Kett.*

Regularly, a Deputy cannot make a Deputy, (*c*) becauſe it implies an Aſſignment of his whole Power, which he cannot aſſign over; but if *A.* be appointed Steward of a Copyhold Court, to be exerciſed *per ſe vel deputatum ſuum*, and he appoints *B.* his Deputy, who hath long exerciſed the ſaid Office, and *B.* authorizes *C.* and *D.* jointly and ſeverally, to take a Surrender of a Copyhold Tenement from *J. S.* which is done by *C.* without reciting his Power, or any Relation had to it, the Surrender is good, being only a ſingle Act; for the Conſtitution in this Manner gives *C.* the Colour and Reputation of an Authority to act as a Steward (*d*) *de facto*; and what he does as ſuch is ſufficient among the Tenants, for they have no Power to examine his Authority, nor is he to render them any Account of it.

(*c*) For a Deputy being only one who is authorized himſelf, he cannot delegate that Authority; and if a Deputy might make a Deputy, ſo ſuch ſecond Deputy, and ſo *ad infinitum*, which would be highly inconvenient. Lil. Reg. 446. (*d*) Where the Deputy of a Deputy of a Cuſtomer, ſitting in the Cuſtom-Houſe with other Officers, and acting as an Officer, his Acts were held good as an Officer *de facto*, though not *de jure*; and that it would be very hard to put thoſe who have to do with Cuſtom-Houſe Officers, to enquire into the Legality of their Inſtitution. Cro. Eliz. 534.

4 Inſt. 291.

The Chief Juſtice in *Eyre* may by the Statute of 32 *H.* 8. *cap.* 35. make his Deputy; yet all the Writs of Summons antient and late are *coram* the *Juſtice itinerant aut ejus deputato.*

Leon. 219. 3 Mod. 147.

It is ſaid, there cannot be an Officer without Deed, (*e*) nor can there be any Deputation of an Office without Deed, being a Matter which lies in Grant.

(*e*) A Deputation of an Office is in its own Nature grantable by Parol; and therefore though it ſhould happen to be granted by Writing, yet ſince it is in itſelf grantable by Parol, it may be revoked by Parol. *Ca. Law & Eq.* 74.

But

But the High Sheriff may make an Under-Sheriff, or his Deputy, without Deed, for he claims no Intereſt in the Office, but as Servant; and therefore (*a*) where an Action on the Caſe was brought againſt the Deputy of a Sheriff for an Eſcape, who pleaded, that the Sheriff made him his Deputy to take Bail of Priſoners, and that he took Bond, *&c.* and ſhewed no Deed of Deputation; yet the Plea was held good on a Demurrer. 3 Mod. 150. (*a*) Cro. Eliz. 67. *Clecott* ver. *Denys* adjudged.

" By the Statute of 2 *H.* 6. *cap.* 10. it is ordained, that all Officers made " by the King's Letters Patents within the King's Courts, who have Power " and Authority, by Virtue of their Offices of old Time accuſtomed, to ap- " point Clerks and Miniſters within the ſame Courts, ſhall be charged and " ſworn to appoint ſuch Clerks and Miniſters for whom they will anſwer " at their Peril. 4 Inſt. 114, 115. 2 Lev. 121.

Upon the Rule of *Reſpondeat ſuperior*, regularly all Officers ſhall anſwer for their (*b*) Deputies, in the ſame Manner as if the Act were done by themſelves, unleſs it be in Criminal Caſes; and therefore Sheriffs ſhall anſwer for the Eſcapes, Amerciaments, *&c.* of their Deputies, *&c.* 4 Co. 33. 2 Inſt. 466. 2 Lev. 160. Dyer 278. (*b*) But if a Clerk in an Office miſ-enter any Thing, he himſelf ſhall be puniſhed, and not the Maſter of the Office, becauſe he takes a Fee for it. Leon. 146. *& vide* Hob. 13.

* If the Coroner be inſufficient, the whole County who made Election and Choice of him ſhall *tanquam elector & ſuperior* anſwer for him. *Page 741 2 Inſt. 466. ——So the Lord of a Franchiſe ſhall anſwer for a Bailiff put in by him. 2 Lev. 160.

If a Perſon be appointed Cuſtomer or Collector of the Cuſtoms in a certain Port, who is impowered by the Statute 1 *Eliz. cap.* 12. to appoint a Deputy, and a Deputy ſo appointed by him conceals the Goods of a Merchant, and the Cuſtomer himſelf being ignorant thereof returns on Oath into the Exchequer the Cuſtoms of this Port, according to the Information of his Deputy; he ſhall, notwithſtanding his Ignorance, anſwer for the Act of his Deputy, and ſhall forfeit treble the Value of the Merchandize, and be fined, *&c.* purſuant to the Statute 3 *H.* 6. *cap.* 3. Dyer 238. b. pl. 38. adjudged in the Exchequer Chamber, as *Saunders* Ch. Bar. informed the Reporter.

If a Deputy ſuffers Eſcapes, it is a Forfeiture by the Principal, unleſs ſuch Deputation be made for Life, and then the Grantee for Life only forfeits the Office. Dyer 278. Cro. Eliz. 534. Poph. 119.

2. Lev. 71. Raym. 216. 3 Mod. 146. 3 Lev. 288. like Point. See 10 Mod. 74, 108, 290, 12 Mod. 13, 90, 466, 469. Fitzgib. 186, 293. Salk. 95. Ld. Raym. 424, 658.

It is ſaid, that if one put in a Deputy, without any Allowance of Salary, he has no Remedy but by *Quantum Meruit*, and that againſt his Principal. 6 Mod. 235.

It hath been held, That though a *Mandamus* will not lie for a Deputy, that yet it lies for him who deputes him, to have ſuch his Deputy either admitted or reſtored; for that otherwiſe he might be deprived of his Power to make a Deputy; and in this Caſe, on a *Mandamus* to reſtore a Deputy Secretary of the Courts of Marches, it was held to be no good Return, that at the Time of the Writ delivered he was not conſtituted Deputy, for that they might have put him out of his Place before the Writ came to them. Lev. 306. 2 Keb. 738, 742. Vent. 110, 111. S. C. adjudged, becauſe Returns muſt be certain, there being nothing to be pleaded to them.

(M) Of the Forfeiture of an Office.

11 E. 4. 1. b. 2 Rol. Abr. 155. IT is laid down in general, that if an Officer acts contrary to the Nature and Duty of his Office, or if he refuses to act at all, that in these Cases the Office is forfeited.

Co. Lit. 233. 9 Co. 50. 3 Mod. 143. But herein it will be necessary to consider more minutely, what shall be said such Acts as are contrary to the Duty of his Office, and how far the same, whether they be Acts of Omission or Commission, amount to a Forfeiture; wherein it hath been clearly agreed, that a *(a)* Gaoler by suffering voluntary Escapes, by abusing his Prisoners, by extorting unreasonable Fees from them, or by detaining them in Gaol after they have been legally discharged and paid their just Fees, forfeits his Office; for that in the Grant of every Office it is implied, that the Grantee execute it faithfully and diligently.

(a) If a Sheriff suffer Felons to escape voluntarily, it is a Forfeiture of his Office, though the Office be for Life or in Fee. Dyer 151. b. Sir *John Savage*'s Case. 2 Rol. Abr. 155. 2 Bulst. 58. 3 Mod. 146. S. P.

39 H. 6. 33. 2 Rol. Abr. 155. But it is held, that one negligent Escape is not a Forfeiture, though one voluntary one is, but that two negligent Escapes amount to a Forfeiture.

2 Vern. 173. & *vide* Stat. 8 & 9 W. 3. c. 27. Tit. *Goal and Goaler*, Letter (D).

*Page 742 6 Co. 50. Co. Lit. 233. b. * There are, says my Lord *Coke*, three Causes of Forfeiture or Seizure of Offices by Matter in Deed. 1*st*, By Abuser. 2*dly*, Non-user. 3*dly*, Refusal. 1*st*, By Abuser; as by a Marshal, or other Gaoler's permitting Escapes. 2*dly*, By Non-user; in which there is this Difference, when the Office concerns the Administration of Justice or the Commonwealth, the Officer *ex officio* ought to attend without any Demand or Request, there by Non-user or Non-attendance the Office is forfeited; but where an Officer is not obliged to attend, but upon Demand or Request made by him whose Officer he is, there, without such Demand or Request, there can be no Forfeiture; and herein also my Lord *Coke* in another Place takes the following Diversity, *viz.* that Non-user of itself, without some special Damage, is no Forfeiture of private Offices, but that it is otherwise of a Public one, which concerns the Administration of Justice. 3*dly*, As to Refusal, he says, that in all Cases where an Officer is bound upon Request to exercise his Office, if he does not do it upon Request, he forfeits it; as if the Steward of a Manor be requested by the Lord to hold a Court, if he does not do it, it is a Forfeiture.

And where Non-attendance or Non-user of an Office is a Forfeiture, *vide* 2 Rol. Abr. 155. Keilw. 194. Dyer 151. 3 Mod. 146. 4 Mod. 29.—That Non-attendance is a good Cause of the Forfeiture of the Office of Recorder. 1 Salk. 435.——Where to a *Scire facias* to repeal the Patent of a Searcher of a Port for Non-attendance, the Officer pleaded that he was sick, and that he was confined in Prison at the King's Suit, *vid* Cro. Car. 491, 492.

2 Inst. 43. The King granted to the Abbot of St. *Alban* to have a Gaol, and to have a Goal-delivery, and divers Persons were committed to that Gaol for Felony; and because that the Abbot would not be at the Expence of making Deliverance, but had detained Persons in Prison a long Time, it was resolved, that the Abbot had for that Cause forfeited his Franchise, and that the same might be seized into the King's Hands.

Cro. Car. 491. *The King* ver. *Hooks* adjudged, 3 Mod. 146. S. C. cited. If a *Scire facias* be brought to repeal the Patent of a Searcher of the Customs in a Port-Town for Non-attendance; and upon Evidence it appears, that such a Ship was imported and unladen, and others also were exported beyond Seas, not being searched, and that when these Ships were so imported or exported, neither the Searcher himself nor any of his Deputies

ties were there, though it does not appear to be by Negligence or voluntarily, yet this voluntary Abſence and Neglect, ſo as neither himſelf nor Servants were there to ſearch, is not only *Craſſa negligentia*, but a voluntary Permiſſion and Forfeiture.

So if a Gaoler ſhould leave his Priſon Doors unlock'd, and the Priſoners eſcape, it is not only a negligent but a voluntary Eſcape. CroCar. 492. *per Cur'*.

If Conditions in Law, which are annexed to Offices, be not obſerved and fulfilled, the Office is loſt for ever, for theſe Conditions are as ſtrong and binding as expreſs Conditions; and therefore if the Office of Foreſter, *&c.* deſcend to an Infant or Feme Covert, (where by Law they may ſo deſcend) and theſe are not exerciſed by ſufficient Deputies, they become forfeited. Co. Lit. 233. b. 8 Co. 44. Cro. Car. 556. Hard. 11.

If a Parker or a Foreſter cut a Tree, not for Browſe or Reparations, this is a Forfeiture in Law of his Office; becauſe he breaks the Condition in Law annexed to his Office, which is, that he will preſerve the Game, and not do any Thing that may impair or deſtroy them; but other Books hold, that the cutting down of Trees is no Forfeiture, if he leaves ſufficient for Browſe and Shade for the Deer, and to cover them. 9 Co. 50. a. Cro. Eliz. 385. And. 29. Poph. 117. *Cont.* Moor 707. 2 Mod 121.

Inſufficiency is an original Incapacity which creates the Forfeiture of an Office; ſo if a Superior puts in a Deputy into an Office, which may be exerciſed by Deputy, who is ignorant and unſkilful, this is a Forfeiture of the Office. 4 Mod. 29. *arguendo.*

If the King grants an Office in any of the Courts at *Weſtminſter*, the Judges may remove ſuch an Officer for Inſufficiency, and are the proper Perſons to judge of his Abilities. 4 Mod. 30. *arguendo.* —Where an Officer may be removed, but cannot be abridged of his Fee, Rol. Rep. 82-3.

* A Philizer of *C. B.* being abſent two Years, and having farmed out his Office from Year to Year, without the Licence of the Court, was diſcharged by the Chief Juſtice, *ex aſſenſu ſociorum ſuorum*, by Words ſpoken openly in Court; and though there was no Record made of the Diſcharge, nor any legal Summons for him to anſwer to any Accuſation, yet the Diſcharge was held good. * Page 743 Dyer 114. b. pl. 64. Rol. Abr. 155. S. C.

An Officer was turned out, becauſe that he *ſpoliavit quædam recorda contra officii ſui debitum*; and it was objected, 1*ſt*, That it was not certain enough, becauſe not ſhewn what Records; to which the Court anſwered, that it would be prolix, and then he having ſpoiled the Records, they are not now to be had. 2*d* Objection, That it may be he did it by Chance, and not wilfully; to which the Court ſaid, that the Concluſion *contra officii ſui debitum* included that. Keb. 597. *Pilkington's* Caſe.—— Clerk of the Peace indicted and removed for not delivering the Records to the new *Cuſtos Rotulorum*. 4 Mod. 31, 32. Show. 282. 12 Mod. 13. 5 Mod. 386. Carth. 426. Ld. Raym. 158, 166. 2 Stra 997. Holt 188. pl. 1.

If *A.* hath the Cuſtody of a Caſtle with all Profits, *&c.* granted to him for Life, of which the Inheritance hath been granted to *B.* and *A.* refuſes *B.* to let him inhabit in the Houſe, this is a Forfeiture in *A.* Cro. Jac. 17, 18.

If Tenant in Tail of an Office commit a Forfeiture, this ſhall bind the Iſſue, by Force of the Condition tacitly annexed by Law to ſuch Eſtate; but if an Officer for Life commit a Forfeiture, this ſhall not affect him who hath the Inheritance. 11 E. 4. 1. 10 E. 4. 56. 39 H. 6. 32. 22 *aſſ.* 34. 8 H. 4. 18.

2 H. 7. 11. 14 H. 7. 1. 2 Rol. Abr. 155. 7 Co. 34. Poph 119. 2 Lev. 71. Raym 216. 3 Lev. 288. 3 Mod. 146. Skin. 114. 2 Vern 173. 2 Vent. 189, 269. Bridgm. 27.

The Archbiſhop of *Canterbury* granted the Office of Guardian and Keeper of *Alyngton* Park to Sir *Edward Nevil*, and to *Henry* one of his Sons, with a certain Fee during their Lives, and the longeſt Liver of them, which was confirmed Plow. 378. Sir *Henry Nevil's* Caſe.

confirmed by the Prior of *Chriſt's Church, Canterbury*, to be exerciſed by them or their ſufficient Deputy, for whom they ſhall anſwer; Sir *Edward* was attainted; and the Queſtion was, if the King ſhould have the Office by the Attainder; and it was reſolved, that being only an Office of Skill and Confidence, the ſame was not forfeited to the King, but that the Survivor ſhould hold the ſame with the Profits incident thereto.

Plow. 180. But if the King grants an Office which concerns Truſt and Diligence to two, and one of them is attainted, the entire Office is forfeited to the King; for he cannot make one to occupy in Common with another.

But for this, *vide* Dyer 155, 198, 211. 9 Co. 98. Co. Lit. 233. Cro. Car. 60, 61. Sid. 81, 134. 8 Co. 44. b. Rol. Abr. 580. 3 Mod. 335. 3 Lev. 288. Where-ever an Officer who holds his Office by Patent commits a Forfeiture, he cannot regularly be turned out without a *Scire facias*, nor can he be ſaid to be completely ouſted or diſcharged without a Writ of Diſcharge; for his Right appearing of Record, the ſame muſt be defeated by Matter of as high a Nature.

Page 744 (N) **Where for Corruption and oppreſſive Proceedings Officers are puniſhable; and herein of Bribery and Extortion.**

That if a Man be made an Officer by Act of Parliament, and miſbehave himſelf in his Office, he is indictable for it at Common Law, as in every public Officer, who miſbehaves himſelf in his Office. 6 Mod. 96.

THERE can be no Doubt but that all Officers, whether ſuch by the Common Law, or made purſuant to Statute, are puniſhable for Corruption and oppreſſive Proceedings, according to the Nature and Heinouſneſs of the Offence, either by Indictment, Attachment, Action at the Suit of the Party injured, Loſs of their Offices, *&c.*

Dyer 218. Palm. 564. But beſides the Puniſhment by Indictment, Information, *&c.* all Courts of Record have a diſcretionary Power over their own Officers, and are to ſee that no Abuſes are committed by them, which may bring Diſgrace on the Court themſelves; alſo the Court of King's Bench, by the Plenitude of its Power, exerciſes a Superintendency over all inferior Courts, and may grant an Attachment againſt the Judges of ſuch Courts for oppreſſive, unjuſt, or irregular Practice, contrary to the obvious Rules of natural Juſtice.

Co. Lit. 368. 2 Inſt. 209. 10 Co. 102. 2 Rol. Abr. 327. Cro. Car. 438, 448. Raym. 315. As to the Extortion by Officers, it is ſo odious, (being more henious, as my Lord *Coke* ſays, than Robbery, as it is uſually attended with the aggravating Sin of Perjury,) that it is puniſhable at Common Law by Fine and Impriſonment, and alſo by a Removal from the Office in the Execution whereof it was committed; and is defined to be the Taking of Money by any Officer by Colour of his Office, either where none at all is due, or not ſo much is due, or where it is not yet due.

21 H. 7. 17. Co. Lit. 368. But the ſtated and known Fees allowed by the Courts of Juſtice to their reſpective Officers, for their Labour and Trouble, are not reſtrained by the Common Law, or by the Statute of *Weſtm.* 1. 3 *Ed.* 1. and therefore ſuch Fees may be legally demanded and inſiſted upon, without any Danger of Extortion.

3 Inſt. 210. 3 Inſt. 149. Co. Lit. 368. Alſo it ſeems, that an Officer, who takes a Reward which is voluntarily given to him, and which has been uſual in certain Caſes for the more diligent or expeditious Performance of his Duty, cannot be ſaid

to

to be guilty of Extortion; for without ſuch a *Præmium* it would be impoſſible in many Caſes to have the Laws executed with Vigour and Succeſs.

But it has been always held, that a Promiſe to pay an Officer Money for the doing of a Thing which the Law will not ſuffer him to take any Thing for, is merely void, however freely and voluntarily it may appear to have been made. Rol. Abr. 16. Rol. Rep. 313. Noy 76. Jon. 65. Cro. Eliz. 654. Moor 468. Cro. Jac. 103.

If an Indictment of Extortion charges *J. S.* with the taking of 50*s.* as a Bailiff of a Hundred *Colore Officii*, without (*a*) ſhewing for what he took it, this is good at leaſt after Verdict, for perhaps he might claim it generally, as being due to him as Bailiff, in which Caſe the Taking could not be otherwiſe expreſſed. Sid. 91. *The King* ver. *Cover.*

(*a*) That an Information for Extortion muſt ſet forth the Time when the Offence was committed. 4 Mod. 101, 103.——That the Court of King's Bench will not quaſh an Indictment for Extortion or Oppreſſion, though erroneous, but will oblige the Party to plead or demur to it. 5 Mod. 13.

* As to Bribery, it is ſaid, in a large Senſe, to be the receiving or offering of any undue Reward by or to any Perſon whatſoever, whoſe ordinary Profeſſion or Buſineſs relates to the Adminiſtration of Public Juſtice, in order to incline him to do a Thing againſt the known Rules of Honeſty and Integrity; but that, in a ſtrict Senſe, it ſignifies the taking of any Thing valuable by one in a Judicial Place, of any one who hath to do before him any way, for doing his Office, or by Colour of his Office, but of the King only; alſo it ſignifies the Taking or giving a Reward for Offices of a Public Nature, which manifeſtly tending to diſcourage Men, and to introduce all Kinds of Corruption, is highly puniſhable by the Common Law. *Page 745 *Forteſcue de Laud.* c. 51. 3 Inſt. 145, 149. Hob. 9. Cro. Jac. 65.

And theſe ſeveral Offences are ſo odious in the Eye of the Law, that they are puniſhable not only with the Forfeiture of the Offender's Office of Juſtice, but alſo with Fine and Impriſonment; alſo it is ſaid, that at Common Law Bribery in a Judge, in relation to a Cauſe depending before him, was looked upon as an Offence of ſo heinous a Nature, that it was ſometimes puniſhed as High Treaſon, before the Statute 25 *Ed.* 3. *ſtat.* 5. *cap.* 2. 3 Inſt. 145. Leon. 291. Cro. Jac. 65. *Ruſhw. Collections* Part 1. fol. 31.

Alſo it is ſaid in general, that all wilful Breaches of the Duty of an Office are Forfeitures of it, and alſo puniſhable by Fine, *&c.* for ſince every Office is inſtituted, not for the Sake of the Officer, but for the Good of ſome other, nothing can be more juſt than that he, who either neglects or refuſes to anſwer the End for which his Office was ordained, ſhould give way to others, who are both able and willing to take Care of it, and that he ſhould be puniſhed for his Neglect, or oppreſſive Execution; but the particular Inſtances wherein a Man may be ſaid to act contrary to the Duty of his Office, though various, are yet ſo generally obvious, that it ſeems needleſs to endeavour to enumerate them. Co. Lit. 233, 234.

OUTLAWRY.

Co. Lit. 128. *Doct. & Stud. Dial.* 2 c. 3. Rol. Abr. 802.

OUTLAWRY is a Puniſhment inflicted on a Perſon for a Contempt and Contumacy, in refuſing to be amenable to and abide by the Juſtice of that Court which hath lawful Authority to call him before them; and as this is a Crime of the higheſt Nature, being an Act of Rebellion againſt that State or Community of which he is Member, ſo doth it ſubject the Party to divers Forfeitures and Diſabilities; for hereby he loſeth *Liberam legem*, is out of the King's Protection, *&c.*

Co. Lit. 128. 3 Inſt. 161.

And as to Forfeitures for refuſing to appear, herein the Law diſtinguiſhes between Outlawries in Capital Caſes, and thoſe of an inferior Nature; for as to outlawries in Treaſon and Felony, the Law interprets the Party's Abſence a ſufficient Evidence of his Guilt, and without requiring further Proof or Satisfaction, accounts him guilty of the Fact, on which enſues Corruption of Blood, and Forfeiture of his whole Eſtate, Real and Perſonal.

* Page 746 Plow. 541. 9 H. 6. 20. b. Show. Parl. Ca. 73.

* But Outlawry in leſſer Crimes, or in perſonal Actions, does not occaſion the Party to be looked upon as guilty of the Fact, nor does it occaſion an entire Forfeiture of his Real Eſtate, but yet is very fatal and penal in its Conſequences; for hereby he is reſtrained of his Liberty, if he can be found, forfeits his Goods and Chattels, and the Profits of his Lands while the Outlawry remains in Force.

Co. Lit. 128. b.

Alſo it is ſaid, that anciently Outlawry was looked upon as ſo horrid a Crime, that any one might as lawfully kill a Perſon outlawed as he might a Wolf, or other noxious Animal; but that the law herein was changed in *Ed.* III.'s Time, which provides, that a Perſon outlawed ſhall be put to Death by the Sheriff only, having lawful Authority for that Purpoſe.

2 Hal. Hiſt. P. C. 202. 9 Co. 91. Bulſt. 146. Cro. Eliz. 908. Moor 606, 668.

Alſo from the Heinouſneſs of the Offence the Sheriff may, on a *Capias utlagatum*, break open the Houſe of the Perſon outlawed; for it would be unreaſonable, that this Privilege or Protection, allowed of in other Caſes, ſhould be extended to him who is declared a Contemner and Violator of the Law; and therefore the Seiſing him as an Outlaw, doth imply the Liberty of entering and ſeiſing him whereſoever he lies hid.

Yelv. 28. Cro. Car. 537. 4 Leon. 41. 2 Jon. 233.

(*a*) That no Perſon is to be outlawed *niſi per legem terræ*. 2 Inſt. 47.

And as to the Puniſhment of Outlawry is of a very ſevere Nature, ſo the Law hath provided and taken great (*a*) Care, that no Perſon ſhould be outlawed without due Notice, and apparent Contempt to the Court; as will appear under the following Heads:

——That three *Capias's* are required, and the Party to be called in five County Courts, a Month ‡ between every Court. Bract. Lib. 3. tract. 2. c. 11.

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‡ In *London* fourteen Days between two *Huſtings* will be well; for the *Huſtings* may be held every Week. 2 Leo. 14. Therefore it is uſual to outlaw in *London*, the Party being outlawed much ſooner there than in any other County. See *infra* 771-2, and 777. under Letter (H).

(A) In what Caſes Proceſs of Outlawry lies. 748.
(B) By what Juriſdiction ſuch Proceſſes are to iſſue. 748.
(C) Againſt whom Proceſs of Outlawry may be awarded. 750.

And

And herein,

1. Whether it may be awarded againſt a Peer. 750.
2. Whether Proceſs of Outlawry may be awarded againſt an Infant. 750.
3. Of awarding Proceſs of Outlawry againſt a Feme Sole or Covert, and the Proceedings thereon. 750.
4. Of awarding Proceſs of Outlawry againſt ſeveral Defendants, and the Proceedings thereon. 751.
5. Of awarding Proceſs of Outlawry againſt Principal and Acceſſary. 752.

(D) **What Forfeitures and Diſabilities an Outlawry ſubjects the Party to.** 753.

And herein,

1. Where it is of the ſame Effect with a Sentence or Judgment. 753.
2. Of the Forfeiture as to Lands, Goods, *&c.* and herein of the Difference between Outlawries in Criminal and Civil Caſes, and of the King's and Party's Intereſt at whoſe Suit the Outlawry was had. 754.

And herein,

1. *Of the Difference between a Forfeiture in a Criminal and Civil Caſe.* 754.
*2. *What Things are forfeited by the Outlawry.* 755. *Page 747
3. *To what Time the Forfeiture ſhall relate.* 757.
4. *Of the King's and Party's Intereſt at whoſe Suit the Outlawry was had, in the Eſtate and Effects of the Party outlawed, and their Remedies for the ſame.* 759.

3. Of the Party's Diſability to bring any Action. 761.
4. What further Diſabilities Outlawry ſubjects the Party to. 765.

(E) **Of the Regularity of the Proceedings on an Outlawry, and for what Errors it may be reverſed.** 766.

And herein,

1. Where, for want of ſuch Proceſs as required by Law, the Outlawry may be reverſed. 766.
2. Where, for want of Form in ſuch Proceſſes, the Outlawry may be reverſed. 767.
3. Where, for Variance in ſuch Proceſſes, the Outlawry may be reverſed. 767.
4. Where, for a defective Execution and Return, the Outlawry may be reverſed. 768.

And

And herein,

1. *To whom ſuch Proceſs is to iſſue and be directed.* 768.
2. *To what Place the Proceſs is to iſſue; and herein of the* Quinto exactus, *and Proclamation on an Outlawry.* 769.
3. *What ſhall be ſaid a good Execution and Return.* 771.

(F) Of the Manner of reverſing an Outlawry; and herein of the Difference between Errors in Fact and in Law. 773.

(G) What the Party muſt do in order to intitle him to a Reverſal. 775.

And herein,

1. Of appearing in Perſon, or by Attorney. 775.
2. Of giving Bail. 776.
3. Of ſuing out a *Scire facias.* 777.

(H) The Effects and Conſequences of a Reverſal. 777.

And herein,

1. Where the Proceedings on the Reverſal are in the ſame Plight as if no Outlawry had been. 777.
2. To what the Party ſhall be reſtored on Reverſal of the Outlawry. 778.

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*Page 748 * (A) In what Caſes Proceſs of Outlawry lies.

Staunf. 192. Bro. Title *Outlawry*, 26, 36, 59. Co. Lit. 128. b. Dyer 213, 214.

IT ſeems, that originally Proceſs of Outlawry only lay in Treaſon and Felony, and was afterwards extended to Treſpaſſes of an enormous Nature; and herein it is laid down by Serjeant *a) Hawkins*, that Proceſs of Outlawry at this Day lies in all Appeals, and in all Indictments of Treaſon or Felony, and in all Indictments of Treſpaſs *vi & armis*, and on all Returns of Reſcous, and, as ſome ſay, in all Indictments of Conſpiracy or Deceit, or other Crimes of a higher Nature than Treſpaſs *vi & armis*; but it lies not in an Action, nor, as ſome ſay, on an Indictment on a (*b*) Statute, unleſs it be given by ſuch Statute, either expreſly, as in the Caſe of *Præmunire*; or impliedly, as in Caſes made Treaſon or Felony by Statute, or where a Recovery given by an Action in which ſuch Proceſs lay before, as in the Caſe of a (*c*) Forcibly Entry.

(*a*) 2 Hawk. P. C. 302, 303, and ſeveral Authorities there cited.

(*b*) Does not lie on an Indictment on the Statutes againſt Foreſtalling. 21 Ed. 4. 11. *b.* 2 Hal. Hiſt. P. C. 194. (*c*) On a Conviction by Juſtices on View of a Forcible Entry Proceſs of Outlawry lies. 1 Keb. 563.

2 Inſt. 665. 6 Mod. 85. (*d*) But a Preſentment is the ſame with an Indictment, on which Proceſs of Outlawry lies. 2 Leon. 200.

In an Aſſiſe a *Capias pro fine* lies, and upon that, Proceſs of Outlawry, if the Aſſiſe be found with Force; but being a mixed Action, as ſavouring of the Realty, it is out of the Statute of Additions, 1 *H.* 5. *cap.* 5. which extends only to Perſonal Actions, Appeals and (*d*) Indictments.

So

So Proceſs of Outlawry lies in Replevin, and is given by the Statute 25 *E.* 3 *cap.* 17. which gives the *Capias* in this Manner; when on the *Pluries replegiari facias* the Sheriff returns *Averia elongata*, then a *Capias in Withernam* iſſues, and on that's being returned *Nulla bona*, a *Capias* iſſues, and ſo to Outlawry; but it does not lie on the original Writ of Replevin, which is *Vicountiel* and determined; and therefore as no Addition is required in ſuch original Writ, ſo neither ought there to be any in the ſecond Writ; for where a Writ of Proceſſes is founded on a former, it muſt purſue the former, and cannot vary from it. 6 Mod. 84. Salk. 5. *Earl of Bannbury* ver. *Wood.* 2 Ld. Raym. 987.

By the Common Law, in all Actions of Treſpaſs *Quare vi & armis*, and in which there is a Fine to the King, a *Capias* was the Proceſs; and herein Proceſs of Outlawry lay by the Common Law. 35 H. 6. 6. b. 22 H. 6. 13. Raſt. Ent. 293. 10 Co. 72. 2 Rol. Abr. 805.

But in Account, Debt, (*a*) Detinue, Annuity, Covenant, and ſuch Actions as are grounded upon Negligence or Laches merely, no *Capias* lay at Common Law, but only Summons and Diſtreſs infinite, and therefore the *Capias* and Outlawry in theſe Actions were introduced by divers Acts of Parliament. Co. Lit. 128. b. 3 Co. 12. 2 Bulſt. 63. 2 Inſt. 143. Cro. Jac. 222, 261. Yelv. 158.

Raym. 128. Keb. 890, 908. Sid. 248, 258. (*a*) Whether Proceſs of Outlawry lies in a Writ Detinue of Charters. Dyer 223. *a. dubitatur.*

By the Statute of *Marlebridge*, 52 *H.* 3. *cap.* 23. the Writ of *Monſtravit de compoto* was given, where before the Proceſs in Account was Summons, Attachment and Diſtreſs infinite; and by *Weſtm.* 2. 13 *Ed.* 1. *ſtat.* 1. *cap.* 11. Proceſs of Outlawry is given in Account. 2 Inſt. 145, 380. F. N. B. 259.

By the 25 *E.* 3. *cap.* 17. it it accorded, that ſuch Proceſs ſhall be made in a Writ of Debt and Detinue of Chattels, and taking of Beaſts, by Writ of *Capias*, and by Proceſs of Exigent, by the Sheriff's Return, as is uſed in a Writ of Account. 3 Co. 12. 2 Rol. Rep. 295. 2 Bulſt. 63.

* And by the 19 *H.* 7. *cap.* 9. reciting, "That for as much as before "this Time there hath been great Delays in Actions of the Caſe that have "been ſued as well before the King in his Bench, as in the Court of his "Common Bench, by Reaſon of which Delays many Perſons have been "put from their Remedy; it is therefore ordained, enacted and eſtabliſh-"ed, that like Proceſs be had hereafter in Actions upon the Caſe as well ſu-"ed and hanging, as to be ſued in any of the ſaid Courts, as in Actions of "Treſpaſs or Debt." * Page 749

But it hath been adjudged, that Proceſs of Outlawry lies in no Caſe but where a *Capias* lies; and that therefore where the Proceedings is by Bill and not by Original, as there can be no *Capias*, ſo there can be no Proceſs of Outlawry, as in a Bill of Privilege by or againſt an Attorney. Leon. 329. 2 Rol. Abr. 76. Sid. 159. Keb. 577.

(B) By what Juriſdiction ſuch Proceſſes are to iſſue.

IT is clear, that the Courts at *Weſtminſter* may iſſue Proceſs of Outlawry, and that the Court of King's Bench, either upon an Indictment originally taken there or removed thither by *Certiorari*, may iſſue Proceſs of *Capias* and Exigent into any County of *England*, upon a *Non eſt inventus* returned by the Sheriff of the County where he is indicted, and a *Teſtatum* that he is in ſome other County. 2 Hal. Hiſt. P. C. 198.

Alſo

2 Hal. Hiſt. P. C. 31, 199. Alſo Juſtices of Oyer and Terminer may iſſue a *Capias* or Exigent, and ſo proceed to the Outlawry of any Perſon indicted before them, directed to the Sheriff of the ſame County where they held their Seſſion at Common Law; and by the Statute of 5 *E.* 3. *cap.* 11. they may iſſue Proceſs of *Capias* and Exigent to all the Counties of *England*, againſt Perſons indicted or outlawed of Felony before them.

2 Hal. Hiſt. P. C. 199 † But now they have Commiſſions of Oyer and Terminer, and other Commiſſions, &c. giving them full Power in all Caſes. But Juſtices of Gaol Delivery † regularly cannot iſſue a *Capias* or Exigent; becauſe their Commiſſion is to deliver the Gaol *de priſonibus in ea exiſtentibus*, ſo that thoſe whom they have to do with are always intended in Cuſtody already.

2 Hal. Hiſt. 199. (*a*) Juſtices of Aſſiſe, Juſtices of *Niſi Prius*, Juſtices of *Oyer and Terminer* and Juſtices of Gaol-Delivery, and alſo Juſtices of the Peace in their Seſſions may proceed to Outlawry in Caſes of Indictments found before them, and that by the Common Law; and in Caſes of Popular Actions may proceed to Outlawry by the Statute of 21 Jac. 1. c. 4. 2 Hal. Hiſt. P. C. 52.——But they cannot iſſue a *Capias utlagatum*, but muſt return the Record of the Outlawry into the King's Bench, and there Proceſs of *Capias utlagatum*, ſhall iſſue. Dalt. 406. 2 Hal. Hiſt. P. C. 52. Juſtices of the Peace may make out Proceſs of Outlawry upon (*a*) Indictments taken before themſelves, or upon Indictments taken before the Sheriff, and returned to the Juſtices of the Peace, by the Statute of 1 *E.* 4. *cap.* 1. but the Power of the Sheriff, to make any Proceſs upon Indictments taken before him, is taken away by that Statute.

2 Hal. Hiſt. P. C. 199. —*Per Hawkins*, a Coroner may award Proceſs until the Exigent, on a Bill of Appeal before him; and that by the better Opinion, ſuch Proceſs ſhall be awarded by him only, and not by him and the Sheriff jointly, and that he may proceed thereon to Outlawry; but that ſince *Magna Charta*, c. 17. by which it is enacted, *That no Sheriff, Conſtable, Coroner, or other Bailiff of the King, ſhall hold Pleas of the Crown*, he cannot proceed to the Trial of the Appellee. 2 Hawk. P. C. 51. and ſeveral Authorities there cited. It is made a *Quære* by *Hale*, whether a Coroner can by Law make out Proceſs of Outlawry againſt a Man indicted by Inquiſition before him.

* Page 750 Yelv. 158. Cro. Jac. 222, 261. * It hath been held, that though the Proceſs in Inferior Courts be a *Capias*, that yet they cannot proceed to outlaw the Perſon.

Raym. 128. Sid. 248, 259. Keb, 890, 908.

2 Hal. Hiſt. P. C. 199. (*b*) Where the *Capias* was *eſte Edmundo Anderſon*, without a *T.* and for this Error the Outlawry was reverſed; for the *Teſte* is the Warrant of the Writ, as it is of all judicial Writs. Cro. Eliz. 592. *Gronby* ver. *Iſcham*. The Proceſs to the Outlawry, *viz.* the *Capias* and Exigent, muſt be in the King's Name, and under the Judicial Seal of the King appointed to that Court that iſſues the Proceſs, and with the (*b*) *Teſte* of the Chief Juſtice or Chief Judge of that Court or Seſſions.

(C) Againſt whom Proceſs of Outlawry may be awarded: And herein,

1. Whether it may be awarded againſt a Peer.

2 Inſt. 49. 3 Inſt. 31. Staunf. 130. 2 Hawk. P. C. 424. IF a Nobleman, or Peer of the Realm be indicted and cannot be found, Proceſs of Outlawry ſhall be awarded againſt him, and he ſhall be outlawed *per judicium Coronatorum*.

But

But in Civil Actions between Party and Party, regularly a *Capias* or Exigent lies not against a Lord of Parliament of *England*, whether Secular or (*b*) Ecclesiastical; yet in Case of an Indictment for Treason or Felony, yea or but for a Trespass *vi & armis*, as an Assault or Riot, Process of Outlawry shall issue against a Peer of the Realm, for the Suit is for the King, and the Offence is a Contempt against him; and therefore, if a Rescue be returned against a Peer, or if a Peer be convict of a Disseisin with Force, or denies his Deed, and it be found against him, a *Capias pro fine* and Exigent shall issue, for the King is to have a Fine; and the same Reason holds upon an Indictment of Trespass or Riot, and much more in the Case of Felony.

2 Hal. Hist. P. C. 199, 200. Cro. Eliz. 170, 503. 5 Co. 54. Rol. Abr. 220.

(*b*) That an Abbot or Prior ought not to be outlawed.

3 E. 3. 2 Rol. Abr. 805.

2. Whether Process of Outlawry may be awarded against an Infant.

An Infant above the Age of fourteen may be outlawed, and the Outlawry is not erroneous; but an Infant under the Age of fourteen cannot be outlawed, for if he be it is erroneous.

3 H. 5. *Utlag.* 11. Fitz. Title *Outlawry*, 11.

2 Rol. Abr. 805. Dyer 104. 2 Hal. Hist. P. C. 207, 208.

But the Outlawry of such Infant is not void, it being of Record, but it is voidable only by Writ of Error.

Dyer 239. a. 2 Rol. Abr. 805.

3. Of awarding Process of Outlawry against a Feme Sole or Covert, and the Proceedings thereon.

A Woman is said to be waived and not outlawed; and the Reason, says my Lord *Coke*, why the Outlawry of a Woman is legally called *Waiviaria mulieris* is, because Women are not sworn in Leets or Torns, as Men are, who are above the Age of twelve; and therefore, says he, Men are called * *utlagati*, i. e. *Extra legem positi*, but Women are *Waiviatoe* i. e. *Derelictæ*, left out or not regarded, because they are not sworn to the Law.

Co. Lit. 122. b. Lit. s. 186.

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Therefore, where a *Capias* and Exigent were awarded against three Men and two Women, and the Return was *Utlagati existunt*, where, as to the Women, it ought to have been *Waiviatæ existunt*, this was held to be Error.

Cro. Jac. 358. *Middleton's* Case.

Rol. Rep. 407. S. P. Rol. Abr. 804. S. P.

If in an Action against Husband and Wife the Husband is outlawed, and Wife waived, and she is taken upon the *Capias utlagat'*, though she is to be discharged of the Imprisonment, (because the Plaintiff cannot proceed against her alone) yet she still remains waived, and when her Husband is taken he must bring her in.

For this, *vide* Dyer 271. b. Cro. Jac. 445. Cro. Eliz. 370. Hut. 86. Sid. 21.

In an Action for a Debt due by a Wife before Marriage, the Husband was returned outlawed and the Wife waived, but before the Return of the Exigent an Attorney procured for the Wife a *Supersedeas*, surmising, that the Wife had appeared by him as her Attorney; and on Motion that this Appearance of the Wife should be received, all the Court conceived, that if upon the Exigent the Sheriff had returned *Reddidit se*, or upon *Pluries Capias* had returned *Cepi Corpus* for the Wife, then her Appearance should be entered, but not by Attorney, as it is here; and the Exigent should only issue against the Husband, & *idem dies* should be given to the Wife; but when the Husband upon the Exigent is returned outlawed, then it shall be entered *Aler sans jour* for the Wife, for the Process is determined; and if

Cro. Car. 58, 59. *Smith* ver. *Asp & Ux'*. Hut. 86. S. C.

if he will purchaſe his Pardon, he ſhall not have any Allowance thereupon in a *Scire facias*, unleſs he appear for himſelf and his Wife; but if for the Huſband, the Sheriff ſhall return *Cepi Corpus* upon a *Pluries Capias*, and a *Non eſt inventa* for the Wife, yet an Exigent ſhall iſſue againſt both, becauſe it muſt be preſumed the Huſband might bring in his Wife; but if upon the Exigent the Sheriff returned *Reddidit ſe* for the Huſband and for the Wife, and ſhe is waived, the Huſband ſhall go *ſine die*; but in this Caſe, becauſe the Exigent was returned againſt both to be outlawed, the *Superſedeas* ſuppoſing the Appearance of the Wife is merely idle and void; whereupon it was diſallowed, and the Exigent appointed to be filed againſt both.

4. Of awarding Proceſs of Outlawry againſt ſeveral Defendants, and the Proceedings thereon.

Cro. Eliz. 648. *Beverley* ver. *Beverley*. If two are ſued in a joint Action, and neither of them will appear, Proceſs of Outlawry muſt be taken out againſt both.

2 Rol. Abr. 802. *Taverner*'s Caſe. 2 Hal. Hiſt. P. C. 204. If an Exigent be awarded againſt two, and the Return is *primo exacti fuerunt & non comparuerunt*, without ſaying, *nec eorum aliquis comparuit*, it is errroneous.

S. C. cited, and S. P. ſaid to have been often adjudged.—Cro. Jac. 358. S. P. adjudged, and ſaid to be manifeſt Error. 3 Mod. 89, 90. S. P. adjudged. Rol. Rep. 406. Palm. 388. S. P. adjudged.

41 E. 3. 3. Rol. Abr. 127. S. C. Brownl. 25. S. P. ſaid. If two in a Writ of Account are adjudged to account, and one is after (*a*) outlawed in the Suit, and the other appears, he ſhall account alone.

(*a*) But if ſued by Bill upon which no Outlawry can be, what Proceedings ſhall be, *Quære*; & *vide* Sid. 159. Keb. 577 ‡.

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‡ Perhaps it might be adviſeable to diſcontinue, and proceed by Original, when after Outlawing one, the Plaintiff might go on againſt the other.——The Action for Money had and received, will in moſt Caſes anſwer the ſame Purpoſe as an Action of Account,

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41 E. 3. 13. b. Rol Abr. 127. & *vide* Moor 188. * When two are adjudged to account, and one is outlawed and accounts, if he diſcharges himſelf upon the Account, this ſhall be a Diſcharge to the other, when he ſues a *Scire facias* upon a Charter of Pardon; and if he be charged by the Account, this ſhall be a Charge upon the other, becauſe they were judged to account jointly.

2 Leon. 76. Dyer 239 pl. 203. *Hawtry* ver. *Anger*. N. Bendl. 148. pl. 205. Moor 74. pl. 203, and And. 10. S. C. adjudged. If in Debt due upon an Obligation againſt *B.* and *C.* Sons and Heirs of the Obligor, and againſt *D.* the Daughter and Heir of *A.* who was another of the Sons and Heirs of the Obligor in Gavelkind, Proceſs is continued till the Uncles are outlawed and the Niece waived and after the Uncles are pardoned, and bring a *Scire facias* againſt the Plaintiff, who thereupon declares againſt them *ſimul cum* the Niece; and the Uncles plead, their Niece is but of the Age of ſeven, *unde non intendunt quod durante minori ætate ſua* they ought to anſwer, *&c.* yet the Parol ſhall not demur; for the Niece is out of Court, and *quoad* her the Original is determined, and at her full Age no Re-ſummons could be ſued againſt her, but the Uncles only, becauſe ſhe never appeared in Court.

Sid. 173. Keb. 642. S. C. *Guy* ver. *Barnard*. An Action of Treſpaſs was brought againſt two, one was outlawed; after the Entry of the Writ it was entered, *& ſciendum eſt quoad prædict' J. S.* (one of the Defendants) *Utlagat' eſt*, and then counts againſt one of them; and on Motion in Arreſt of Judgment, the Court held the Declaration naught,

naught, and the Courſe of Pleading in ſuch Caſes, after the Entry of the Writ, was to ſay, *& quod prædict'* J. S. *utlagat' eſt in Præc' illo*, and that the laſt Words are eſſential, becauſe that he might be outlawed in another Writ, and not in this.

5. Of awarding Proceſs of Outlawry againſt Principal and Acceſſary.

Herein we muſt firſt take Notice, that by the Statute of *Weſtm.* 1. 3 *Ed.* 1. *cap.* 14. it is recited, "That it had been uſed in ſome Counties to outlaw "Perſons being appealed of Commandment, Force, Aid or Receipt, "within the ſame Time that he which is appealed for the Deed is outlaw-"ed; and thereupon it is provided, that none be outlawed upon Appeal "of Commandment, Force, Aid or Receipt, unleſs he that is appealed of "the Deed be attainted, ſo that one like Law be uſed therein through the "Realm; nevertheleſs, he that will ſo appeal, ſhall not by Reaſon of "this intermit or leave off to commence his Appeal at the next County "againſt them, no more than againſt their Principals which he appealed of "the Deed, but their Exigent ſhall remain until ſuch as be appealed of "the Deed be attainted of Outlawry, or otherwiſe."

In the Conſtruction of this Statute, the following Particulars are laid down by Serjeant *Hawkins* as moſt remarkable.

1*ſt*, That it ſeems agreed, that it extends as well to Indictments as to Appeals, not only becauſe the Word *Appeal* in the Statute may in a large Senſe be taken for any Accuſation in general; but becauſe Indictments are certainly as much within the Reaſon of the Statute as Appeals; and the Common Law, for the ſettling whereof this Statute was made, did not make any Diſtinction in this Reſpect between Appeals and Indictments. 2 Inſt. 183. 2 Hawk. P. C. 306.

2*dly*, That it ſeems to be agreed, that where-ever ſome of the Defendants are expreſly charged as Principals, and others as Acceſſaries, before the Award of this Exigent, the Outlawry thereon of thoſe charged as Acceſſaries cannot but be reverſible, becauſe it appears upon the Record that the Exigent iſſued contrary to the Direction of the Statute; but if ſeveral be outlawed on a Writ of Appeal, which chargeth them all alike without any Diſtinction, there can be no Advantage taken of * the Appellant's not having purſued the Statute, ſince it appears not but that he might have charged them all as Principals. 2 Hawk. P. C 306. 2 Hal. Hiſt. P. C. 200. *Page 755

3*dly*, That it is ſtrongly holden, that if an Appellant take out the Exigent at the ſame Time againſt all the Defendants, he muſt, when they appear, count againſt them all as Principals; and ſhall be concluded from charging any of them as Acceſſaries, becauſe he has taken out ſuch Proceſs as is erroneous where all are not Principals; but he makes a Doubt, whether this be Law at this Day, ſince all Errors, as the Law ſeems now to be holden, are ſalved by Appearance. 2 Hawk. P. C. 306. & *vide* 2 Hal. Hiſt. P. C. 200.

4*thly*, That it ſeems the better Opinion, that where there are more than one Principal, the Exigent ſhall not iſſue till all of them are arraigned; and herein it is ſaid by *Hale*, that if *A.* and *B.* be indicted as Principals in Felony, and *C.* as Acceſſary to them both, the Exigent againſt the Acceſſary ſhall ſtay till both be attainted by Outlawry or Plea; for that it is ſaid, if one be acquitted, the Acceſſary is diſcharged, becauſe indicted as Acceſſary to both, and therefore ſhall not be put to anſwer till both be attaint; but hereof he adds a *Dubitatur*, becauſe, though *C.* be Acceſſary to both, he might have been indicted as Acceſſary to one, becauſe the Felonies are in Law ſeveral; but if he be indicted as Acceſſary to both, he muſt be proved ſo. 2 Hawk. P. C. 306. 2 Hal. Hiſt. P. C. 200, 201.

In

Hal. Hiſt. P. C. 238. In Treaſon all are Principals; and therefore Proceſs of Outlawry may go againſt him that receives, at the ſame Time as againſt him that did the Fact.

(D) What Forfeitures and Diſabilities an Outlawry ſubjects the Party to: And herein,

1. Where it is of the ſame Effect with a Sentence or Judgment.

2 Hal. Hiſt. P. C. 399. IF a Man be outlawed of Treaſon or Felony, though there be no other Judgment (*a*) but *Utlagatus eſt per judicium coronatorum*, yet it is of itſelf an Attainder, and ſubjects the Party to ſuch an Award thereupon, to be made by the Court where he is brought, as is ſuitable to the Offence for which he is indicted and outlawed.

(*a*) If the Outlawry appear by the Sheriff's Return of the Exigent, or by the Coroner's Return of a *Certiorari* to them directed, to certify whether the Party were outlawed or not, the Party is as much attainted, and ſhall forfeit and loſe as much, as if Sentence had been given againſt him upon Verdict or Confeſſion. 2 Hawk. P. C. 446-7. & *vide* 2 Hal. Hiſt. P. C. 205-6.—That thoſe Malefactors who wilfully fly from Juſtice, add a new Crime to their former Offence, and therefore ought to have no Benefit of the Law. 3 Mod. 72. 10 Mod. 188, 358, 379, 409. Stra. 530. 2 Stra. 824. Barnard. K. B. 79.

2 Hawk. P. C. 447. But if ſuch Outlawry appear to the Court to be erroneous, whereof any one as *Amicus curiæ* may inform them, the Party ſhall have Counſel aſſigned him to take Advantage of the Error; but if he will neither bring a Writ of Error, nor plead in covenient Time, and the Outlawry be voidable only, and not void, the proper Execution ſhall be awarded againſt him, but no Sentence pronounced; becauſe the Outlawry is a Judgment, and no Man ſhall have two Judgments for one Offence.

2 Hal. Hiſt. P. C. 408. And herein it is ſaid by *Hale*, that though the Court *ex officio* is to prefix the Party a Day to purchaſe a Writ of Error, and in the mean Time to reſpite Execution; yet that muſt be on his alledging Error in Fact, or Error in Law upon the Outlawry; for if the Court be ſatisfied that it is merely a * Pretence, they may chuſe whether they will allow him a Day to ſue forth a Writ of Error, but may award Execution preſently.

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2 Hawk. P. C. 343. Hal. Hiſt. P. C. 521. 2 Hal. Hiſt. P. C. 350. But though an Outlawry be an Attainder, and equal to a Conviction or Sentence by Verdict or Confeſſion, yet it does not ſubject the Party to any ſeverer Puniſhment than the Crime does for which the Outlawry was pronounced; and therefore, if it be in ſuch a Crime for which Clergy is allowable, the Party outlawed ſhall be allowed his Clergy in the ſame Manner as he who is convicted by Verdict or Confeſſion.

2 Salk. 494. pl. 1. *The King* ver. *Tippin.* One was outlawed upon an Information for ſeducing a young Gentleman to marry a young Woman of a lewd Character, and fined 5000 *l.* And it was moved in Behalf of the Defendant, that he could not be fined upon the Outlawry; becauſe in Miſdemeanors the Outlawry does not enure as a Conviction for the Offence, as it does in Caſes of Treaſon and Felony, but as a Conviction for the Contempt in not anſwering, which Contempt is puniſhed by the Forfeiture of his Goods and Chattels; and if he might be fined now, he muſt be fined again upon the principal Judgment; and the firſt was held to be irregular; and that the Outlawry in theſe Caſes is not a Conviction, as appears by *Fleta*, *Quamvis quis pro contumacia & fuga utlagetur, non propter hoc convictus eſt de facto principali.*

2. Of

2. Of the Forfeiture as to Lands, Goods, *&c.* and herein of the Difference between Outlawries in Criminal and Civil Caſes, and of the King's and Party's Intereſt at whoſe Suit the Outlawry was had: *And herein,*

1. *Of the Difference between a Forfeiture in a Criminal and Civil Caſe.*

Herein we muſt obſerve, that an Outlawry of Treaſon or Felony is a Conviction and Attainder of the Offence wherewith the Party is charged; and ſuch Outlawry corrupts the Blood, and cauſes an abſolute Forfeiture of the Party's Eſtate both Real and Perſonal, *viz.* in Caſe of Outlawry of Treaſon his Lands are forfeited to the King of whomſoever they are held; and in Caſe of Outlawry of Felony, to the Lord by Eſcheat of whom they are immediately holden. 9 H. 6. 20. 2 Rol. Abr. 85. Staunf. *Pre.* 47. Co. Lit. 128. 2 Hal. Hiſt. P. C. 205.

Alſo in Civil Caſes, the Retiring from the Inquiries of Juſtice is held ſo criminal in the Eye of the Law, that it is puniſhed with the Loſs of the Offender's Goods and Chattels, and Iſſues and Profits of his Real Eſtate; but by Outlawries in Civil Caſes the King has no Eſtate, but only a Pernancy of the Profits; nor can he manure or ſow the Ground; and his Intereſt continues no longer than the Party hath an Eſtate, and determines with the Party's Death; and being originally introduced to compel the Defendant to come in the ſooner and anſwer the Plaintiff's Demand, may more eaſily be ſuperſeded or reverſed, and thereby the King's Pernancy of the Profits diſcharged, than an Outlawry in a Capital Caſe. Plow. 541. 5 Co. 110. Show. Par. Ca. 73. & *vide* the Authorities *ſupra.*

Alſo if a Perſon make Default till the Award of an Exigent, either upon an Appeal or Indictment of a Capital Offence, he forfeits his Goods, unleſs he was pardoned before the Exigent was awarded; and it is holden, that the Law is the ſame, as to ſuch a Default upon an Indictment of Petit Larceny, and that where-ever Goods are ſo forfeited, they are not ſaved by an Acquittal at the Trial, but by a Reverſal of the Award of the Exigent they are ſaved, whether ſuch Reverſal be for an Error either in Fact or in Law; as for the Impriſonment of the Defendant at the Time when the Exigent was awarded, or for a Defect in the Indictment, Appeal or Proceſs. Staunf. *Pre.* 47, 183. Rol. Abr. 793. Cro. Eliz. 472. 5 Co. 110. Co. Lit. 259. Cro. Jac. 464.

* 2. *What Things are forfeited by the Outlawry.* * Page 755

Outlawry in a Capital Caſe being, as hath been ſaid, an Attainder and Conviction, it is clear, that all Lands of Inheritance, as all other the Real and Perſonal Eſtate whereof the Party outlawed is ſeiſed or poſſeſſed in his own Right, are forfeited abſolutely. For which *vide* Title *Forfeiture.*

Alſo the King hath by the Common Law ſuch a Power to require his Subjects to anſwer all Demands of Law and Juſtice, that his not appearing on Proceſs in a Civil Action, is ſuch a Contempt, that the Party guilty is put out of the Law, forfeits his Goods and Chattels, his Leaſes for Years, and his Truſt in ſuch Leaſes, and the Profits of his Lands of Freehold. Salk. 109. 5 Mod. 114

But Outlawry in Treſpaſs, or any Civil Action, works no Corruption of Blood; and therefore if the Huſband be outlawed in any ſuch Action, the Wife ſhall notwithſtanding have Dower, and the Iſſue ſhall inherit; for it is a Forfeiture of the Iſſues and Profits of the Lands only during the Life of the Party outlawed, and ſo long as the Outlawry remains unreverſed; alſo it ſeems, that if the Wife herſelf be outlawed or waived in any ſuch Action, yet her Dower is not forfeited. Bro. Title *Outl.* 82. Perk. ſ. 388. Co. Lit. 31. a.

Hetl. 164. It is ſaid to have been agreed by the whole Court, that Arrearages of Rent reſerved upon an Eſtate for Life are not forfeited by Outlawry, becauſe they are Real, and no (*a*) Remedy for them but by Diſtreſs; otherwiſe if upon a Leaſe for Years.

(*a*) For this *vide* Title *Rents*.

Alſo it is held, that there are other Things which the Party outlawed may have, and are not forfeited to the King; and that therefore an Executor or Adminiſtrator cannot plead in Excuſe of Aſſets, that his Teſtator or Inteſtate was outlawed, becauſe he might have Debts (*b*) due upon Contract; alſo Goods taken for Treſpaſs before the Outlawry, for which he may have Treſpaſs, and recover the Value of the Goods, which ſhall be Aſſets in his Hands.

Cro. Eliz. 851. Hut. 53. & *vide* 4 Co. 93. a. 2 Rol. Abr. 806. Cro. Eliz. 203.

(*b*) That Debtors may pay Debts to the Executor or Adminiſtrator of a Perſon outlawed, and their Releaſe ſhall be a good Diſcharge to them, though the Executors ſhall be accountable to the King for them. Hut. 54.

Hut. 53. So if the Teſtator had mortgaged his Land upon Condition that if the Mortgagee pay not at ſuch a Day to him, his Executors or his Heirs, 100*l.* that then it ſhall be lawful for him or his Heirs to re-enter, and after, but before the Day, the Teſtator is outlawed, and makes his Executor, and dies, and at the Day the Mortgagee pays the Money to the Executors; this is Aſſets, and not forfeited to the King.

9 H. 6. 21. 2 Rol. Abr. 806. If Tenant for Term of Years be outlawed, the Term is forfeited to the King, and he may ſeize it, and uſe it at his Pleaſure.

2 Rol. Abr. 807. So if *A.* being poſſeſſed of a Leaſe for Years grants it over to *B.* in Truſt for himſelf, and afterwards is outlawed in a perſonal Action, this Truſt ſhall be forfeited to the King.

9 H. 6. 21. 2 Rol. Abr. 806. If Tenant at (*c*) Will ſows the Land, and afterwards is outlawed, the King ſhall have the Corn.

(*c*) If a Man leaſe at Will, and the Leſſee ſows the Land, and the Leſſor is outlawed, the King ſhall not have the Corn, and can have only the Rent, for he is intitled to no more than the Leſſor himſelf. 5 Co. 116.

2 Rol. Abr. 807. *North* ver. *Fines*. If the Conuzee of a Statute-Staple take the Conuzor in Execution upon the Statute, and afterwards is outlawed in a perſonal Action, the Debt ſhall be forfeited to the King, and the King may diſcharge the Conuzor out of Execution.

*Page 756 2 Rol. Abr. 808. * So if there are two Conuzees of a Statute, and they take the Body of the Conuzor in Execution, and one of the Conuzees is outlawed in a perſonal Action, it is ſaid to be a Forfeiture of the Debt againſt both.

22 *Aſſ.* 33. 2 Rol. Abr. 708. S. C. If a Man be outlawed in a Perſonal Action, the King ſhall preſent to his Churches, although he hath a Freehold or Inheritance in them.

2 Rol. Abr. 807. So if a Perſon outlawed hath an Advowſon, that happens to become void (*d*) during the Time the Outlawry is in Force, ſuch Avoidance is forfeited to the King, whether the Outlawry were in a Capital Caſe, an Action of Treſpaſs, or other Perſonal Action.

(*d*) If after the Outlawry the Party purchaſeth any more Goods, the Property is immediately veſted in the King. Carth. 442.

Beverley ver. *Cornwall*. Cro. Eliz. 44. And. 148. Moor 269. Savil 89. Gouldſ. 103. Owen 3. S. C. If pending a *Quare Impedit* brought by *A.* he is outlawed, and Judgment is given for him in the *Quare Impedit*, and thereupon the Incumbent reſigns, and takes a new Preſentation from the Queen by Virtue of the Outlawry, and accordingly he is inſtituted and inducted, and afterwards *A.* reverſeth the Outlawry, and brings a *Scire facias* to have Execution of the Judgment; though the Preſentation was veſted in the Queen, and executed before the

Outlawry

Outlawry reverſed, yet *A.* ſhall have Execution of his Judgment; for upon a Recovery in a *Quare Impedit*, any Incumbent that cometh in *Pendente placito* ſhall be removed †.

† *Vide poſt* 778.

Things Perſonal, ſettled by Way of Truſt on the Offender, are as much forfeited as if he had the legal Intereſt, or were in Poſſeſſion of them; as if a Bond be taken in another's Name, in Truſt for a Perſon who is afterwards outlawed, this is forfeited in the ſame (*a*) Manner as if taken in his own Name.

Hob. 214. Cro. Jac. 512.

(*a*) And ſhall be executed by an Information in the Exchequer Chamber, or in Chancery. Hal. Hiſt. P. C. 248.

So the Truſt of a Term granted by a Man for the Uſe of himſelf, his Wife and Children, *&c.* is liable in like Manner to be forfeited, if fraudulently made with an Intent to avoid a ſubſequent Forfeiture; but it ſhall be forfeited ſo far only as is reſerved for the Benefit of the Party himſelf, if made *bona fide*, whether before or after Marriage for good Conſideration, without Fraud, which is to be left to a Jury on the whole Circumſtances of the Caſe, and ſhall never be preſumed by the Court, where it is not expreſly found.

Lane 54, 113. Mod. 16, 38. 2 Keb. 564, 608, 644, 763, 772. Lev. 279. Hard. 496. And. 294.

Raym. 120. 2 Rol. Abr. 34. Rol. Abr. 343. March 45, 88. Sid. 260. Keb. 909.

So where upon an Indictment of Recuſancy the Party, intending to go beyond Sea, made a Deed of Gift of all his Goods and Chattels upon ſome feigned Conſideration, and then he went out of the Realm, and was afterwards outlawed on the ſame Indictment; and it was adjudged, that the Deed of Gift was void to defeat the Queen of the Forfeiture of the Goods, and this by the Statute of 13 *Eliz. cap.* 5. and that the Queen was intitled to his Leaſes and Goods by the Forfeiture.

3 Co. 82. *Pawncefoot* ver. *Blunt*, cited in *Twine*'s Caſe; & *vide* Dyer 295. a.

The Forfeiture, as hath been ſaid, muſt be of Goods which the Party has in his (*b*) own Right, and not the Right of another; and therefore an Executor or Adminiſtrator outlawed forfeit nothing which they have in Right of their Teſtator or Inteſtate.

11 H. 6. 17, 37. Cro. Eliz. 575, 851. 2 Rol. Abr. 806.

Cro. Car. 566. (*b*) So a Term limited to Executors, and not veſted in the Party himſelf, is not forfeitable. 2 Leon. 5, 6. And. 19. Moor 100. Dyer 309.

So if an Executor recovers in Account againſt the Receiver of the Teſtator, and afterwards is outlawed, yet he ſhall not forfeit this Debt; for it continues the Debt of the Teſtator, and is only put in Certainty by the Judgment.

20 H. 6. 8. b. 2 Rol. Abr. 806.

* Debts and Duties upon Simple Contract are forfeited to the King by the Outlawry of the Party, though the Debtor might have waged his Law on ſuch Contract on an Action brought by the Creditor; of which Privilege he is deprived by the Outlawry

* Page 757 4 Co. 95. *Slade*'s Caſe.

It hath been adjudged, that the Cattle of a Stranger (*c*) *Levant* and *Couchant* on Lands extended on an Outlawry, may be taken for the King upon a *Levari facias* as the Iſſues and Profits of the Lands; for that otherwiſe there might be no Iſſues at all, or the Perſon outlawed may take in other Mens Cattle to agiſt, and ſo defeat the Outlawry.

Carth. 441. Salk. 395. 408. pl. 4. Ld. Raym. 305. Skin. 617. pl. 13.

5 Mod. 112. S. C. *Britton* ver. *Cole*. (*c*) That it is neceſſary to aver that the Cattle were *Levant* and *Couchant*. Carth. 442.

So if the Perſon outlawed ſhould after the Inquiſition make a Feoffment of his Lands, the Cattle of the Feoffee may be taken for the Iſſues of thoſe Lands, for the Land is (*d*) Debtor to the King.

Carth 442. *per Cur'*.

(*d*) But if Tenant for Life is outlawed, and dies, *Qu.* whether the Iſſues can be extended on the Reverſioner. Carth. 442.

But

Carth. 442. But if the Owner of the Soil is outlawed, the Cattle of a Commoner cannot be taken as Iſſues; but if they ſhould be taken, he muſt plead his Title in the Exchequer, unleſs his Right of Common is found by Inquiſition on the Outlawry.

3. *To what Time the Forfeiture ſhall relate.*

Co. Lit. 13, 14. If a Man be outlawed upon an Indictment of Felony and Treaſon, and pending the Proceſs he alien the Land, yet the King or Lord ſhall have the Land which he held at the Time of the Treaſon or Felony committed; for the Indictment contains the Year and Day when it was done, unto which the Attainder by Outlawry relates: But if a Man ſue an Appeal by Writ of Felony or Murder, and pending it the Party aliens, and then is outlawed before Appearance, the Lord's Eſcheat is loſt, becauſe it relates only to the Time of the Outlawry pronounced; in as much as the Writ of Appeal is general, and contains no (*b*) certain Time of the Offence committed.

(*b*) But if the Defendant had appeared, and the Plaintiff had declared upon his Writ, and the Defendant had been convicted and attainted by Verdict or Confeſſion, or if the Appeal had been by Bill, and thereupon the Party had been outlawed, though, before Appearance, the Eſcheat had related to the Time of the Fact committed to avoid meſne Incumbrances; for in the Declaration in the one Caſe and in the Bill in the other, the Year and Day of the Felony is ſet forth. Hal. Hiſt. P. C. 261. 2.

Co. Lit. 288. b. 41 *Aſſ.* 13. As to Goods and Chattles, the very Iſſuing of the Writ of Exigent in Caſe of Treaſon or Felony gives to the King, or the Lord of a Franchiſe to whom that Liberty is granted, the Forfeiture of all the Goods of the Party ſo put in Exigent, from the Time of the *Teſte* of the Writ of Exigent.

Staunf P. C. 184. 41 *Aſſ.* 13. 4 E. 3. 17. 5 Co. 111. a. And as the Award of the *Exigent* gives the Forfeiture, ſo if that be well awarded, the Forfeiture ſhall continue, though the Outlawry be reverſed for Error in Law or in Fact, ſubſequent to the Award of the Exigent; for the King's Title being by the Exigent, and that being of Record muſt be awarded by Matter of as high a Nature; therefore it is neceſſary for a Party outlawed in Treaſon to bring his Writ of Error ſpecially, *tam in adjudicatione brevis de Exigi facias quam in promulgatione utlagariæ:* Alſo a Writ of Error lies to reverſe the very Award of the Exigent; and though no Error ſubſequent to the Award of the Exigent will avoid it, yet if there be Error in the Exigent, or in the Appeal or Indictment upon which it iſſues, both Outlawry and Exigent ſhall be reverſed.

* Page 758 Co. Lit. 197. * And as the Award of the Exigent gives the Forfeiture of the Goods, ſo the Outlawry gives the Forfeiture or Loſs of the Lands of the Party outlawed; but the bare Judgment of Outlawry by the Coroners, without the Return thereof of Record, is no Attainder, nor gives any Eſcheat, but it muſt be returned by the Sheriff with the Writ of *Exigi facias*, and the Return indorſed.

Reg. 284. Dyer 223. a. 317. a. And therefore, if there be a *Quinto exactus*, and thereupon *utlagatus eſt per judiciam coronatorum*, but no Return thereof is made, there lies a Writ of *Certiorari* to the Coroners, or to the Sheriff and Coroners, to certify the Outlawry into the King's Bench; but this is only either to ground a Charter of Pardon on it, or to amerce the Sheriff where he returned only a *Quarto exactus*; but as to the Effect it has otherwiſe, my Lord Chief Juſtice *Hale* thinks as follows,

Dyer 317. a. 2 Hal. Hiſt. P. C. 206. 1*ſt*, That it doth not diſable the Party to bring an Action, becauſe in relation to Party and Party it ſtands as nothing, till returned by the Sheriff.

2 Hal. Hiſt. P. C. 206. 2*dly*, That conſequently, barely upon ſuch a Return of an Outlawry upon a *Certiorari*, without the Writ of Exigent indorſed and returned together with

with the *Certiorari*, it ſeems no Eſcheat lies for the Lord; but this he makes a *Quære*.

3*dly*, But if the Writ of *Certiorari* be directed to the Sheriff and Coroners, and the Writ of Exigent be extant in Court, and they return this Outlawry; poſſibly this may be a ſufficient Warrant to enter it of Record, as a Return upon the *Exigent* for the King's Advantage, and to iſſue upon it a *Capias utlagatum* to have the Forfeiture of his Goods. 2 Hal. Hiſt. P. C. 206-7.

4*thly*, But unleſs the Writ is ſome Way returned or extant, it gives the King no Title to Land or Goods; for the Writ of *Exigi facias* is the Warrant of the Outlawry, and that which gives the Coroners their Authority in ſuch a Caſe to give Judgment of Outlawry; and it is not like the Caſe where there was once a Writ and Return of Outlawry, and the Record ſince loſt; for that upon Circumſtances a Jury, upon the General Iſſue, may find a Record though not ſhewn in Evidence; but here the Writ was never in Truth indorſed nor returned. 2 Hal. Hiſt. P. C. 207.

5*thly*, But if the Writ of *Certiorari* were directed to the Coroners alone, though it may be a Ground to cauſe the Sheriff to mend his Return, and make it according to the Truth; yet the Certificate of the Coroners will not make a Record to intitle the King or Lord to any Thing without the Writ of Exigent extant, and the Return upon it amended by the Sheriff; for without the *Exigi facias*, and the Return of the Outlawry upon it, there is neither Diſability, Forfeiture nor Eſcheat; and therefore a *Certiorari* ſhall not be ſo much as granted to the Coroners to remove an Outlawry after the Party's Death. 2 Hal. Hiſt. P. C. 207.

A. was outlawed, and afterwards made a Leaſe of his Lands, and afterwards theſe Lands amongſt others were found by Inquiſition; and this Leaſe was pleaded in Bar, to bind the King, being before the Inquiſition; and the Court held, that a Leaſe or other Eſtate, made by the Party after Outlawry, and before an Inquiſition taken, will prevent the King's Title, if it be made *bona fide* and upon good Conſideration; but if it be in Truſt for the Party only, it will not be a Bar; but that no Conveyance whatſoever made after the Inquiſition will take away or diſcharge the King's Title. Hard. 101. *Attorney General* ver. *Sir Ralph Freeman.*

A. was outlawed at the Suit of *B.* and his Lands extended; afterwards *C.* claiming Title to them brought his Ejectment, and pleaded to the Inquiſition; and upon a Bill in the Exchequer, an Injunction was prayed for the King to ſtay the Proceedings at Law, but denied; for though a Perſon outlawed cannot after an Extent prevent the King's Title by any Alienation whatſoever; yet ſuch Outlawry gives no (*a*) Privilege to the * Poſſeſſion of a Diſſeiſor, but that the Diſſeiſee may enter and bring his Ejectment; for by the Outlawry the King had no Intereſt in the Land itſelf, but only a Title to recover the Profits. Hard. 176. *Hammond's* Caſe.

* Page 759

(*a*) Any one that has an Eſtate or a Right may grant the ſame over, if his Title be precedent to the Outlawry. Hard. 422. —— *A.* owes Money to *B.* on a Judgment, and to *C.* on a Bond; *A.* is outlawed at the Suit of the Obligee, and his Lands ſeiſed on the Outlawry; and the Queſtion was, whether the Conuſee of a Judgment could extend thoſe Lands; and it was held, the Outlawry ſhould be preferred, and that the King's Hands ſhould not be amoved, unleſs the Conuzor could ſhew Covin and Practice between the Obligor and Obligee. 2 Salk. 495. pl. 2. *Attorney General* ver. *Baden.*

It was found by Special Verdict in Ejectment, that *A.* being outlawed in a perſonal Action levied a Fine, and the King ſeiſed the Lands in the Hands of the Conuzee; and it was reſolved, that if the Seiſure was before the Fine levied, the King may well retain againſt the Conuzee; but if the Fine was levied before the Seiſure, the Conuzee may well take. Raym. 17. Lev. 33. Keb. 57, 74, 76. *Winſor* ver. *Seywell.*

From theſe Caſes the Law ſeems to be now ſettled, as laid down in *Salk.* *viz.* That by a bare Outlawry the Party immediately forfeits his perſonal Goods, and they are veſted in the King, but that he does not forfeit the Profits of his Lands, nor Chattels Real, till Inquiſition taken; and that therefore Salk. 395. Carth. 442. S. C. And that if a Perſon outlawed do

alien his Lands before any Inquiſition

therefore an Alienation after Outlawry, and before Inquiſition, is good to bar the King of the Pernancy; but if he makes a Feoffment after Inquiſition, the Feoffee has the Eſtate, and the King ſhall have the Profits.

taken for the King, which he may lawfully do, yet the Alienee muſt plead off the Extent in the Exchequer, by ſhewing his Title precedent.

4. *Of the King's and Party's Intereſt at whoſe Suit the Outlawry was had, in the Eſtate and Effects of the Party outlawed, and their Remedies for the ſame.*

Hard. 422. Carth. 441.

When the Outlawry is returned on the *Exigi facias* by the Sheriff, and recorded in Court, Execution may be taken out againſt the Party outlawed, either general, to arreſt the Body, or ſpecial, to arreſt the Body and extend the Goods and Lands, as alſo Debts and *Choſes in Action* belonging to the Party outlawed, and when ſuch Inquiſition is returned by the Sheriff, a Tranſcript of the Outlawry and Inquiſition is tranſmitted into the Exchequer; and thereupon, if any Debt be returned due from any one to the Outlawed, on Application to the *Exchequer* a *Scire facias* iſſues to ſuch Perſon, to ſhew Cauſe why the King ſhould not have ſuch Sum ſo found due on the Inquiſition to the Outlawed; and the Reaſon of returning the Tranſcript of the Record into the Exchequer is, *ad ulterior' Execution' prædicto Domino Reg' per eand' Cur' de Scacc' ſuperinde fiend'*; for when the Inquiſition has returned the Outlawed to be poſſeſſed of any Goods or Lands, the Property of thoſe Goods belong to the King, ſince the Outlawed being out of the King's Protection cannot enjoy any Thing, and the Profits of the Land are to be ſeiſed into the King's Hands; but the Lands themſelves are not forfeited, unleſs it be in Capital Caſes; but in other Caſes the Profits are ſeiſed whilſt the Party continues outlawed; and therefore the Tranſcript of this Record is ſent into the Exchequer, that the Court of ordinary Revenue may have it in Charge; but the Court of Exchequer (*a*) uſually grants a *Cuſtodiam* to ſuch Perſon as ſued out the Outlawry.

(*a*) That the King is to ſatisfy the Party, at whoſe Suit the Outlawry was taken out; but this *per Popham* Ch. J. is *de gratia*, and not *de jure*. Yelv. 19. & *vide* 2 Vern. 314. Show. *Parl. Ca.* 72. *The King* ver. *Baden*, a good Caſe on this Head.

46 E. 3. 16. 5 Co. 109. Co. Lit 288. * Page 760 (*b*) Outlawry in *Northumberland* for a Debt in *Durham*, whether the King, or Biſhop of *Durham*, he having a Grant of *bona fugit'* in *Durham*, ſhould have the Goods, *vide* Lane 90, 91. 2 Rol. Abr. 808.

The King by his Prerogative is to have *Bona felonum & fugitivorum*; and (*b*) though the Lord of a Manor or other private Perſon may claim * them, yet that cannot be by Preſcription, but muſt be by way of Grant; for every Preſcription muſt be immemorial; and the Goods of Felons and Fugitives cannot be forfeited without Matter of Record, which preſuppoſes the Memory of that Continuance.

Co. Lit. 288. b. Cro. Eliz. 707. But in 2 Lev. 50. it is held, that there is no Difference between Outlawries before and after Judgment.

There is a Difference ſaid to be between an Outlawry on meſne Proceſs and after Judgment; that as to the firſt the Party hath no Intereſt, but that the whole Benefit of the Forfeiture accrues to the King.

Cro. Jac. 619. *Meer* and *Sir George Reynolds*, S. P. but by *Bridg.* 67. it appears to have been an Action upon the Caſe.

If a *Capias ad ſatisfaciendum* iſſues upon a Judgment in an Action of Debt, and the Sheriff returns *Non eſt inventus*, and after a *Capias utlagatum* iſſues, upon which he is taken and impriſoned, and after he is let to

go at large, the Party that recovered may have an Action of Debt for this Eſcape againſt the Sheriff, becauſe of the Prejudice to him, (*a*) he being in Execution as well for his Benefit as for the King's. 1 *Roll. Abr.* 810. (*b*) *Leighton* ver. *Walwin.*

(*a*) But if after the Year (admitting) he could not be in Execution for him without Prayer, yet Caſe lies; for the Plaintiff was prejudiced by the Eſcape; for he ought not to be diſcharged, till he found Sureties to ſatisfy the Plaintiff. 5 Co. 89. b. and *vide* 5 E. 3. c. 13. (*b*) 5 Co. 88. *Gamon's* Caſe, S. C. the *Capias utlagatum* being taken out and executed within the Year. Cro Eliz. 706, 707. S. C. adjudged. Moor 566. pl. 772. S. C. Rol. Abr. 895. S. C. Yelv. 20. S. C. cited. 5 Mod. 201. S. C. cited.

So if a *Capias utlagatum* iſſues upon an Outlawry upon meſne Proceſs, and the Defendant is taken and ſuffered to eſcape, an Action upon the Caſe lies; becauſe the Plaintiff is thereby delayed of his Debt. Cro. Eliz. 652. *Bonner* ver. *Stokeley*, adjudged.

Moor 641. pl. 882. S. P. adjudged, & *vide* Lutw. 110, 111.

If within the Year a *Capias ad ſatisfaciendum* iſſues on a Judgment, and the Defendant is thereupon outlawed, and two Years after taken upon a *Capias utlagatum*, and the Sheriff ſuffers him to eſcape, Debt will lie againſt him; for the Defendant was in Execution at the Suit of the Plaintiff, without Prayer, in as much as the Plaintiff was at the End of his Proceſs, and no Continuance nor *Scire facias* lay after the *Capias utlagatum*, which being ſued at the Charge of the Plaintiff imported an Election of the Body. *Salk.* 318. (*c*) *Wolf.* ver. *Davidſon* adjuded. Sid. 380. S. P. adjourned.

(*c*) 5 Mod. 200. S. C. adjudged. Comb. 373. S. C. adjourned; and *Holt* Ch. J. ſaid, he never underſtood the Diverſity taken in the Caſe where within the Year and where after.

If *A.* hath Judgment in Debt againſt *B.* for 50 *l.* and thereupon he takes out a ſpecial *Capias utlagatum* againſt him, and *J. S.* promiſes, that, in Conſideration of his ſtaying any further Proceeding on that Writ, he the ſaid *J. S.* would ſatisfy him the Debt, unleſs *B.* did it before ſuch a Day; an *Aſſumpſit* lies on this Promiſe, for the Plaintiff is at the Charge of ſuing out the Writ, and hath the Carriage of it; and the Party ſhall be in Execution at his Suit, and the King is to ſatisfy him out of the Goods of the Party outlawed; although it was objected, that the Conſideration was againſt Law, being in Delay of Juſtice, and that the whole Benefit accrued to the King. Yelv. 19. *Jennings* ver. *Hatly* adjudged, by three Judges *cont. Popham.*

But it hath been adjudged, that an Action on the Caſe will not lie againſt the Sheriff for neglecting to extend or ſeize the Goods and Lands of a Perſon outlawed upon a *Capias utlagatum*, becauſe it is the King's Loſs; and though it was urged, the Sheriff's Extending and Seiſing would be a Means to enforce the Defendant to appear to the Plaintiff's Action; this the Court ſaid was ſo remote, as not to be conſidered as a Ground to ſupport an Action; but if it had been ſhewn, that the Sheriff might have taken his Body, and had neglected to do it, there might have been more Reaſon to ſupport the Action. 2 Vent. 89. 90. *Dawſon* ver. *The Sheriffs of London.*

* When after the Extent the Lands are leaſed out, or a *Cuſtodiam* granted to him at whoſe Suit the Outlawry was had, the Leſſee ſhall account only according to the extended Value; and if they happen to be extended too low, the Party hath no Remedy but by taking out a *Melius inquirend'*, and thereby have them extended at a greater Value. * Page 761 Hard. 106. *Marters* ver. *Whitefield.*

If by the Inquiſition the Lands of the Perſon outlawed are found in the particular Occupation of ſuch and ſuch Perſons, but the Value of every particular Parcel is not found, but by the Lump that *in toto* the Lands are of ſuch a Value; this is a good Finding. Hard. 6, 7. *Croſſe's* Caſe; & *vide* Hard. 58. where it is ſaid, that ſuch Inquiſition ought to be as certain as an Indictment or Declaration.

Hard. 191. *Wilford* ver. *Greaves.* It was found by Inquiſition upon an Outlawry, that the Party outlawed was ſeiſed in Fee *de ſex clauſis prati & paſturæ*; and it was objected, that the Inquiſition was void for Uncertainty; & *per Hale* Chief Baron, an Inquiſition found *de uno meſſuagio ſive tenemento* has been held good; becauſe it is not an Office of Intitling but of Inſtruction or Information, which does not require ſuch preciſe Certainty as an Office of Intitling does; ſo in an Inquiſition upon an Extent upon a Statute or Judgment, or in Dower, ſuch Certainties ſuffice, elſe all ſuch Inquiſitions were liable to be quaſhed, which would annul all ſuch Proceedings; which would be miſchievous; and ſuch Inquiſitions have not uſed to be quaſhed for want of ſuch preciſe Certainty.

Hard. 22. *The Protector* ver. *Lord Lumley.* A Bill was exhibited by the Attorney General againſt a Perſon outlawed, to diſcover his Real and Perſonal Eſtate, and what ſecret and fraudulent Gifts and Conveyances he had made, becauſe by the Outlawry his Goods and the Profits of his Lands were forfeited; to which the Defendant demurred; *quia nemo tenetur prodere ſeipſum*, and to diſcover his Eſtate upon a Forfeiture; but the Court held, that he ought to anſwer the Bill; becauſe the King is intitled to his Eſtate by Courſe of Law, and the Outlawry is in the Nature of a Gift to the King, or a Judgment for him; and a common Perſon may have a Bill of Diſcovery in the like Caſe to intitle him to take out Execution.

Mod. 90. Will. Rep. 445. pl. 128, 684, 687, 690. Alſo in Caſe of Outlawry, it is ſaid to be the Courſe of the Exchequer to prefer an Information in Nature of Trover and Converſion againſt him who hath the Goods of a Perſon outlawed.

10 Mod. 188, 357, 380, 409. 11 Mod. 173. pl. 15. 12 Mod. 175, 438. Fitzgib 265. Comyns 51. pl. 34. Ld. Raym. 305.

3. Of the Party's Diſability to bring any Action.

Lit. ſ. 197. Co. Lit. 128. A Perſon outlawed cannot regularly maintain any Action, for by his Contumacy he is out of the King's Protection, and ſhall have no Privilege or (*a*) Benefit from that Law of which he is a Violator, and to which he refuſes to be ameneable.

(*a*) But a Perſon outlawed may be ſued, being to his Prejudice. Noy 1. Sid. 60. *Utlegatus Legem Terræ amittit. Glanvil*, Lib. 2. c. 3. *Reſpondra a Touts mes nul reſpondra a luy.* Cor, Jac. 426. cited from *Britton and Bracton.*

28 E. 3. 92. 22 *Aſſ.* pl. 47, 63. 5 Co. 109. 7 Co. 29 Co. Lit. 29. This Diſability may be taken Advantage of by pleading the ſame in Bar or Abatement, with this Diverſity, that it may be pleaded in Abatement in all Caſes, but it cannot be pleaded in Bar, unleſs the Ground or (*b*) Cauſe of the Action be forfeited; as in Felony, where it may be pleaded in Bar to all Actions concerning Lands and Tenements, as well as Goods and Chattels, becauſe all are forfeited by the Felony.

(*b*) If the Demandant in a *Ceſſavit* be outlawed in a perſonal Action, this Outlawry may be pleaded in Bar of the Action, becauſe the Arrearages are due to the King. 2 Inſt. 298.

Dyer 227. in Margin. 3 Leon. 197, 105. * Page 762 Owen 22. Cro. Eliz. 203. 2 Vent. 282. 3 Lev. 29. Jon. 239. Lutw. 1604. But though it cannot be pleaded in Bar, unleſs the Ground or Cauſe of Action be forfeited, nor in Actions where the Damages are uncertain; yet it is now held, that in Actions on the Caſe, where the Debt to avoid the Law-Wager is turned into Damages, there Outlawry may be pleaded in Bar; for it was veſted in the King by the Forfeiture as a Debt certain due to the Outlaw; and the turning it into Damages, whereby it becomes uncertain, ſhall not deveſt the King of what he was once lawfully poſſeſſed of.

It hath alſo been held, that Outlawry may be pleaded in Bar after it is pleaded in Abatement; becauſe the Thing is forfeited, and the Plaintiff has no Right to recover.

The

The Diſability cannot be taken Advantage of until the Exigent be returned; for the Inquiring after him in the County is in order that he may appear; and therefore if he does appear at the Return of the Exigent, the Law is ſatisfied, and the Outlawry muſt not be recorded againſt him. And. 36. Co. Lit. 128. Dyer 317. a. pl. 6. 2 Rol. Abr. 805.

Alſo this Diſability is only pleadable when the Plaintiff ſues in his own Right; for if he ſues *en Auter droit* as Executor, Adminiſtrator, or as Mayor with his Commonalty, Outlawry ſhall not diſable him, becauſe the Perſon whom he repreſents has the Privilege of the Law, and Outlawry being no Objection to his Repreſentation, it is no Objection but he ſhould be anſwered. Co. Lit. 128. a. Doct. Pl. 390.

But it hath been held, that to an Information againſt a Juſtice of Peace, for refuſing to grant his Warrant to ſuppreſs a Conventicle, Outlawry in the Informer is a good Plea, though objected that he ſues in Right of the King; for as to a Moiety he recovers to his own Uſe, which he cannot do by Reaſon of this Diſability †. 2 Mod. 267. 10 Mod. 188, 246. 357, 359, 379, 409.

12 Mod. 175, 177, 400, 413, 438, 545. Ld. Raym. 305, 591, 605. Comyns 51. pl. 34. 2 Salk. 500 Comb. 345. 2 Ld. Raym. 1056. Vern. 184. 2 Vern. 37, 198, 312. 2 Will. Rep. 269 pl. 68. Prec. Chan. 13. Gilb. Eq. Rep. 184. Barnes 228, 230. 2 Stra. 824. Barnard. K. B. 79. 2 Stra. 901. Fitzgib. 265 *& vide* 11 Co. 65. Hob. 327.——† *Sed qu.* as Penal Statutes give the Action to any one that will ſue?

So where a Relator in his Information ſets forth, that he and the Defendants were Part-Owners of ſeveral Coal-Mines in *Derbyſhire*, that the King had a Duty of Lot and Cope out of all the Lead-Mines there; that by the Cuſtom, if one Owner were at the Expence for the Improving and Working a Mine, all the Owners ought to contribute and bear their Part of the Charge; that the Relator had been at great Charges in making Soughs and other Things for Working and Improving the Mines, without which they could not be wrought, and ſo the King would loſe his Duty; and that the Defendant would not contribute nor pay any Part of the Charge; therefore to make him account with the Relator, and pay his Part of the Charge, was (amongſt other Things) the Scope of the Information. To which the Defendant pleaded an Outlawry in the Relator; and after much Debate the Plea was held good; for though Mr. *Attorney* be Plaintiff, yet the Relator is to have the whole Benefit or Loſs of the Suit, and is himſelf Party to it; for it would abate by his Death, *&c.* and the King's Name is only made uſe of by the Form of the Court, and he is not directly concerned at all, and very little by Conſequence, and the Suit is not for the King's Duty, but the Relator's Intereſt. Preced. Chan. 13. Attorney General of the Duchy, at the Relation of Mr. *Vermuden* ver. *Sir John Heath & al'*, in the Duchy Chamber *coram* Ch. B. *Atkins* and Juſt. *Ventries*; *& vide* 2 Bluſt. 134. which ſeems *cont. & vide* And. 30.

If there be two Tenants in Common of a Rectory for Years, and one of them is outlawed, yet the other, on ſetting forth this Matter, may have an Action of Debt for a Moiety. Sid. 49.

If the Party outlawed bring a Writ of Error to reverſe the Outlawry, the Outlawry in that Suit, or any Stranger's, ſhall not diſable him; for if he were outlawed at ſeveral Mens Suits, and one ſhould be a Bar to another, he could never reverſe any of them; and if it be for Error in the ſame Outlawry, the Outlawry itſelf is no Objection, for that would be *Exceptio ejuſdem rei cujus petitur diſſolutio*; nor is another Outlawry pleadable in Bar to ſuch Writ of Error, for then two erroneous Outlawries would be irreverſible, which would amount to *exceptio ejuſdem, rei, &c.* So if there be an Attaint brought on a Verdict, Outlawry grounded on that Verdict ſhall not be pleaded in Bar, for the above Reaſons. Co. Lit. 128. Raym. 46.

As this is a dilatory Plea, when it is pleaded in another Court than where the Outlawry iſſued, the Defendant muſt bring it in immediately; for this being in Delay, if the Court ſhould give Time, and it ſhould not be brought in, Delay of Juſtice would be from the Court; and ſince there is a Way of having it immediately, by producing it under the Great Seal, no 10 *Aſſ.* 10. *Doct. Pl.* 396. 6 Co. 53. 5 Co. 88. 8 Co. 142.

Time ſhall be given to bring it (*a*) *ſub pede ſigilli*; but otherwiſe when it is in the ſame Court, for then the Record is already in Court.

(*a*) That Outlawry muſt be pleaded *ſub pede ſigilli*, otherwiſe the Plaintiff may refuſe it, but he ſhall not afterwards demur for that Cauſe. Salk. 217.

Co. Lit. 128. *Doct. Pl.* 392, 394.

In pleading Outlawry in Diſability in another Court, the antient Way was to have the Record of the Outlawry itſelf *ſub pede ſigilli* by *Certiorari* and *Mittimus*; but this being very expenſive, it is now held to by ſufficient to plead the *Capias Utlagatum* under the Seal of the Court from whence it iſſues; for the Iſſuing of the Execution could not be without the Judgment, and therefore ſuch Execution is a Proof to the Court that there is ſuch a Judgment; which is a Proof, that the Defendant's Plea of a Matter of Record is proved by a Matter of Record, and therefore appears to the Court not to be merely Dilatory; and therefore on ſhewing ſuch Execution, if the Plaintiff will plead *Nul tiel Record*, the Court will give the Defendant a Day to bring it in.

Fitz. *Coron.* 233. a. 12 E. 4. 16. *Doct. Pl.* 396. Co. Lit. 128. 2 Rol. Rep. 38. Cro. Car. 566.

Outlawry in a County Palatine cannot be pleaded in any of the Courts at *Weſtminſter*, for he is only ouſted of his Law within that Juriſdiction; and it ſhall not extend to diſable a Man in another County where they have no Power; for the County Palatine being a Royal Juriſdiction within Bounds, the Loſing the Privileges of the Law within that Juriſdiction can be no Diſadvantage to him in another County; and if he does not live within the Palatine Juriſdiction, he is not obliged to attend there; but it ſeems, that Outlawry in the County Palatine of *Lancaſter* may be pleaded in the Courts of *Weſtminſter*; becauſe that County was erected by Act of Parliament in *Ed.* III's Time, but *Durham* and *Cheſter* are by Preſcription.

Doct. Pl. 397. 5 Co. 90. Moor 73. Dyer 228. Cro. Jac. 484. Salk. 329. 2 Ld. Raym. 1014. 2 Rol. Rep. 38. Yelv. 36. 8 Co. 142. Brownl. 83. Co. Lit. 128. *Doct. Pl.* 397. Cro. Jac. 425. *Piers Griffith* ver. *Hugh Middleton.*

If Outlawry be pleaded either in Bar or Abatement, and the Plaintiff replies *Nul tiel record*, and the Defendant has a Day given him to bring in the Record, and in the Interim the Plaintiff removes the Record by Writ of Error, and reverſes it; though the Defendant fails in bringing in the Record, yet this ſhall not be fatal and peremptory on him; for in the firſt Caſe he ſhall have Liberty to plead a new Bar, and in the ſecond, the Judgment ſhall only be a *Reſpondeas Ouſter*; becauſe his Plea was a true Plea at the Time of pleading it, and the Plaintiff was actually diſabled from ſuing, not having then his *Liberam legem.*

So that Outlawry does not abate the Writ, but is only a Temporary Impediment that diſables a Plaintiff from proceeding; for upon obtaining a Charter of Pardon, or reverſing the Outlawry, he is reſtored to his Law, and ſhall oblige the Defendant to plead to the ſame Writ.

Audita Querela to avoid a Statute upon the Statute of Uſury; to which the Defendant pleaded Outlawry in the Plaintiff at the Suit of *J. S.* and on Demurrer it was inſiſted, that Outlawry could not be pleaded in this Caſe, the Suit being only by way of Diſcharge, and not to recover any Thing; but it was held, that a Perſon outlawed is not receivable to ſue in any Court, unleſs it be to reverſe his own Outlawry; and the Chief Juſtice ſaid, that where the Action is *ad lucrandum*, there ought to be Ability in the Perſon, and that it is all one to gain by way of Diſcharge, as by way of Perquiſition.

Cro. Jac. 616. *Bythal* ver. *Harris*, adjudged by three Judges *ver. Houghton*

But where Error was brought by ſix to reverſe a Judgment in Ejectment, and the Defendant in Error pleaded Outlawry in one of the Plaintiffs; the Plea was held ill on Demurrer, becauſe this was only a Commiſſion which went in (*b*) Diſcharge, and in which all the Plaintiffs were obliged to join; it was alſo ſaid in this Caſe, that it would be very miſchievous upon an Outlawry in Caſe of (*c*) Error, Attaint or *Au-*

(*b*) But it was agreed, That if two Plaintiffs in Debt be barred, and bring Error, the Outlawry againſt one is a good Bar againſt the other, becauſe they are to recover. Cro. Jac. 616. (*c*) But for this, *vide* Cro. Eliz. 648. 6 Co. 25. Cro. Jac. 117.

dita

* *dita Querela*, which are only by way of Diſcharge, if this ſhould be any Bar. *Page 764

A Perſon is outlawed in Debt, and taken upon a *Capias* and committed to the *Fleet*, the Keeper of the *Fleet* lets him eſcape voluntarily, and afterwards the Executor of the Plaintiff in Debt takes him in Execution again upon a new Writ, and upon this ſecond Taking he brings an *Audita Querela*; to which Outlawry in the Plaintiff in the *Audita Querela* was pleaded; upon which Plea he demurred; and it was reſolved, that Outlawry was a good Plea in this Caſe in Diſability of the Plaintiff; becauſe that this Writ is not directly to reverſe the Outlawry, (as a Writ of Error is) but is founded upon a Wrong, *viz.* upon the Eſcape, and not upon the Record only. Sid. 43. *Jaſon* ver. *Ketſ.*

In Debt upon a Judgment brought in *Trinity* Term, the Defendant imparled till *Michaelmas* Term, and then pleaded in Bar, that the Plaintiff *die lunæ prox' poſt teſt' Sanct' Martini* was outlawed; to which the Plaintiff demurred. It was urged, that the Outlawry was meſne between the Action brought and the Plea pleaded, and that all Matters in Diſcharge of the Action, which happen after the Action brought, ought to be pleaded *Puis darrein continuance*; but the Court compared this to the common Caſe of a Judgment confeſſed by an Executor after an Action brought, which is never pleaded after *Puis darrien continuance*, but as this Caſe is; and in theſe Caſes the Time of the Outlawry, and the Time of the Judgment, and when it was, appear in themſelves. Salk. 178. pl. 3. *Moor* ver. *Green.* 5 Mod. 11. S. C.

In pleading Outlawry, it hath been adjudged, that the Defendant muſt conclude his Plea with a *prout patet per recordum*, and not *hoc paratus eſt verificare*. 3 Lev. 29.

If the Defendant after Imparlance pleads Outlawry in Bar, and the Plaintiff replies *Nul tiel record*, and the Defendant hath a Day to bring in the Record, and fails therein, Judgment ſhall be given abſolutely againſt him, and not a *Reſpondeas Ouſter*. Cro. Car. 566. *Dawſon* ver. *Lee.*

If ten Outlawries on meſne Proceſs be pleaded in Diſability of the Plaintiff, this is naught for Duplicity; for though there be a Difference as to pleading double between Pleas in Bar and Abatement, there is likewiſe a Difference between a Plea of an Outlawry in Diſability and other Pleas in Abatement; and the Court held this Plea ill for Duplicity, becauſe the Plaintiff is diſabled as well by one Outlawry as by all the other nine, to which ſeveral Anſwers are required. Carth. 8, 9. *Trevelian* ver. *Seccomb.* Show. 80. S. C.

Outlawry may be pleaded to a Bill in Equity, as well as to an Action at Common Law; and in this Caſe the Defendant need not ſet down the Plea; as he muſt other Pleas and Demurrers, in eight Days, or they muſt ſtand over-ruled; but the Plaintiff muſt ſet it down, if there be any Inſufficiency in Point of Form in pleading; for being *ſub pede ſigilli* it appears, upon ſhewing of it, to be a good Plea, and therefore not preſumed to be neceſſary to be argued before the Court; alſo if an Outlawry be not pleaded, yet it may be ſhewed at the Hearing as a peremptory Matter againſt the Plaintiff's Demand, if it be perſonal; becauſe it ſhews the Right of the Thing in Demand to be in the King. If a Plea of Outlawry ſtand allowed, whereby the Suit is put *ſine die*, and after the Outlawry is reverſed, the Plaintiff muſt bring his Bill of Revivor; becauſe that Suit being abated, the Defendant has no Day in Court, and therefore muſt be brought into Court by a new Proceſs. That this Plea muſt be on Oath. 2 Vern. 37.

But if the Bill be for Relief againſt an Action at Law, and an Outlawry be pleaded by the Defendant in the ſame Action, it will not be allowed; (*a*) becauſe the Outlawry is Part of the Grievance, and it is *exceptio ejuſdem rei cujus petitur diſſolutio*; alſo as at Law, an Outlawry in an Executor, Adminiſtrator or Guardian, is no good Plea, becauſe they do not claim in their own Right; and the real Actor being the Teſtator or Infant, the Outlawry in any third Perſon is no Exception againſt him why he ſhould not ſhare *in judicio*. (*a*) That to avoid Pleas of Outlawry, the Plaintiff may make all that have Outlawries againſt him Defendants. 2 Vern, 199, *per Hutchins* Lord Commiſſioner.

• Page 765 • 4. What further Diſabilities Outlawry ſubjects the Party to.

Co. Lit. 6. b. & *vide* Title *Juries.* Perſons outlawed are under ſeveral other Diſabilities, beſides that of bringing an Action; ſuch a one cannot be a Juror, becauſe he is not *Liber & legalis homo*, as the Law requires.

Vide Title *Evidence.* But one outlawed in a perſonal Action may be a Witneſs though he cannot be a Juror.

Co. Lit. 6. b. A Perſon outlawed cannot be an (*a*) Auditor to take Accounts.

(*a*) But a Perſon outlawed may be a private Attorney. Co. Lit. 52. a.——May be Executors or Adminiſtrators, *vide* Title *Executors and Adminiſtrators.*—— Incapable of executing an Office in a Corporation. Carth. 199. Show. 288.

2 Hawk. P. C. 205. One outlawed in a perſonal Action cannot be an Approver; becauſe by his Outlawry he is out of the Law, and his Accuſation ſhall not be of ſuch Credit as to put any Perſon on his Trial.

Bulſt. 29. If a Man pledge Goods and then is outlawed, he cannot redeem them; becauſe then the abſolute Property of them is in the King; but if the Outlawry be reverſed, then the outlawed Perſon is re-inſtated in his Property as if there had been no Outlawry, and therefore may redeem them.

Co. Lit. 8 b. Perſons outlawed in Debt, Treſpaſs, or other Civil Action may be Heirs.

Brook 82. Perk. 388. Co. Lit. 31. a. If a Huſband be outlawed in Treſpaſs, or any Civil Action, the Wife ſhall have Dower, for this works no Corruption of Blood, or Forfeiture of Lands; ſo likewiſe it ſeems if the Wife be outlawed or waived in ſuch Actions, yet her (*b*) Dower is not forfeited.

(*b*) So a Huſband ſhall be Tenant by the Curteſy, though he be outlawed in a Civil Action. 5 Co. 110. Co. Lit. 92. b. 391. a.

Owen 116. *Knowles* ver. *Powel.* Moor 237. S. C. *A.* being outlawed, the Queen granted him a Leaſe for Years, rendering Rent, he was again outlawed after the Grant, but before any Seizure there was a Pardon of all Goods and Chattels forfeited; and it was adjudged, that a Perſon outlawed was capable of receiving a Leaſe, and that by the Pardon, the Term which was forfeited revived, and was reſtored again.

11 Co. 29, 31. 2 Hawk. P. C. 343, 350. It is held, that where Clergy is allowable, it ſhall be as much allowed to one who is outlawed by Common Law for Felony, as to one who is convicted by Verdict or Confeſſion; alſo a Statute taking away the Benefit of Clergy, from thoſe who ſhall be found guilty, doth not thereby take it from Perſons who are outlawed; neither doth the Statute of 25 *H.* 8. *cap.* 1. *ſect.* 3. which takes away Clergy from thoſe who are found guilty after the Laws of this Realm, extend to Perſons outlawed.

2 Inſt. 187. 2 Hawk. P. C. 97. By the Statute of *Weſtm.* 1. 3 *Ed.* 1. *cap.* 15. it is enacted, that if a Perſon be attaint by Outlawry of any Felony, he is not bailable; but it is held, that the Court of King's Bench may in their Diſcretion, in ſome ſpecial Caſes, bail a Perſon upon an Outlawry of Felony; as where he pleads, that he is not of the ſame Name with the Perſon that was outlawed, or alledges any other Error in the Proceedings.

(E) Of the Regularity of the Proceedings on an Outlawry, and (a) for what Errors it may be reverſed: And herein,

* Page 766

(a) By Statute of Recuſancy the Outlawry of a Recuſant not to be reverſed for want of Form.

1. Where, for want of ſuch Proceſs as required by Law, the Outlawry may be reverſed.

THE Forfeitures and Penalties in an Outlawry being ſo ſevere, great Care hath been taken and Caution uſed, that no Perſon ſhould be outlawed without ſufficient Notice, and great Contumacy to the Proceſs of the Court; and therefore the Law requires, that in all Civil Cauſes and in every Indictment or Appeal for any Crime under the Degree of Capital, there ſhould be three *Capias's* to the Sheriff of the County where the Action or Proſecution is commenced, before the Exigent is awarded; and if any ſuch Proceſs is omitted, the Outlawry is erroneous. 5 Mod. 141. 3 H. 6. 9. Rol. Abr. 793. *Finch of Law* 351, 355. Raſt. Ent. 188. pl. 18. Co. Lit. 259.

But (b) after Judgment upon a *Capias ad ſatisfaciendum*, an Exigent may be awarded, without an *Alias* and *Pluries*, and thereupon the Defendant be outlawed; becauſe he having been already in Court before Judgment, and having Conuſance of the Debt, ought to pay the Debt on the firſt ſuing out of the *Capias*; otherwiſe it is a Contumacy in not performing the Judgment of the Court, for which Diſobedience he is put out of the King's Protection. 40 E. 3. 25. pl. 28. Finch 476.

(b) So after Judgment there need not be any Proclamations to the County where he reſided. Cro. Jac. 577.—If one is outlawed in *Middleſex* a *Capias utlagat'* may be ſued out againſt him in any other County without a *Teſtatum*. Vent. 33. 2 Hal. Hiſt. 198.

It is ſaid to be agreed, that one *Capias* before the Award of the Exigent hath always been ſufficient in an Indictment or Appeal of Death, or High Treaſon; but that it ſeems doubtful whether two *Capias's* were not required by the Common Law in all Indictments and Appeals of any other Felony; however, ſays *Hawkins*, it is (c) certain, that they are required in all Indictments of any other Felony by 25 *E.* 3. 14. by which it is enacted, "That if after any Man be indicted of Felony before the Juſtices in "their Seſſions, to hear and determine, it ſhall be commanded to the She- "riff to attach his Body by Writ or Precept, which is called a *Capias*; and "if the Sheriff return that the Body is not found, another ſhall be incontinen ly made, returnable at three Weeks after, wherein it ſhall be com- "priſed, that the Sheriff ſhall cauſe to be ſeiſed his Chattels, and ſafely to "keep them till the Day of the Writ or Precept returned; and if the She- "riff return, that the Body is not found, and the Indictee cometh not, the "Exigent ſhall be awarded, and the Chattels ſhall be forfeit as the Law "of the Crown ordaineth; but if he come and yield himſelf, or be taken "by the Sheriff or by other Miniſter, before the Return of the ſecond *Ca-* "*pias*, then the Goods and Chattels ſhall be ſaved." 2 Hawk. P. C. 303.

(c) But *vide* 2 Hal. Hiſt. P. C. 194-5.

It is ſaid to have been the general Opinion, that this Statute extends to Appeals, as well as to Indictments, though it mention only the latter; but that it extends not to any Indictment or Appeal of Death, though it ſpeak of Felony in general. 2 Hawk. P. C. 303.

It is left a *Quære*, if three *Capias's* be ſtill neceſſary in an Appeal of Rape, as they were at the Common Law, notwithſtanding it be made Felony by Statute. 2 Hawk. P. C. 303.

2. Where,

Page 767 2. Where, for want of Form in ſuch Proceſſes, the Outlawry may be reverſed.

3 H. 7. 8. b. 9. a. Sid. 100. Dyer 206. If any Proceſs required in an Outlawry be erroneous, the Outlawry for this may be reverſed; for a Perſon ſhall not be ſubject to any Diſadvantage in reſpect of having ſuch Proceſs awarded againſt him, nor ſhall he be condemned barely for not appearing, where that which ſhould have compelled him to have appeared is (*a*) defective.

(*a*) Where, for want of Form in a Writ of Proclamation, and for improper Abbreviations, the Outlawry was reverſed. Style 182. —So where in the Exigent it was *Utleſt'* for *Utlagat'*, the Outlawry was reverſed. Style 227. So where it was *Utlegat'* inſtead of *Utlagat'*. Lev. 164.—But it is ſaid, that a Defect in Proceſs in an Outlawry may be ſalved by the Defendant's purchaſing a Pardon, and ſhewing it to the Court; for that ſuppoſes that there was ſuch an Outlawry againſt him as needed a Pardon, which if it were erroneous it would not do. 2 Hawk. P. C. 302.

Cro. Eliz. 592. 2 Hal. Hiſt. P. C. 199. As where the *Capias* was *eſte Edmundo Anderſon*, without a *T*, for this Error the Outlawry was reverſed; for the *Capias* and Exigent muſt be in the King's Name, and under the Judicial Seal of the King appointed to that Court that iſſues the Proceſs, and with the *Teſte* of the Chief Juſtice or Chief Judge of that Court or Seſſions.

But for this Cro. Eliz. 467. Dyer. 175. Lev. 143. Every *Capias* ought to be returnable the enſuing Term, for the Miſchief that might otherwiſe befall the Priſoner in being kept always in Priſon.

2 Salk. 700.

Latch 11. Lutw. 333. The *Capias utlagatum* can iſſue only in Term-time, being a Judicial Writ; yet in pleading an Outlawry the Party need not alledge that it iſſued in Term-time; for that it ſhall be ſo intended, unleſs the Contrary appears.

Cro. Jac 577. If the Proceſs be againſt the Feme, and the Words are, *Quas recuperavit verſus Eum*, inſtead of *Eam*; this is (*b*) ſuch an Error for which the Outlawry may be reverſed,

(*b*) So an Outlawry was reverſed upon a Writ of Error, for that in the Exigent it was fourteen in Figures, and not in Words. 2 Keb. 128. So where the Year of the Lord was in Figures, and not in Words. Style 334.—— So where it was *ex inſinuatone* for *ex inſinuatione*, for want of *i*, the Outlawry was held to be erroneous. Cro. Jac. 577.

Style 334. If the Writ be *Præcipipimus vobis* inſtead of *Præcipimus vobis*, this is erroneous; for without a Command to the Sheriff the Writ is not good, and here there is none; the Word *Præcipipimus* being ſenſeleſs is of no greater Force than if omitted.

3. Where, for Variance in ſuch Proceſſes, the Outlawry may be reverſed.

Fitz. Utlagary, 41. Bro. *Variance*, 90. If there be a Variance between the Original and Extent or other Proceſs, for this the Outlawry may be reverſed.

Miſnomer, 80. *Error*, 172.

2 Leon. 120. As a Variance between the original Writ and Filazer's Rule.

Cro. Eliz. 240. *Elden* ver. *Barnes*. So where in Error to reverſe an Outlawry in Treſpaſs, in the Original the Plaintiff was named *Barnes*, and in the Exigent *Barnes*; this was held Error; ſo where in the Original it was *Blaba ſua*, and the *Exigent* was *Blada*; this was held a plain Variance, and the Outlawry was reverſed.

Cro. Jac. 576. So where in the Original the Party was named *Agnes Gargrave* of *Kingſly in Com' Ebor'*, and in the *Exigent* ſhe is named *Nuper de Kingſly*; this was held Error.

4. Where,

*4. Where, for a defective Execution and Return, the Outlawry may be reverſed: *And herein.* *Page 768

1. *To whom ſuch Proceſs is to iſſue and be directed.*

The Exigent and ſeveral Proceſſes in order to an Outlawry, are to be directed to the Sheriff of the proper County; and ſuch Care hath been taken that there might be no Surprize in the Affair, that in Civil Caſes there are three ſeveral Offices concerned in the iſſuing of ſuch Proceſs; the firſt is the Chancery, out of which the Original iſſues; the ſecond, the Philazer, who makes out the *Capias*, *Alias* and *Pluries*; and the third, the Exigenter, who makes out the Exigents; which ſeveral Proceſs muſt be legally executed before the Party can be ſaid to be outlawed; therefore if the Sheriff returns a *Cepi*, if he have not the Body at the Day, the Court will not award an Exigent on the Suggeſtion of an Eſcape, unleſs the Sheriff will return one. 2 Hawk. P. C. 303.

If the Exigent be directed to the Sheriffs of the City of *Lincoln*, and the Direction is *Quod Capias Corpus ejus ita quod Habeas Corpus ejus*, where (as it was objected) it ought to have been *Capiatis & habeatis*; yet this is no Error, for they are both but one Officer to the Court, and though in the End of the Writ it was *Ita quod habeatis ibi hoc breve*; this was likewiſe held to be good, and no Way repugnant, being good both Ways. Cro. Jac. 576.

But if, in the Direction of Proceſs of Outlawry to the Sheriffs of *London*, it be *Præcipimus tibi* inſtead of *vobis*; this is ſuch an Error for which the Outlawry will be reverſed, becauſe that the Court will *ex officio* take Notice that there are two Sheriffs in *London*. Hetly 93. Lit. Rep. 150. S. C.

Judgment of Outlawry is given by the Coroner at the fifth County-Court, upon the Party's not appearing to the Exigent, (which is a Writ, commanding the Sheriff to cauſe the Defendant to be demanded from County-Court to County-Court until he be outlawed, *&c.*) and ſuch Judgment is entered thus, *Ideo, &c. per judicium Coronatoris Domini Regis Comitatus prædict' utlagatus eſt.* Dyer 223. pl. 24. Bro. *Coron.* 166. 3 Inſt. 212.

If the Judgment appear not by the Return of the Exigent to have been given by the Coroner, it is erroneous, except in *London*, where the Mayor by Cuſtom is Coroner, and the Judgment given by the Recorder. Co. Lit. 288. Dyer 317. pl. 6. 8 Co. 126.

Cro. Eliz. 648. Palm. 43. Cro. Jac. 358, 531. Rol. Rep. 266.

If there be two Coroners in a County, the Calling upon the Exigent may be by one of them, and likewiſe one alone may give the Judgment of Outlawry; but it ſeems, the Return muſt be by two in Miniſterial Acts; the Name of the Coroner muſt be ſubſcribed to the Judgment of Outlawry at the *Quinto exactas* upon an Outlawry of Felony; and it muſt be ſubſcribed alſo by the Name of their Office, *A. B. & C. D. Coronatores*, unleſs in *London*, where the Mayor is Coroner; the Sheriff's Name and Office muſt alſo be ſubſcribed to the Return of the Exigent, *e. g. A. B. Armiger vicecomes.* 2 Hal. Hiſt. P. C. 204.

If after the *Quinto exactus* the Coroners refuſe to give Judgment of Outlawry, the Court will grant an Attachment againſt them; and it is ſaid, that the Coroners of *Stafford* for ſuch an Offence were fined 10 *l.* but after the Judgment of the Outlawry pronounced, they may (*a*) ſtay the Return of the Exigent to be adviſed, if the Caſe requires it. Noy 113. An Attachment granted againſt the Coroners of *York*.

(*a*) That a *Certiorari* lies to return the Outlawry, which muſt be returned by the Sheriff on the *Exigi facias*, and ſuch Return recorded in the Court above. Dyer 223. a.

By the Statute of 34 *H.* 8. *cap.* 14. The Clerks of the Crown, Clerks of Aſſiſe, and Clerks of the Peace, are to certify into the King's Bench 2 Hal. Hiſt. P. C. 56.

the

Page 769 the Names of all Perſons outlawed, attainted, or convicted; and upon Letter from the Juſtices aforeſaid, Certificates ſhall be made of ſuch Perſons outlawed, attaint, or Convict, to the Juſtices of Gaol-Delivery.

2. *To what Place the Proceſs is to iſſue; and herein of the* Quinto exactus, *and Proclamations on an Outlawry.*

Fitz. Exigent, 26. Dyer 295.

The Exigent muſt be ſued to the County where the Party really reſides, for there all Actions were originally laid; and becauſe that Outlawries were at firſt only for Treaſon, Felony, or very enormous Treſpaſſes, the Proceſs was to be executed at the Torn, which is the Sheriff's Criminal Court; and this held not only before the Sheriff but before the Coroners, who were ancient Conſervators of the Peace, being the beſt Men in each County, to preſide with the Sheriff in his Court, and who pronounced the Outlawry in the County-Court on the Party's being *Quinto exactus*; and therefore anciently there was no Occaſion for any Proceſs to any other County than that in which the Party actually reſided; but this Matter being ſince altered, and the Learning thereof depending on ſeveral Acts of Parliament, it will be neceſſary to take Notice of the Statutes themſelves.

And firſt, it is enacted by the 6 *H.* 6. *cap.* 1. That before any Exi- " gents be awarded againſt Perſons indicted in the King's Bench of " Treaſon or Felony, Writs of *Capias* ſhall be directed as well to the " Sheriff or Sheriffs of the County wherein they be indicted, as to the " Sheriff or Sheriffs of the County whereof they be named in the In- " dictments; the ſame *Capias* having the Space of ſix Weeks at the leaſt, " or longer Time, by the Diſcretion of the ſaid Juſtices, if the Caſe re- " quire it, before the Return of the ſame; which Writs ſo returned, the " Juſtices ſhall proceed in the Manner as they had done before the Sta- " tute; and if any Exigent be awarded, or any Outlawry pronounced " againſt ſuch Perſons, before the Return of the ſaid Writs, the ſame Exi- " gent ſo awarded, with the Outlawry thereof pronounced, ſhall be void " and holden for none.

And it is farther Enacted by 8 *H.* 6. *cap.* 10. " That upon every In- " dictment or Appeal, by the which any Subject dwelling in other Coun- " ties than were ſuch Indictment or Appeal ſhall be taken of Treaſon, " Felony and Treſpaſs, before the Juſtices of the Peace, or before any " other having Power to take ſuch Indictments or Appeals, or other Com- " miſſioners or Juſtices in any County, Franchiſe or Liberty of *England*, be- " fore any Exigent awarded, preſently after the firſt Writ of *Capias* re- " turned another Writ of *Capias* ſhall be awarded, directed to the Sheriff " of the County whereof he who is indicted is or was ſuppoſed to be con- " verſant, by the ſame Indictment, returnable before the ſame Juſtices, " before whom he is indicted or appealed, at a certain Day, containing " the Space of three Months from the Date of the ſaid laſt Writ, where " the Counties be holden from Month to Month, and where the Counties " be holden from ſix Weeks to ſix Weeks, the Space of four Months, " until the Day of the Return of the ſaid Writ, by which Writ of ſecond " *Capias* the Sheriff ſhall be commanded to take him which is ſo indicted " or appealed, by his Body, if he can be found within his Bailiwick; and " if he cannot be found within his Bailiwick, to make Proclamation in " two Counties before the Return of the ſame Writ, that he which is ſo " indicted or appealed ſhall appear before the ſaid Juſtices, *&c.* at the " Day contained in the ſaid Writ, to anſwer, *&c.* after which Writ ſo " ſerved and returned, if he which is ſo indicted or appealed come not *Page 770* " at the Day of ſuch Writ returned, the Exigent * ſhall be awarded; and " that every Exigent and Outlawry otherwiſe awarded or pronounced ſhall " be holden for none and void.

But

But it is expreſly provided, "That the above recited Statute concerning "Proceſs to be made before the King in his Bench ſtand in Force, and "that this preſent Statute ſhall not extend to Indictments or Appeals taken "within the County of *Cheſter*; and that if any Perſons ſhall be indicted "or appealed of Felony or Treaſon, and at the Time of the ſame Felony "or Treaſon ſuppoſed was converſant within the County whereof the In-"dictment or Appeal makes mention, the like Proceſs to be made againſt "them as was uſed before.

And it is farther enacted by 10 *H.* 6. *cap.* 6. "That ſuch ſecond *Capias* "as is required by 8 *H.* 6. *cap.* 10. ſhall be awarded upon Indictments or "Appeals removed into the King's Bench, or elſewhere, by *Certiorari* or "otherwiſe.

And by the 31 *Eliz. cap.* 3. it is enacted, "That in every Action per-"ſonal, wherein any Writ of Exigent ſhall be awarded out of any Court, "one Writ of Proclamation ſhall be awarded and made out of the ſame "Court having Day of *Teſte* and Return, as the ſaid Writ of Exigent "ſhall have directed, and delivered of Record to the Sheriff of the County "where the Defendant, at the Time of the Exigent ſo awarded, ſhall be "dwelling; which Writ of Proclamation ſhall contain the Effect of the "ſame Action; And that the Sheriff of the County, unto whom any ſuch "Writ of Proclamation ſhall be directed, ſhall make three Proclamations "in this Form following, and not otherwiſe; that is to ſay, one of the "ſame Proclamations in the open County-Court, and one other of the "ſame Proclamations to be made at the general Quarter-Seſſions of the "Peace in thoſe Parts where the Party Defendant, at the Time of the "Exigent awarded, ſhall be dwelling, and one other of the ſame Procla-"mations to be made one Month at the leaſt before the *Quinto exactus* by "Virtue of the ſaid Writ of Exigent, at or near the moſt uſual Door of "the Church or Chapel of that Town or Pariſh where the Defendant ſhall "be dwelling at the Time of the Exigent ſo awarded; and if the Defend-"ant ſhall be dwelling out of any Pariſh, then in ſuch Place as aforeſaid, "of the Pariſh in the ſame County, and next adjoining to the Place of the "Defendant's Dwelling, and upon a *Sunday* immediately after Divine Ser-"vice and Sermon, if any Sermon there be; and if no Sermon there be, "then forthwith after Divine Service; and that all Outlawries had and "pronounced, and no Writs of Proclamations awarded and returned ac-"cording to the Form of this Statute, ſhall be utterly void and of none Effect †."

† On Exigend for a criminal Matter, a Proclamation ſhall be delivered to the Sheriff three Months before the Return. 4 & 5 W. & M. c. 22. ſ. 4.

In the Conſtruction of theſe Statutes the following Opinions have been holden:

That though the Words are expreſs, that any Outlawry pronounced contrary to the Directions of the Statute ſhall be void; yet it is not to be taken, as if ſuch Outlawries were abſolutely void, but only voidable by Writ of Error. Cro. Eliz. 179. 3 Co. 59. Plow. 137. Hob. 166.

If a Defendant be expreſly named of the ſame County wherein he is indicted or appealed and be alſo named under an *Alias dictus* of another, it hath been adjudged, that there is no need of any *Capias*, with a Command for Proclamation according to 8 *H.* 6. *cap.* 10. becauſe that which comes under the *Alias dictus* is no Way traverſable nor material: Alſo if a Defendant be named of *B.* and late of *C.* there is no need of any *Capias* to the Sheriff of the County wherein *C.* lies; becauſe that it appears, that the Defendant is at preſent converſant at *B.* but if a Defendant be named of no certain Place at preſent, but only late of *B.* and late of *C.* and late of *D.* &c. being all of them in Counties different from that in which the Proſecution is commenced, a *Capias* ſhall go to the Sheriff of every one of theſe Counties. 2 Hawk. P. C. 304-5. 2 Hal. Hiſt. P. C. 195-6.

On

*Page 771 * On a Writ of Error to reverſe an Outlawry upon the Statute of 5 *Eliz.*
Cro Jac. 167. *cap.* 9. of Perjury, the firſt Error aſſigned was, that he was indicted by the
Leech's Caſe. Name of *N. L. de parochia de Aldgate*, and not ſhewn in what County *Aldgate* is. 2*dly*, For that a County Court was held 23 *Feb.* and the next County Court was held 23 *March* following, ſo as there were not twenty-eight Days between theſe two County-Courts, as there ought to be by the Law, excluſive and not incluſive. And for the firſt Cauſe it was reverſed; although it was objected to be well enough becauſe *Middleſex* was in the Margin, ſo the Pariſh ſhould be intended to refer thereto; but becauſe an Indictment ſhall not be taken by Intendment, and becauſe the County in the Margin ſhall be referred to the Place where the Offence was committed, and not to the Indictment of the Party; and by the Statute of 8 *H.* 6. *cap.* 10. there ought to be the Addition of the Place and County where the Party indicted inhabits; therefore it was held to be ill, and reverſed for the ſecond Cauſe; alſo it was held to be erroneous; but *Tanfield* ſaid, that ought to be aſſigned as an Error *in Fait*, for it might be Leap-Year, and then it is good, and that Matter iſſuable.

2 Hal. Hiſt. P. C. 201-2. If an *Exigi facias* be delivered to the Sheriff, and there are but two County-Courts before the Return, and the Sheriff return the firſt and ſecond *Exactus*, & *non comparuit*, and that there were no more County-Days between the Delivery of the Writ to him and the Day of the Return, there may iſſue a ſpecial *Exigi facias* with an *Allocato comitatu*, if it be prayed after the Return, and before any new County-Day be paſt; but if any County-Day be paſt between the laſt of the former County-Days and the Return, no *Exigi facias* ſhall iſſue with an *Allocato comitatu*, but an *Exigi facias de novo*; for the Demand of the Party muſt be at five County-Courts ſucceſſively held one after another without any County-Court intervening; ſo if after the ſecond *Exactus* the Offender render himſelf, and find Mainprize, and at the Day of the Return make Default, no *Exigi facias* with an *Allocato comitatu* ſhall iſſue, becauſe three County-Days intervened, but a new Exigent and a *Capias* againſt the Bail.

Palm. 287. 2 Leon. 14. 2 Hal. Hiſt. P. C. 202. And therefore it hath been holden, that in *London*, where the Holding of the *Huſtings* is uncertain, no *Exigi facias* ſhall iſſue with an *allocato Huſtings*, becauſe the Court cannot take Notice of the ſet Times of holding it, as they may of the Times of holding the County-Courts; but it is now agreed, that if an Exigent iſſues in *London*, and they begin *Huſtings de placito terræ* (as they may) they ſhall proceed along at that *Huſtings* to the Outlawry, without mingling their *Huſtings de communibus placiti*; but if an *allocato Huſting* comes, they ſhall proceed without omitting any *Huſting*.

3. *What ſhall be ſaid a good Execution and Return.*

Before a Perſon is pronounced outlawed he is to be *Quinquies exactus*, for he hath three Days for Appearance, one for Grace, and if he ſtands in Contempt at all theſe Days, at the fifth County Court he is pronounced (*a*) Cro. Jac. 660. Palm. 280. S. C. outlawed by the Coroners; and therefore (*a*) if a Perſon be outlawed the Day of the *Quinto exactus*, this is Error, becauſe he hath all that Day to appear.

Noy 49. *Hartland* ver. *Yates*. But if an Exigent be awarded againſt *A.* and after he is *Quinto exactus*, and before the Return of the Exigent he dies, yet the Outlawry ſhall ſtand in its force, and ſhall not be reverſed; for Judgment was by the Coroners upon the *Quinto exactus*, and they may certify the Outlawry; but otherwiſe (*b*) if *A.* had died before the *Quinto exactus*.

(*b*) If upon an Indictment of Murder an Exigent be awarded, but before the Return the Party dies, his Executors may by Writ of Error, ſetting forth the ſpecial Matter, reverſe the Proceedings. 5 Co. 111. a. *Eaton's* Caſe cited in *Foxley's* Caſe.——That an Executor may reverſe an Outlawry. 2 Keb. 507.——That an Heir or Executor may. 2 Hawk. P. C. 461.—But a Gaoler or Sheriff cannot take any Advantage of an Error in an Outlawry. Dyer 67. a. 3 Keb. 286.

If

• If on an Outlawry againſt two, it be returned, that *Exacti non comparuerunt*, without ſaying *nec aliquis eorum comparuit*, this is erroneous; for peradventure one of them did appear. • Page 772. Rol. Abr. 802. *Clark*'s Caſe. 2 Rol. Rep. 440. S. C. adjudged.

So where a *Capias*, and thereupon an Exigent, was awarded againſt five, *viz.* three Men and two Women, and the Return was, *Quod ad quartum comitatum, &c. non comparuerunt*, without ſaying *nec eorum aliquis comparuit*; and this was held to be manifeſt Error; and it being likewiſe returned *utlagati exiſtunt*, where for the Woman it ought to have been *Waviatæ*, this likewiſe held to be Error. Cro. Jac. 358. *Middleton*'s Caſe.

The Return muſt ſhew where the County-Court was held, and in what County; and this muſt be ſhewn on every *Exactus*; and therefore (*a*) an Outlawry was reverſed, becauſe the Place where the County-Court was held was not ſhewn on the *ſecund' Exactus*; ſo (*b*) were not ſhewn on the *tertio Exactus*. 2 Hal. Hiſt. P. C. 203. (*a*) Style 451. (*b*) Keb. 50.

Alſo the Party muſt be named of ſuch a Place (*c*) *in Com. Midd'*, and not *de Midd'*. Cro. Jac. 616 (*c*) An Outlawry in *London* was reverſed upon a Writ of Error, becauſe the *Huſtings* were ſet out to be held in, but not for the City. Trin. 6. Geo. 2. *Martin* ver. *Duckett*.

If the Sheriff returns, that *ad Comitatum meum* S. *tent' apud* C. and ſays not *in Com' præd'*, or *in Com'* S. this is erroneous. 11 H. 7. 10. a. 2 Rol. Abr. 802. 2 Hal. Hiſt. P. C. 293.

So if it be *ad Comitatum meum tentum apud* S. *in Com' Somerſ'*, and ſays not *ad Comitatum meum Somerſ'*, or *ad Comitatum Somerſ'* without ſaying *ad Comitatum meum Somerſet*; this is erroneous. 2 Rol. Abr. 802. Palm. 480. Latch 210.

So an Outlawry was reverſed, for that the Proclamations were returned to be *ad Comitat' meum tent' apud* ſuch a Place *in Com' prædict'* and not ſaid *pro Com'*; for antiently one Sheriff had two or three Counties, and might hold the Court in one County for another. Vent. 108. Show. 319. 3 Mod. 89. 2 Keb. 141. Comb. 19. 2 Show. 60, 68. pl. 52. Lev. 164.

The Sheriff muſt return the Day and Year of the King to every *Exactus*; and therefore if the Day and Year of the King be inſerted in the *1ſt*, *2d*, *3d*, and *5th Exactus*, but omitted in the *4th*, it is erroneous, and ſhall not be ſupplied by Intendment. 2 Rol. Abr. 802. 2 Hal. Hiſt. P. C. 203.

So if it be *Anno Regni Domini Reginæ*, without ſaying *Elizabethæ*, without ſaying *Reginæ*, or *Anno Regni Domini Regis Jacobi*, without ſaying, *Regni ſuæ Angliæ*, for the Year of *England* and *Scotland* differ; ſo if there be leſs than a Month between the firſt and ſecond *Exactus*; in theſe Caſes the Outlawry is erroneous. 2 Rol. Abr. 803. 2 Hal. Hiſt. P. C. 203.

So if the Return be *ad Huſting tent' apud Guild-hall Civitatis London*, without ſaying *de communibus Placitis*, it is erroneous; becauſe they have two Huſtings, one *de Communibus Placitis*, another *de placitis terræ*. 2 Rol. Abr. 802. 2 Hal. Hiſt. P. C. 203.

If an Outlawry be returned, that the Party was *exact'* at three ſeveral Times 10 *Jac.* and that he was *Quarto exact'* 25th Day of *Feb'* & *Quinto exact'* ſuch a Day in *March* 10 *Jac.* although it may be intended, that he was *Quarto exact'* in 10 *Jac.* yet the Outlawry ſhall not be good by Intendment; for perhaps the Clerk would have made it *Quarto exact'* 8 *Jac.* which would have been clearly bad. 2 Rol. Abr. 803. *Chapman*'s Caſe.

(F) Of the Manner of reverſing an Outlawry; and herein of the Difference between Errors in Fact and in Law.

* Page 773 *

2 Hal. Hiſt. P. C. 207.

OUtlawries are regularly to be reverſed by Plea by Writ of *Identitate nominis*, or by Writ of Error, for any Errors, be they Errors in Fact or in Law.

Co. Lit. 259. 2 Hawk. P. C. 460.

As to Errors in Fact; as that in Felony, the Party was an Infant under the Age of fourteen, was in Priſon or beyond Sea; theſe can regularly be only taken Advantage of by Writ of Error; but it is agreed, that by the Common Law *in favorem vitæ* an Outlawry of Treaſon or Felony might be avoided by Plea, that the Defendant was in Priſon, or in the King's Service beyond Sea, *&c.* at the Time of the Outlawry pronounced againſt him; but that no Outlawry for any other Crime (againſt a Party rightly deſcribed) can be avoided by Plea of any Matter of Fact whatſoever.

2 Rol. Abr. 804. 2 Hal. Hiſt. P. C. 208.

As to avoiding of an Outlawry of Felony, becauſe the Party was beyond the Sea, theſe Differences are laid down by *Rolle* and *Hale*, as agreed to by the Court, 1*ſt*, That if a Man, having committed a Felony, goes beyond the Sea voluntarily, or upon his own Occaſions, and not in the King's Service, before any Exigent awarded, though after the Indictment, and then an Exigent is awarded, and the Offender beyond the Sea is outlawed for the Felony, he may aſſign it for Error. 2*dly*, But if after the Exigent awarded upon the Indictment of Felony, then he goes beyond the Sea voluntarily, or upon his own Occaſions, and being ſo beyond Sea is outlawed, he ſhall not avoid it by ſuch being beyond Sea; becauſe by the Exigent awarded he has Notice of the Proſecution, and by ſuch a Means he may avoid his Conviction, by ſtaying till all the Witneſſes are dead. 3*dly*, But yet *prima facie* the Error in that Caſe is well aſſigned, by alledging he was *ultra mare tempore promulgationis utlagariæ*; and if he were in the Realm after the Exigent iſſued, it ſhall come in by the Plea of the King's Attorney to ſhew it. 4*tly*, But if he were within the Realm at the Time of the Exigent iſſued, and went beyond the Sea upon the Service of the King or Kingdom, and then is outlawed, being beyond the Sea, this Outlawry ſhall be reverſed; if the Party alledge generally, that he was *ultra mare tempore promulgationis utlagariæ*, and the King's Attorney reply, that he was in *England tempore emanationis brevis de Exigi facias*, it is a good Replication for the Plaintiff in the Writ of Error to alledge, that he went out after the Exigent, and before the Outlawry pronounced, upon the King's Command or Service, and ſhew it ſpecially, and ſo confeſs and avoid the Plea.

As to the avoiding an Outlawry in Treaſon, on the Party's being beyond Sea, it is enacted by the 26 *H.* 8. *cap.* 13. and 5 & 6 *E.* 6. *cap.* 11. "That all Proceſs of Outlawry to be had or made within this Realm "againſt any Offenders in Treaſon, being reſiant or inhabiting out of the "Limits of this Realm, or in any of the Parts beyond the Seas, at the "Time of the Outlawry pronounced againſt them, ſhall be as good and "effectual in Law, to all Intents and Purpoſes, as if ſuch Offenders had "been reſiant and dwelling within this Realm at the Time of ſuch Pro-"ceſs awarded, and Outlawry pronounced; (*a*) provided that the Party "ſo to be outlawed ſhall, within one Year next after the ſaid Outlawry "pronounced, yield himſelf to the Chief Juſtice of *England* for the "Time being, and offer to traverſe the Indictment or Appeal whereon "the ſaid Outlawry ſhall be pronounced, as is aforeſaid, that then he "ſhall be received to the ſame Traverſe; and being thereupon found

(*a*) For this *vide* Dyer 287 pl. 48. 2 Jon. 180. 4 Mod. 47. 366. 8 Mod. 12. 10 Mod. 188, 353, 357, 380, 409. 12 Mod. 10, 312, 544, 626, 668. Comyns 79. Ld. Raym. 153, 466, 472, 682.

"Not

"Not guilty by the Verdict of twelve Men, he ſhall be clearly acquitted "and diſcharged of the ſaid Outlawry, &c. *Page 774

It is the allowed Practice of the Court of Common Pleas to ſuffer a Defendant, coming in by *Capias utlagatum* the ſame Term on which an Exigent is returnable, to avoid the Outlawry without Writ of Error, by ſhewing, that he purchaſed a *Superſedeas* out of the ſame Court, and delivered it to the Sheriff before the *Quinto exactus*, &c. or by ſhewing any other Matter apparent on Record which makes the Outlawry erroneous; as the Want of an Original, or the Omiſſion of Proceſs, or Want of Form in a Writ of Proclamation, &c. or a Return by a Perſon appearing not to be Sheriff, or a Variance between the Original and Exigent, or other Proceſs, or the Want of ſuch Addition as required by 1 *H.* 5. *cap.* 5. yet it is ſaid in many Books to be the conſtant Courſe of the Court of King's Bench never to reverſe an Outlawry on the Crown Side, either in the ſame or a different Term, for theſe or other Errors of a like Nature, without a Writ of Error. 2 Hawk. P. C. 458-9. and ſeveral Authorities there cited

It is agreed, that any Outlawry whatſoever may be avoided by a Defendant's coming in upon the *Capias utlagatum*, and pleading a Miſnomer either of the Name or Addition in the Writ, &c. as by ſhewing, that whereas he is called by ſuch a Name of Baptiſm or Surname, he hath been always known by a different one, and not by that in the Writ, &c. or whereas he is named of ſuch Eſtate, Degree or Myſtery, that he hath ſome other Addition, and not that in the Writ, &c. alſo it is ſaid in many Books, that he may plead, that there is no ſuch Town as that whereof he is named; and it ſeems clearly agreed, that he may plead, that at the Time of the Writ purchaſed, and ever ſince, he hath made his Abode at ſome other Town, and not at that in the Writ, &c. and it is ſaid, that by ſuch Plea the Outlawry ſhall only be avoided as to the Perſon who pleads it, (who ſhall not be intended to be the Perſon meant), and ſhall ſtand in Force againſt the Perſon of the Name and Addition in the Record; but it is ſaid, that a Perſon of the ſame Name and Addition as are mentioned in a Record of Outlawry cannot avoid it, by averring, that there are two Perſons of ſuch Name and Addition, and that the Perſon intended is the Elder, and he himſelf is the Younger, but ſhall be put to his Writ *De identitate nominis*; which is ſaid by ſome to be the only Remedy in ſuch Caſe, after an Outlawry returned; and it ſeems, that notwithſtanding in Civil Caſes, before an Outlawry is returned, one of the ſame Name may come into Court, and ſhew that he is not the Perſon intended; whereupon, if the Plaintiff confeſs it, the Diverſity of the Names ſhall be entered on the Roll, and a new Exigent ſhall iſſue, with a fuller Deſcription of the Perſon intended; yet this cannot be done upon an Indictment without a Writ of *Identitate nominis*, becauſe it would make the Proceſs variant from the Indictment, which cannot be altered without the Conſent of the Jurors. 2 Hawk. P. C. 460, 461.

If *A.* brings an *Audita querela* againſt *B.* and declares, that whereas *B.* had recovered againſt *A.* 200 *l.* Debt, &c. and thereupon the ſaid *A.* was outlawed, and upon a *Capias utlagatum* taken, and in Execution at the Suit of the ſaid *B.* and after from the ſaid Execution was delivered and ſuffered to go at large, &c. and yet *B.* hath taken out Execution upon the ſaid Judgment, and endeavours, &c. the Defendant may plead and ſhew how, that after the ſaid Enlargement, and before the Purchaſe of the *Audita querela*, the Outlawry was ſet aſide and made void; and ſo conclude *Quod (a) non habetur tale recordum.* 8 Co. 141, 142. Doctor *Drury*'s Caſe. Vaugh 158. S. C. cited,

(a) For this *vide* Co. Ent. 157. 3 Keb. 291. Mod. 111. Hern. Ent. 49. Aſt. Ent. 143.

If a Perſon procures another to be outlawed clandeſtinely, who appears openly and in Public, the Court will, on Motion, oblige ſuch Perſon 2 Vent. 46. 2 Jon. 211. Comb. 19. 2 Salk. 495.

pl. 3. S. P. where an Outlawry was reverſed, on Motion, at the Charge of him who procured it, on

* Page 775 on Affidavit, that the Defendant was actually in the *Fleet* in Execution for the Plaintiff in another Suit,

* Perſon who procures the Outlawry to reverſe the ſame at his own Coſts; but if it appears, that the Party outlawed had lurked backward and forward between two Counties, and that the Perſon procuring the Outlawry had dealt openly, and had been regular in ſending down the Proclamations to the Sheriff of the County where he ſometimes reſided; the Court will not interpoſe in this ſummary Manner, but will leave the Party to his ordinary Remedies by Plea or Writ of Error.

and that he knew it.—But in the ſame Page in *Salk.* it is ſaid, that though ſuch Motions are frequently granted in *B. R.* becauſe it is a great Charge to reverſe an Outlawry there, yet that it is otherwiſe in *C. B.* the Charge there being but 16 *s.* 8 *d.*

(G) What the Party muſt do in order to intitle him to a Reverſal: And herein,

1. Of appearing in Perſon, or by Attorney.

2 Leon. 22. ——Where the Huſband and Wife being outlawed, and the Wife refuſing to appear, the Outlawry could not be reverſed. Cro. Eliz. 611.—One outlawed prayed to appear by Attorney; and upon an Affidavit made of his Sickneſs, the Court *ex ſpeciali gratia* allowed him to appear by Attorney; but the Clerk was commanded to enter it, *Quod venit in propria perſona*, the Law being clear, that upon an Outlawry he ought to appear in Perſon. Cro. Jac. 462.—Having once appeared in Perſon, the Reſidue of the Proceedings may be by Attorney. 2 Keb. 507.—Said that there was a Difference where the Error appeared on the Face of the Record; that in ſuch Caſe Error may be aſſigned *per Attorn'*, without a ſpecial Rule of Court for that Purpoſe. Carth 7.

REgularly in all Outlawries, as well Perſonal as Criminal, the Party in order to reverſe the ſame was to appear in Perſon, and could not appear by Attorney.

But now by the 4 & 5 *W. & M. cap.* 18. For the more eaſy and ſpeedy Reverſing of Outlawries in the Court of King's Bench, it is enacted, "That "from and after the firſt Day of *Eaſter* Term thence enſuing, no Perſon "or Perſons whatſoever, who are or ſhall be outlawed in the ſaid Court for "any Cauſe, Matter or Thing whatſoever, (Treaſon and Felony only ex-"cepted,) ſhall be compelled to come in Perſon into or appear in Perſon "in the ſaid Court to reverſe ſuch Outlawry, but ſhall or may appear by "Attorney and reverſe the ſame without Bail in all Caſes, (except where "ſpecial Bail ſhall be ordered by the ſaid Court.)

And it is further enacted by the ſaid Statute, "That if any Perſon or "Perſons outlawed, or hereafter to be outlawed, in the ſaid Court, (other "than for Treaſon or Felony,) ſhall from and after the ſaid firſt Day of "*Eaſter* Term be taken and arreſted upon any *Capias utlagatum* out of the "ſaid Court, it ſhall and may be lawful to and for the Sheriff or Sheriffs, "who hath or ſhall have taken and arreſted ſuch Perſon and Perſons, (in all "Caſes where ſpecial Bail is not required by the ſaid Court,) to take an At-"torney's Engagement under his Hand to appear for the ſaid Defendant or "Defendants, and to reverſe the ſaid Outlawries, and thereupon to diſcharge "the ſaid Defendant and Defendants from ſuch Arreſts; and in thoſe Caſes, "where ſpecial Bail is required by the ſaid Court, the ſaid Sheriff and She-"riffs ſhall and may take Security of the ſaid Defendant or Defendants by "Bond, with one or more ſufficient Surety or Sureties, in the Penalty of "double the Sum for which ſpecial Bail is required, and no more, for his, "her, or their Appearance by Attorney in the ſaid Court at the Return of "the ſaid Writ, and to do and perform ſuch Things as ſhall be required by "the ſaid Court; and after ſuch Bond taken to diſcharge the ſaid Defend-"ant and Defendants from the ſaid Arreſt.

And

* And it is further enacted by the ſaid Statute, "That if any Perſon or * Page 776.
"Perſons outlawed as aforeſaid, and taken and arreſted upon a *Capias*
"*utlagatum*, ſhall not be able within the Return of the ſaid Writ to give
"Security, as aforeſaid, in Caſes where ſpecial Bail is required, ſo as he
"or they are committed to Gaol for Default thereof, that whenſoever
"the ſaid Priſoner or Priſoners ſhall find ſufficient Security to the Sheriff
"or Sheriffs, in whoſe Cuſtody he or they ſhall be, for his or their Ap-
"pearance by Attorney in the ſaid Court at ſome Return in the Term
"then next following, to reverſe the ſaid Outlawry or Outlawries, and
"to do and perform ſuch other Thing and Things as ſhall be required
"by the ſaid Court, it ſhall and may be lawful to and for the ſaid Sheriff
"and Sheriffs, after ſuch Security taken, to diſcharge and ſet at Liberty
"the ſaid Priſoner and Priſoners for the ſame; any Law or Uſage to the
"contrary notwithſtanding."

It hath been held, that if the Party outlawed comes in by *Cepi Corpus*, he ſhall not be admitted to reverſe the Outlawry without appearing in Perſon, as in ſuch Caſe he was obliged to do at Common Law; or putting in Bail with the Sheriff for his Appearance upon the Return of the *Cepi Corpus*, and for doing what the Court ſhall order. 2 Salk. 496. pl. 7.

2. Of giving Bail.

By *Weſtm.* 1. 3 *Ed.* 1. *cap.* 9. it is expreſly provided, that thoſe who are outlawed, have abjured the Realm, &c. ſhould be excluded the Benefit of Replevin; yet it hath been always held, that the Court of King's Bench may in their Diſcretion, in ſpecial Caſes, bail a Perſon upon an Outlawry of Felony; as where he pleads, that he is not of the ſame Name, and therefore not the ſame Perſon with him that was outlawed, or alledges any other Error in the Proceedings. 2 Hawk. P. C. 98. *Vide* Title *Bail in Criminal Cauſes.* Letter (D)

By the 31 *Eliz. cap.* 3. *ſect.* 3. it is enacted, "That before any Allow-
"ance of any Writ of Error, or Reverſing of any Outlawry be had by
"Plea, or otherwiſe, through or by Want of any Proclamation to be had
"or made according to the Form of this Statute, the Defendant and De-
"fendants in the original Action ſhall put in Bail, not only to appear and
"anſwer to the Plaintiff in the former Suit in a new Action to be com-
"menced by the ſaid Plaintiff for the Cauſe mentioned in the firſt Action,
"but alſo to ſatisfy the Condemnation, if the Plaintiff ſhall begin his Suit
"before the End of two Terms next after the Allowing the Writ of Error,
"or otherwiſe Avoiding of the ſaid Outlawry †."

† *Vide* the Stat. 4 & 5 W. & M. c. 18, *ante* 777.

A. who was a foreign Merchant and never in *England*, was outlawed at the Suit of *B.* in an Action on ſeveral Promiſes for Goods ſold and delivered; and upon a ſpecial *Capias Utlagatum* a Ship and other Effects belonging to *A.* were ſeiſed, as forfeited upon this Outlawry; and it was moved, that this Outlawry may be vacated, and Reſtitution awarded, upon Affidavits produced and read, that the Defendant was never *Infra Legem*, *i. e.* that he never was in *England*, and therefore could not be outlawed, becauſe that was putting him *Extra Legem*. *Sed per Cur':* This Outlawry ſhall not be vacated upon ſuch Affidavits, but the Defendant may bring a Writ of Error, which he was compelled to do, and thereupon to put in Bail to the Action in which he was outlawed according to the new Statute of 4 & 5 *W.* & *M. cap.* 18. *ante* 777. and then the Plaintiff conſented to the Reverſal of the Outlawry. Carth. 459. Ld. Raym. 349. *Matthews* ver. *Erbo.*

H. was outlawed in two Actions, one was for 10*l.* the other for 40*s.* and upon reverſing the Outlawry the Court took ſpecial Bail for the firſt, and an Appearance for the other, upon the Statute 4 & 5 *W.* & *M. cap.* 18. and the Recognizance was taken purſuant to 31 *Eliz. cap.* 3. *ſect.* 3. 2 Salk. 496. pl. 6.

*Page 777

3. Of ſuing out a *Scire facias*.

Dyer 34. pl. 20. Cro. Eliz. 235. Keb. 141. pl. 11. Sid. 316. 3 Keb. 29. 3 Mod. 42, 47. 4 Mod. 366. 2 Hal. Hiſt. P. C. 209. S. P. and that ſuch Writ is to iſſue returnable at fifteen Days; and if any Lords do appear, they may plead to the Errors; and if the Sheriff return there are no Lands, *&c.* then the Court proceeds to examine the Errors. (*a*) So ruled Mich. 12 *Annæ*, *The Queen* ver. *Strafford*, upon Examination of all the Precedents. 2 Hawk. P. C. 461. *Ca. Law and Eq.* 188.

It is clearly agreed, that an Attainder of Felony of a Perſon who had any Lands ſhall never be reverſed by Writ of Error, without a *Scire facias* againſt all the Ter-tenants and Lords mediate and immediate; but it is (*a*) ſettled, that ſuch *Scire facias* is not neceſſary in the Caſe of High Treaſon.

2 Salk. 495. pl. 5. Ld. Raym. 154.

Alſo it is ſaid, that it is not neceſſary in the Caſe of Felony, when it is ſuggeſted on the Roll that the Party had no Lands, and the Attorney-General confeſſes it.

(H) The Effects and Conſequences of a Reverſal: And herein,

1. Where the Proceedings on the Reverſal are in the ſame Plight as if no Outlawry had been.

Cro. Jac. 464. Cro. Car. 365. 3 Mod. 42. 8 Mod. 26. 10 Mod. 188, 357, 380, 409. 11 Mod. 173. pl. 15. 12 Mod. 544, 626, 668. Vern. 170, 175. 2 Vern. 312. Will. Rep. 445. pl. 428, 690. 2 Will Rep. 269. pl. 68, 270. 6 Mod. 115. (*b*) 2 Hal. Hiſt. P. C. 209.

IT is agreed, that after an Outlawry of Treaſon or Felony is reverſed the Party ſhall be put to plead to the Indictment, for that ſtill remains good, and (*b*) he may be tried at the King's Bench Bar; or the Record may be remitted into the Country, if it were removed into the King's Bench by *Certiorari*, with a Command to the Juſtices below to proceed by the Statute of 6 *H.* 6. *cap.* 6.

Salk. 371. pl. 10. *Rex* ver. *Hill.* 5 Mod. 141. S. P.

So if a Man be outlawed by Proceſs in an Information, and comes in and reverſes the Outlawry, he muſt plead *inſtanter* to the Information.

March 9. 3 Lev. 145. *Whitwick* ver. *Hevenden.*

The Law is the ſame in Civil Caſes; and therefore if an Outlawry in a perſonal Action be reverſed, the Original remains.

Treſpaſs for taking and detaining his Beaſts till he made a Fine, the Action was laid in *Suſſex*; the Defendant pleads, that the Cauſe of Action did not accrue within ſix Years before ſuing of the Writ. The Plaintiff replies, that at another Time he brought an Original in Battery in *London*, intending when the Defendant had appeared to have declared for this Treſpaſs; and that the Defendant was outlawed in *London*; and that within ſuch a Time after the Reverſal of the Outlawry he declared here; the Defendant demurred; and for the Defendant it was inſiſted, that the Original being laid in *London*, he could not in this Action declare in another County, though the Cauſe of Action be tranſitory; but upon Information by the Prothonotaries that the Courſe of the Court is, that although the Original be laid in *London* for expediting the Outlawry, yet when the Defendant comes in, the Plaintiff may declare againſt him in any other County, be the Action local or tranſitory, and the Statute 21 *Jac.* 1. *cap.* 16. gives to Plaintiffs generally a Power to commence a new Suit within the Year after the Outlawry reverſed; and that ſo he may do in this Caſe to warrant his Declaration within the Courſe of the Court and Judgment was given for the Plaintiff.

2. To

* 2. To what the Party ſhall be reſtored on Reverſal of the Outlawry. *Page 778

It hath been adjudged, that if the King grant over the Lands of a Perſon outlawed for Treaſon or Felony, and afterwards the Outlawry, be (a) reverſed, the Party may enter on the Patentee, and needs neither to ſue a Petition to the King, nor a *Scire facias* againſt the Patentee. And. 188.

(a) Shall, after Outlawry reverſed, be reſtored to his Law, and to be of Ability to ſue. Co. Lit. 288. b.

If the Goods of a Perſon outlawed are ſold by the Sheriff upon a *Capias Utlagatum*, and after the Outlawry is reverſed by Writ of Error, he ſhall be reſtored to the Goods themſelves; becauſe the Sheriff was not compellable to ſell thoſe Goods, but only to keep them to the Uſe of the King. 5 Co. 90. *Hoe*'s Caſe. Rol. Abr. 778. S. C. cited. Cro. Eliz. 278. S. P. adjudged; where a Termor being outlawed upon the Statute of Recuſancy, the Lord Treaſurer and Barons of the Exchequer ſold the Term; & *vide* 2 Jon. 101. 2 Show. 68. pl. 52. 3 Keb. 871. that there ſhall be Reſtitution of Profits actually paid into the Exchequer.

If an Advowſon comes to the King by Forfeiture upon an Outlawry, and, the Church becoming void, the King preſents, and then the Outlawry is reverſed; yet the King ſhall enjoy that Preſentment, becauſe the Preſentment there came to the King as the Profit of the Advowſon. Moor 269. *Beverly* ver. *Cromwal.*

But if the Church be void at the Time of the Outlawry, and the Preſentation is thereby forfeited as a Chattel principally and diſtinct of itſelf, thereupon the Reverſal of the Outlawry, the Party ſhall be reſtored to the Preſentation †. Moor 269. agreed *per Curiam.* † *Vide ante* 756.

If a Termor being outlawed for Felony grants over his Term, and after the Outlawry is reverſed, the Grantee may have Treſpaſs, for the Profits taken between the Reverſal of the Outlawry and the Aſſignment; for by the Reverſal it is as if no Outlawry had been, and there is no Record of it. Cro. Eliz. 170. *Ognal*'s Caſe, & 13 Co. 20, 22.

It is ſaid, that if a Man be outlawed in the King's Bench, and the Party's Goods are ſeiſed into the King's Hands, and then the Outlawry is reverſed, there can be no Reſtitution; the Reaſon whereof is, for that the Court of King's Bench cannot ſend a Writ to the Treaſurer; and the Court of Exchequer have no Record before them to iſſue out a Warrant for Reſtitution ‡. 5 Mod. 61.

‡ *Sed. qu.* If Reſtitution would not be made on Petition to the King?

It hath been adjudged in Chancery, that if *A.* being poſſeſſed of ſeveral Houſes for a long Term of Years, mortgages the ſame, and is outlawed for High Treaſon, upon which thoſe Houſes are ſeized into the King's Hands, and the ſame granted for valuable Conſideration to *J. S.* who likewiſe gets an Aſſignment of the Mortgage; that yet the Repreſentative of *A.* may redeem the Mortgage upon Reverſal of the Outlawry; and herein the Lord Keeper ſaid, that the Judgment upon the Reverſal is, that the Party ſhall be reſtored to all that has not been anſwered to the King; which in all Caſes has been underſtood of the meſne Profits anſwered to the King and not as to the principal Thing itſelf, tho' ſeiſed into the King's Hands; and that it was undoubtedly ſo as to a Freehold or Inheritance, and he ſaw no ſubſtantial Difference in the Caſe of a Leaſehold §. 2 Vern. 312. *Peyton* ver. *Ayliffe*; & 2 Lev. 49. the Caſe of *Pinfold* ver. *Northey.*

§ Outlawry not diſcharged by general Pardon. 20 Geo. 2. c. 52. ſ. 61.

Papiſts

* Papiſts and Popiſh Recuſants.

THE Laws for reſtraining the Growth of Popery, and by which Papiſts are ſubjected to divers Penalties, Forfeitures, Diſabilities and Inconveniencies, may be conſidered in general, as relating to Popiſh (*a*) Recuſants, ſuch who refuſe to make the Declaration againſt Popery, and ſuch who promote, encourage or profeſs the Popiſh Religion; and theſe Laws, though made for the Advancement of Religion and the Public Good, yet being conſidered as Penal Laws have, like all other Penal Laws, been conſtrued ſtrictly.

(*a*) *i. e.* Thoſe who refuſe to come to Church, and being Perſons profeſſing the Popiſh Religion, and convicted of ſuch Refuſal or Recuſancy, are termed Popiſh Recuſants convict; but the 23 Eliz. c. 1. extends to all Recuſants; and the Courts cannot take Notice of the Grounds of the Recuſancy, but muſt puniſh them for not coming to Church, without exan ing into the Cauſe why they did not. Skin. 99. pl. 14. *per Sanders* Ch. J. but for this, *vide* Title *Hereſy and Offences againſt Religion.*—And what ſhall be Evidence to prove a Perſon a Popiſh Recuſant convict, *vide* Keb. 7.

Hawk. P. C. c. 12, 13, 14.

For the better underſtanding of theſe Penalties, &c. the Laws herein are ranked under the following Heads:

(A) The Diſabilities, Reſtraints, Forfeitures and Inconveniencies which Popiſh Recuſants are ſubject to. 780.

And herein,

1. *Of their Diſability to bring any Action.* 780.
2. *Of bearing any Public Office or Charge.* 781.
3. *Of claiming any Part of a Huſband's perſonal Eſtate.* 782.
4. *Of claiming an Eſtate by Curteſy, or by Way of Dower, after a Marriage againſt Law.* 782.

2. Of the Reſtraints they are put under. 782.

And herein,

1. *From going five Miles from Home.* 782.
2. *From coming to Court.* 783.
3. *From keeping Arms.* 783.
4. *From coming within ten Miles of* London. 784.

Of the Forfeitures they are liable to. 784.

And herein.

1. *That of two Parts of a Jointure or Dower.* 784.
2. *That of* 20 l. *for not receiving the Sacrament yearly after Conformity.* 784.
3. *That of* 10 l. *for an unlawful Marriage.* 784.
4. *That of* 100 l. *for an Omiſſion of lawful Baptiſm.* 784.
5. *That of* 20 l. *for an unlawful Burial.* 785.

4. Of

*4. Of the Inconveniencies they are ſubject to. 785. *Page 780

And herein,

1. *That their Houſes may be ſearched for Reliques, whether they be Men or Women.* 785.
2. *If they be Women, and married, that they may be committed.* 785.

(B) Of the Offence of not making a Declaration againſt Popery, and the Reſtraints it ſubjects them to. 786.

And herein,

1. From ſitting in Parliament. 786.
2. Holding a Place at Court. 786.
3. From living within ten Miles of *London*. 786.
4. From keeping Arms. 787.

(C) Of the Offence in Promoting or Profeſſing the Popiſh Religion. 787.

And herein,

1. Of the Offence of ſaying or hearing Maſs or other Popiſh Service. 787.
2. Of giving or receiving Popiſh Education. 788.
3. Of buying or ſelling Popiſh Books. 790.
4. Of keeping Schools. 790.
5. Of with-holding a competent Maintenance from a Proteſtant Child. 790.
6. Of the Diſability of thoſe profeſſing the Popiſh Religion to preſent to a Church. 790.
7. Of their Diſability to purchaſe. 792.

(A) The Diſabilities, Reſtraints, Forfeitures and Inconveniencies which Popiſh Recuſants are ſubject to: And herein,

1. *Of their Diſability to bring any Action.*

BY the 3 *Jac.* 1. *cap.* 5. *ſect.* 11. it is enacted, "That every Popiſh "Recuſant convict ſhall ſtand to all Intents and Purpoſes diſabled as "a Perſon lawfully excommunicated, and as if ſuch Perſon had been ſo de- "nounced and excommunicated according to the Laws of this Realm, un- "til he or ſhe ſhall conform, *&c.* and that every Perſon ſued by ſuch Per- "ſon ſo diſabled, may plead the ſame in diſabling of ſuch Plaintiff as if he "or ſhe were excommunicated by Sentence in the Eccleſiaſtical Court, ex- "cept the Action of ſuch Recuſant do concern ſome Hereditament or Leaſe, "which is not to be ſeiſed into the King's Hands by Force of ſome Law "concerning Recuſancy.

In

* Page 781 * In the Conſtruction of this Branch of the Statute it hath been holden,

See 1 Com. Dig. 10. as to pleading, and 4 Com. Dig. 58. &c. as to the Law, in general. Noy 89. Latch 176. Hetl. 18. 2 Hawk. P. C. 23. That the Plea of ſuch a Conviction, like all other Pleas in Diſability, ought to be pleaded before (*a*) Imparlance, and alſo to conclude with a (*b*) Demand if the Plaintiff ſhall be anſwered.

(*a*) Cannot be pleaded after a general Imparlance, but may be pleaded *Puis darrein continuance*, becauſe being in Diſability of the Perſon, may accrue after a Continuance. Mod. *Ca. in Law and Eq.* 43, 381. (*b*) In Debt for Rent by the Plaintiffs as Executors of *J. S.* Defendant pleads in Abatement by *Pet' judicium de brevi, &c.* for that one of the Plaintiffs is a Popiſh Recuſant convict, and *Quaſi excom'* by this Statute; but it was held, that this, as here, ought not to be pleaded in Abatement, becauſe the Writ is not abated thereby, but only ſuſpended; and the Pleading ought to be *Reſponderi non debent*. 3 Lev. 208.——So where Judgment was demanded generally. Mod. *Ca. in Law and Eq.* 43, 381.

Noy 89. Latch 176. 3 Lev. 333-4. That ſuch Plea ought alſo to ſhew before what Juſtices the Conviction was, that the Court may know where to ſend for a Certificate thereof, if it be denied; and alſo that the Record itſelf, or at leaſt a Certificate thereof, ought to be immediately produced, according to the general Rule of Law, as to all dilatory Pleas grounded on Records.

Hetl. 176. That if after ſuch a Plea it be certified, that the Plaintiff hath conformed, and thereupon the Defendant be ordered to plead in chief, and then the Plaintiff relapſe, and be convict again, the Defendant cannot plead the ſame in Diſability a ſecond Time.

3 Lev. 11, 12, 332-3. 2 Lutw. 1117. That it muſt appear, either from the Conviction itſelf, or by proper Averments, that the Plaintiff is convicted of Popiſh Recuſancy, becauſe no Recuſants, except Popiſh ones, are within the ſaid Clauſe; but this is ſufficiently ſet forth, by alledging, that the Plaintiff being *Papalis Recuſans* was indicted and convicted *ſecundum formam Statuti, &c.*

2 Bulſt. 155. Cawley 216. Hawk. P. C. 23-4. It ſeems to be the better Opinion, that this being a Penal Law, and therefore to be conſtrued ſtrictly, the Words *As Perſons lawfully excommunicate, &c.* mean no more than to diſable the Party, in the ſame Manner as an excommunicated Perſon, to bring an Action, but do not ſubject the Party to the other Conſequences of an Excommunication.

2. *Of bearing any Public Office or Charge.*

By the 3 *Jac.* 1. *cap.* 5. *ſect.* 8. it is enacted, " That no Recuſant convict ſhall at any Time practiſe the Common Law of this Realm as a " Counſellor, Clerk, Attorney or Solicitor in the ſame; nor ſhall practiſe " the Civil Law as Advocate or Proctor; nor practiſe Phyſick, nor uſe or " exerciſe the Trade or Art of an Apothecary; nor ſhall be Judge, Miniſter, Clerk or Steward of or in any Court, or keep any Court; nor ſhall " be Regiſter or Town-Clerk, or other Miniſter or Officer in any Court; " nor ſhall bear any Office or Charge as Captain, Lieutenant, Corporal, " Serjeant, Antient Bearer, or other Office in Camp, Troop, Band or " Company of Soldiers; nor ſhall be Captain, Maſter, Governor, or bear " any Office or Charge of or in any Ship, Caſtle or Fortreſs of the King's " Majeſty's, his Heirs and Succeſſors, but be utterly diſabled for the ſame; " and every Perſon offending herein ſhall alſo forfeit for every ſuch Offence " 100*l.* the one Moiety whereof ſhall be to the King's Majeſty, his Heirs " and Succeſſors, and the other Moiety to him that will ſue for the ſame by " Action of Debt, Bill, Plaint or Information, in any of the King's Ma- " jeſty's Courts of Record; wherein no Eſſoin, Protection, or Wager of " Law ſhall be admitted or allowed.

And by *Sect.* 9. of the ſaid Statute it is farther enacted, " That no " Popiſh Recuſant convict, nor any having a Wife being a Popiſh Re- " cuſant convict, ſhall exerciſe any Public Office or Charge in the " Commonweath, but ſhall be utterly diſabled to exerciſe the ſame by " himſelf or by his Deputy, (except ſuch Huſband himſelf and his

" Children

" * Children which ſhall be above the Age of nine Years abiding with him, *Page 782
" and his Servants in Houſhold, ſhall once every Month at the leaſt, not
" having any reaſonable Excuſe to the contrary, repair to ſome Church
" or Chapel uſual for Divine Service, and there hear Divine Service; and
" the ſaid Huſband, and ſuch his Children and Servants as are of meet Age,
" receive the Sacrament of the Lord's Supper at ſuch Times as are limited
" by the Laws of this Realm, and do bring up his ſaid Children in true
" Religion †.)"

† Perſons in Office are to take the *Teſt*, in ſix Months, by 16 Geo. 2. c. 30. ſ. 3.—And by 20 Geo. 2. c. 52. ſ. 56. Convictions of Recuſants are excepted out of General Pardon.

On theſe Sections it hath been obſerved, 1ſt, That the latter extends to all Public Offices and Charges in general, whereas the former extends only to thoſe which are particularly enumerated. 2*dly*, That this latter expreſly diſables a Popiſh Recuſant to exerciſe ſuch an Office by himſelf or his Deputy, but the other ſays nothing at all of the Exerciſe of an Office by a Deputy. Hawk. P. C. 24.

3. *Of claiming any Part of a Huſband's Perſonal Eſtate.*

By the 3 *Jac.* 1 *cap.* 5. *ſect.* 10. it is enacted, " That every Woman
" being a Popiſh Reſcuſant convict, (her Huſband not ſtanding convicted
" of Popiſh Recuſancy) which ſhall not conform herſelf and remain con-
" formed, but ſhall forbear to repair to ſome Church or uſual Place of Com-
" mon Prayer, and there hear Divine Service and Sermon, if any then be,
" and receive the Sacrament of the Lord's Supper, according to the Laws
" of this Realm, by the Space of one whole Year next before the Death
" of her ſaid Huſband, ſhall not only be diſabled to be Executrix or Ad-
" miniſtratrix of her ſaid Huſband, but alſo to have or demand any Part
" of her ſaid Huſband's Goods or Chattles by any Law, Cuſtom or Uſage
" whatſoever;" and by 3 *Jac.* 1. *cap.* 5. *ſect.* 13. every Woman is put under the like Diſability, being a Popiſh Recuſant, who ſhall be married otherwiſe than according to the Church of *England*.

4. *Of claiming an Eſtate by Curteſy, or by Way of Dower, after a Marriage againſt Law.*

By the 3 *Jac.* 1 *cap.* 5. *ſect.* 13. it is enacted, " That every Man, who,
" being a Popiſh Recuſant convict, ſhall be married otherwiſe than in ſome
" open Church or Chapel, and otherwiſe than according to the Orders of
" the Church of *England*, by a Miniſter lawfully authoriſed, ſhall be diſ-
" abled to have any Eſtate as Tenant by the Curteſy; and that every
" Woman, being a Popiſh Recuſant convict, who ſhall be married in
" other Form than as aforeſaid, ſhall be diſabled to claim her Dower, or
" Jointure, or Widow's Eſtate.

2. Of the Reſtraints they are put under: And herein,

1. *From going five Miles from Home.*

To this Purpoſe it is enacted by 35 *Eliz. cap.* 2. and 3 *Jac.* 1. *cap.* 5. *ſect.* 6, 7. " That every Popiſh Recuſant convict ſhall repair to his
" Place of Dwelling, *&c.* and not remove above five Miles from thence,
" unleſs he be urged by Proceſs, *&c.* or have a Licence from the Privy
" Council, *&c.* or under the Hands and Seals of four Juſtices of the Peace,
" with the Aſſent in Writing of the Lieutenant of the County, or of the
" Biſhop,

" Biſhop, &c. (every Licence of which Kind by Juſtices of Peace muſt " expreſs both the particular Cauſe and the Time for which it was given,
*Page 783 " * and ought not to be granted without a previous Oath of ſome reaſonable " Cauſe,) under Pain of forfeiting all his Goods and Hereditaments, whe- " ther Freehold or Copyhold,) for his Life, or of abjuring the Realm, if " he be not worth twenty Marks a Year, or forty Pounds in Goods, unleſs " he recant before Conviction, and alſo continue conformable."

Hawk. P. C. 25. In the Conſtruction hereof it hath been holden, that the Privy Council may grant ſuch Licence without any ſuch ſpecial Cauſe or Oath, &c. but that Juſtices of Peace cannot. Alſo it hath been holden, that in pleading a Licence of Juſtices of Peace, it muſt be expreſly ſhewn that it was made under their Hands and Seals; alſo the Cauſe in particular or which it was granted muſt be ſet forth, and the Time for which it was limited, and that the Party was ſworn to the Truth of ſuch Cauſe.

Cro. Jac. 352. Rol. Rep. 108. Moor 836.

Hawk. P.C. 25. It is ſaid, that if the ſame Perſon be both a Juſtice of Peace, and a Lieutenant, he cannot both join in a Licence as Juſtice of Peace, and alſo give his Aſſent as Lieutenant, but can only act in one Capacity.

Crawley 130. Cro. Eliz. 212. It ſeems, that the Miles ſhall be computed according to the *Engliſh* Manner, allowing 5280 Feet, or 1760 Yards, to each Mile; and that the ſame ſhall be reckoned not by ſtrait Lines, as a Bird or Arrow may fly, but according to the neareſt and moſt uſual Way.

2. *From coming to Court.*

By the 3 *Jac.* 1. *cap.* 5. *ſect.* 2. it is enacted, " That no Popiſh Recuſant convict ſhall come into the Court or Houſe where the King or his " Heir apparent ſhall be, unleſs he be commanded ſo to do by the King, " upon Pain of 100 *l.* And it is further enacted by 3 *Car.* 2 *Stat.* 2. " *ſect.* 5 & 6. that every Popiſh Recuſant convict, who ſhall come ad- " viſedly into or remain in the Preſence of the King or Queen, or ſhall " come into the Court or Houſe where they or any of them reſide, ſhall be " diſabled to hold or execute any Office or Place of Truſt Civil or Mili- " tary, or to ſue in Law or Equity, or to be an Executor, &c. or capable " of any Legacy or Deed of Gift, and ſhall forfeit for every Offence 500 *l.* " unleſs ſuch Perſon do, within the Term next after ſuch his Coming or " Remaining, take the Oaths of Allegiance and Supremacy, and make the " Declaration againſt Tranſubſtantiation and the Invocation of Saints, &c. " in the Court of Chancery.

3. *From keeping Arms.*

By the 3. *Jac.* 1. *cap.* 5. *ſect.* 27, 28, 29. it is enacted, " That all ſuch " Armour, Gun-powder and Munition of whatſoever Kinds, as any " Popiſh Recuſant convict ſhall have in his own Houſe, or elſewhere, or " in the Poſſeſſion of any other, at his Diſpoſition, ſhall be taken from " him by Warrant of four Juſtices of Peace at their General or Quar- " ter Seſſions, (except ſuch neceſſary Weapons as ſhall be allowed him by " the ſaid four Juſtices for the Defence of his Perſon o Houſe) and that " the ſaid Armour, &c. ſo taken, ſhall be kept at the Coſts of ſuch Re- " cuſants in ſuch Place as the ſaid four Juſtices at their ſaid Seſſions ſhall " appoint; and that if any ſuch Recuſant, having ſuch Armour, &c. or " if any other Perſon who ſhall have any ſuch Armour, &c. to the Uſe " of ſuch Recuſant, ſhall refuſe to diſcover to the ſaid Juſtices, or any " of them, what Armour he hath, or ſhall let or hinder the Delivery " thereof to any of the ſaid Juſtices, or to any other Perſon authoriſed

" by

" by their Warrant to take the ſame; that then every Perſon ſo offend-
" ing ſhall forfeit his ſaid Armour, &c. and alſo be impriſoned for three * Page 784
" Months without Bail, by Warrant from any Juſtice of Peace of ſuch
" County; and it is further enacted, that notwithſtanding the taking away
" ſuch Armour, &c. yet ſuch Recuſant ſhall be charged with the Main-
" taining of the ſame, and with the Providing of a Horſe, &c. in ſuch Sort
" as others of his Majeſty's Subjects."

4. *From coming within ten Miles of* London.

By the 3 *Jac.* 1. *cap.* 5. *ſect.* 4, 5. it is enacted, " That no Popiſh Re-
" cuſant, &c. ſhall remain within the Compaſs of ten Miles of *London*,
" under Pain of 100 *l.* except ſuch Perſons as at the Time of the ſaid Act
" did uſe ſome Trade, Myſtery or manual Occupation in *London*, &c. and
" ſuch as ſhall have their only Dwelling in *London*, &c."

3. Of the Forfeitures they are liable to: And herein,

1. *That of two Parts of a Jointure or Dower.*

By the 3 *Jac.* 1. *cap.* 5. *ſect.* 10. it is enacted, " That every married
" Woman, being a Popiſh Recuſant convict, (her Huſband not ſtanding
" convicted of Popiſh Recuſancy,) who ſhall not conform herſelf and re-
" main conformed, but ſhall forbear to repair to ſome Church or uſual
" Place of Common Prayer, and there to hear Divine Service and Ser-
" mon, if any then be, and receive the Sacrament of the Lord's Supper,
" according to the Laws of this Realm, within one Year next before the
" Death of her ſaid Huſband, ſhall forfeit to the King the Profits of two
" Parts of her Jointure and Dower of any Hereditaments of her ſaid Huſ-
" band, &c.

2. *That of* 20 l. *for not receiving the Sacrament yearly after Conformity.*

By the 3 *Jac.* 1. *cap.* 5. *ſect.* 1, 2, 3. it is enacted, " That if any Po-
" piſh Recuſant convict who hath conformed himſelf to the Church, &c.
" ſhall not receive the Sacrament in his own Pariſh-Church, &c. within
" one Year after his Conformity, he ſhall forfeit 20 *l.* and for the ſecond
" Year 40 *l.* and for every Year after 60 *l.* &c.

3. *That of* 100 l. *for an unlawful Marriage.*

By the 3 *Jac.* 1. *cap.* 5. *ſect.* 13. it is enacted, " That every Popiſh
" Recuſant convict, who ſhall be married to a Woman who is no Inhe-
" ritrix, otherwiſe than according to the Church of *England*, ſhall forfeit
" 100 *l.*

4. *That of* 100 l. *for an Omiſſion of lawful Baptiſm.*

By the 3 *Jac.* 1. *cap.* 5. *ſect.* 14. it is enacted, " That every Popiſh Re-
" cuſant ſhall, within one Month after the Birth of his Child, cauſe the
" ſame to be baptized by a lawful Miniſter according to the Laws of this
" Realm, in the open Church of the ſame Pariſh where the Child

" ſhall

*Page 785 " ſhall be born, or in ſome other Church near adjoining, or Chapel where " Baptiſm is uſually adminiſtered; or if by Infirmity of the Child it cannot " be brought to ſuch Place, then the ſame ſhall within the Time aforeſaid " be baptized by the lawful Miniſter of any of the ſaid Pariſhes or Places " aforeſaid; upon Pain that the Father of ſuch Child, if he be living, by " the Space of one Month next after the Birth of ſuch Child, or if he be " dead, within the ſaid Month, then the Mother of ſuch Child ſhall for " every ſuch Offence forfeit 100 *l.* *&c.*

5. *That of* 20 l. *for an unlawful Burial.*

By the 5 *Jac.* 1. *cap.* 5. *ſect.* 15. it is enacted, " That if any Popiſh " Recuſant, not being excommunicate, ſhall be buried in any other Place " than in the Church or Church-yard, or not according to the Laws of " this Realm, the Executors, *&c.* of ſuch Recuſant knowing the ſame, or " the Party that cauſeth him to be ſo buried, ſhall forfeit 20 *l.* *&c.*

4. Of the Inconveniencies they are ſubject to: And herein,

1. *That their Houſes may be ſearched for Reliques, whether they be Men or Women.*

To this Purpoſe it is enacted by the 3 *Jac.* 1. *cap.* 5. *ſect.* 26. " That " any two Juſtices of Peace, and all Mayors, Bailiffs and Chief Officers of " Cities and Towns Corporate in their reſpective Juriſdictions, may ſearch " the Houſe and Lodgings of every Popiſh Recuſant convict for Popiſh " Books and Reliques, and that if any Altar, Pix, Beads, Pictures, or " ſuch like Popiſh Relique, or any Popiſh Book be found in the Cuſtody " of ſuch Perſon, as in the Opinion of the ſaid Juſtices, *&c.* ſhall be un- " meet for him or her to have or uſe, it ſhall be defaced and burnt, if it be " meet to be burnt; and if it be a Crucifix, or other Relique of any Price, " the ſame ſhall be defaced at the General Quarter-Seſſions in the County " where it ſhall be found, and then reſtored to the Owner.

2. *If they be Women, and married, that they may be committed.*

To this Purpoſe it is enacted by the 7 *Jac.* 1. *cap.* 6. *ſect.* 28. " That if " any married Woman, being a Popiſh Recuſant convict, ſhall not within " three Months after her Conviction conform herſelf, and repair to Church " and receive the Sacrament, *&c.* ſhe may be committed to Priſon by one " of the Privy Council, or by the Biſhop, if ſhe be a Baroneſs; or if " under that Degree, by Juſtices of Peace, whereof one to be of the *Quo-* " *rum*, there to remain till ſhe perform, *&c.* unleſs the Huſband will " pay to the King ten Pounds a Month for her Offence, or elſe the third " Part of all his Lands, *&c.* at the Choice of the Huſband, *&c.*"

* (B) Of the Offence of not making a Declaration againſt Popery, and the Reſtraints it ſubjects them to: And herein,

* Page 789

1. From ſitting in Parliament.

BY the 30 *Car.* 2. *ſtat.* 2. *cap.* 1. it is enacted, "That no Peer ſhall "vote or make his Proxy in the Houſe of Peers, or ſit there during "any Debate; and that no Member of the Houſe of Commons ſhall vote "or ſit there during any Debate after the Speaker is choſen, until ſuch "Peer or Member ſhall take the Oaths of Allegiance and Supremacy, and "make a Declaration of his Belief that there is no Tranſubſtantiation in "the Sacrament of the Lord's Supper, and that the Invocation or Adora-"tion of the Virgin *Mary*, or any other Saint, and the Sacrifice of the "Maſs, as they are now uſed in the Church of *Rome*, are ſuperſtitious and "idolatrous, &c. on Pain that every ſuch Offender ſhall be adjudged a "Popiſh Recuſant convict, and diſabled to hold or execute any Office, &c. "or from thenceforth to ſit or vote in either Houſe of Parliament, to ſue "in Law or Equity, or to be Guardian, Executor or Adminiſtrator, or "capable of any Legacy or Deed of Gift, and ſhall forfeit for every Of-"fence 500 *l.*"

2. Holding a Place at Court.

By the 30 *Car.* 2. *ſtat.* 2. *ſect.* 9, 12, 13. it is enacted, "That every "Perſon who ſhall be a ſworn Servant to the King ſhall take the ſaid Oaths, "and ſubſcribe the ſaid Declaration in Chancery the next Term after he "ſhall be ſo ſworn a Servant, &c. and that if any ſuch Perſon neglecting "ſo to do ſhall adviſedly come into or remain in the Preſence of the King "or Queen, or ſhall come into the Court or Houſe where they are, or any "of them reſide, he ſhall ſuffer all the Penalties expreſſed in the foregoing "Section; unleſs ſuch Perſon coming into the King's Preſence, &c. ſhall "firſt have Licence ſo to do by Warrant under the Hands and Seals of ſix "Privy Counſellors, by Order of the Privy Council, upon ſome urgent "Occaſion therein to be expreſſed; which Licence ſhall not exceed ten "Days, and ſhall be firſt filed, &c. in the Petty-Bag Office for any Body "to view without Fee, &c. and no Perſon to be licenſed for above thirty "Days in one Year."

3. From living within ten Miles of *London*.

By the 1 *W. & M. cap.* 9. it is enacted, "That every Juſtice of Peace "in *London* and *Weſtminſter*, and within ten Miles thereof, ſhall cauſe to "be arreſted and brought before him all reputed Papiſts, (except Foreign-"ers, being Merchants or menial Servants to ſome Ambaſſador or Public "Agent, and except all ſuch as uſed ſome Trade, Myſtery, or ſome "Manual Occupation at the Time of the ſaid Act, in *London*, &c. and "alſo except all ſuch Perſons as had their Dwelling in *London*, &c. within "ſix Months before the thirteenth of *February*, 1688. and no Dwelling "elſewhere, and certified their Names to the Seſſions before the firſt of "*Auguſt* 1689.) and that every ſuch Juſtice ſhall tender the ſaid Declara-"tion to every ſuch Perſon; and that every ſuch Perſon refuſing the ſame, "and afterwards remaining in *London*, &c. or within ten Miles thereof, on

"being

*Page 787 " * being certified to the King's Bench or Quarter-Seſſions at the next Term " or Seſſions as having refuſed to make the ſaid Declaration, and neglecting " to make the ſame in ſuch Court, ſhall ſuffer as a Popiſh Recuſant con- " vict, &c."

4. From keeping Arms.

By the 1 *W. & M. cap.* 15. it is enacted, " That any two Juſtices of " Peace may and ought to tender the ſaid Declaration to any Perſon whom " they ſhall know or ſuſpect, or have Information of as being a Papiſt, or " ſuſpected to be ſuch; and that no ſuch Perſon ſo required, and not " making and ſubſcribing the ſaid Declaration, or not appearing before the " ſaid Juſtices upon Notice to him given or left at his uſual Abode, by one " authoriſed by Warrant under the Hands and Seals of the ſaid Juſtices, " ſhall keep any Arms or Ammunition or Horſe above the Value of 5 *l.* in " his own Poſſeſſion, or in the Poſſeſſion of any other Perſon to his Uſe, " (other than ſuch neceſſary Weapons as ſhall be allowed him by the " Quarter-Seſſions for the Defence of his Houſe or Perſon,) and that any " two Juſtices of Peace, by Warrant under their Hands and Seals, may " authoriſe any Perſons in the Day-time, with the Aſſiſtance of the Con- " ſtable or his Deputy, or Tithingman, to ſearch for all ſuch Arms, &c. " and Horſes, and ſeiſe them to the King's Uſe, and that the ſaid Juſtices " ſhall deliver the ſaid Arms and Ammunition at the next Quarter-Seſſions " in open Court, and that whoever ſhall conceal, &c. or ſhall be aiding " to the Concealing any ſuch Arms or Horſes, ſhall be committed to the " common Gaol by Warrant under the Hands and Seals of any two Juſtices " of Peace, and alſo forfeit treble the Value; and that thoſe who diſcover " any ſuch Arms or Ammunition, ſo as the ſame may be ſeized, ſhall " have the full Value thereof, to be awarded to them by the Seſſions, &c. " and that ſuch Refuſers of the ſaid Declaration, &c. ſhall be diſcharged " whenever they make the ſame."

(C) Of the Offence in Promoting or Profeſſing the Popiſh Religion: And herein,

1. Of the Offence of ſaying or hearing Maſs or other Popiſh Service.

BY the 23 *Eliz. cap.* 1. *ſect.* 4. it is enacted, " That every Perſon who " ſhall ſay or ſing Maſs, being thereof lawfully convict, ſhall forfeit " two hundred Marks, and be committed to Priſon in the next Gaol, there " to remain by the Space of one Year, and from thenceforth till he have " paid the ſaid Sum of two hundred Marks; and that every Perſon who " ſhall willingly hear Maſs ſhall forfeit the Sum of one hundred Marks, " and ſuffer a Year's Impriſonment.

2 Show. 216. pl. 220.

Alſo it is enacted by the 11 & 12 *W.* 3. *cap.* 4. " That every Perſon " who ſhall apprehend any Popiſh Biſhop, Prieſt or Jeſuit, and proſecute " him to Conviction for ſaying Maſs, or exerciſing any other Part of the " Function of a Popiſh Biſhop or Prieſt, ſhall receive 120 *l.* of the Sheriff; " and that every ſuch Popiſh Biſhop, &c. (except, being a Foreigner, he " be entered in the Secretary's Office, and officiate only in the Houſe of a " Foreign Miniſter,) ſhall be adjudged to perpetual Impriſonment."

2. Of

*2. Of giving or receiving Popiſh Education. *Page 788

To this Purpoſe there are ſeveral Statutes, and firſt by the 1 *Jac.* 1. *cap.* 4. *ſect.* 6, 7. it is enacted, "That if any Perſon or Perſons under "the King's Obedience ſhall go or ſend, or cauſe to be ſent any Child, "or any other Perſon under their or any of their Government, beyond the "Seas out of the King's Obedience to the Intent to enter into, or reſide "in, or repair to any College, &c. of any Popiſh Order, Profeſſion or "Calling, to be inſtructed, perſwaded or ſtrengthened in the Popiſh Re-"ligion, or in any Sort to profeſs the ſame; every ſuch Perſon ſo ſending "ſuch Child, &c. ſhall forfeit 100 *l.* and every ſuch Perſon ſo paſſing or "being ſent, &c. ſhall in reſpect of him or herſelf only, and not in reſpect "of any of his Heirs or Poſterity, be diſabled to inherit, purchaſe, take, "have or enjoy any Profits, Hereditaments, Chattels, Debts, Legacies, "or Sums of Money, &c. whatſoever; and that all Eſtates, Terms and "other Intereſts whatſoever to be made, ſuffered or done, to the Uſe or "Behoof of any ſuch Perſon, or upon any Truſt or Confidence mediately "or immediately to or for the Benefit or Relief of any ſuch Perſon, ſhall "be utterly void.

And it is farther enacted by 3 *Jac.* 1. *cap.* 5. *ſect.* 16. "That if the Keb. 263. "Children of any Subject within the Realm, (the ſaid Children not being "Soldiers, Mariners, Merchants or their Apprentices, or Factors,) ſhall be "ſent or go beyond Sea to prevent their good Education in *England*, or for "any other Cauſe, without the Licence of the King or ſix of his Privy "Council, (whereof the Principal Secretary to be one,) under their Hands "and Seals; that then every ſuch Child ſhall take no Benefit by any Gift, "Conveyance, Deſcent, Deviſe or otherwiſe, of or to any Hereditament "or Chattel, 'till ſuch Child being of the Age of eighteen Years, or above, "take the Oath of Obedience before ſome Juſtice of Peace of the Coun-"ty, Liberty, Limit, where the Parent of ſuch Child did and ſhall inha-"bit; and that in the mean Time the next of Kin to ſuch Child, who ſhall "be no Popiſh Recuſant, ſhall have the ſaid Hereditaments, &c. ſo given, "&c. until ſuch Child ſhall conform, &c. and take the ſaid Oath and "receive the Sacrament; and after ſuch Conformity, &c. he who hath "received the Profits of the ſaid Hereditaments, ſhall account for the "ſame, and in reaſonable Time make Payment thereof, and reſtore the "Value of the ſaid Goods, &c. and that whoever ſhall ſend ſuch Child "over Seas, ſhall forfeit 100 *l.* which by 11 & 12 *W.* 3. *cap.* 4. *ſect.* 6. "ſhall be to the ſole Uſe and Benefit of the Perſon who ſhall diſcover the "Offence.

Alſo it is enacted by 3 *Car.* 1. *cap.* 2. "That if any Perſon under the "Obedience of the King ſhall go, or ſhall convey or ſend, or cauſe to "be ſent or conveyed, any Perſon out of the King's Dominions into any "Parts beyond the Seas, out of the King's Obedience, to the Intent to "enter into or be reſident, or trained up in any Priory, Abbey, Nun-"nery, Popiſh Univerſity, College or School, or Houſe of Jeſuits, Prieſts, "or in a private Popiſh Family, and ſhall be there by any Popiſh Perſon "inſtructed, perſwaded or ſtrengthened in the Popiſh Religion, in any "Sort to profeſs the ſame; or ſhall convey or ſend, or cauſe to be conveyed "or ſent, any Thing towards the Maintenance of any Perſon ſo going or "ſent, and trained and inſtructed as is aforeſaid, or under the Colour of "any Charity towards the Relief of any Priory, &c. or religious Houſe "whatſoever; every Perſon ſo ſending, &c. any ſuch Perſon or Thing, "and every Perſon paſſing or ſent, being thereof convicted, &c. ſhall "be diſabled to proſecute any Suit in Law or Equity, or to be Executor "or Adminiſtrator to any Perſon, or capable of any Legacy or Deed of "Gift,

Page 789 " Gift, or to bear any Office within the Realm; and ſhall forfeit all his "Goods and Chattels, and ſhall forfeit all his Hereditaments, Offices and "Eſtates of Freehold, during his Life."

Hob. 73, 74. Ley 59. *Tredway's* Caſe.

In the Conſtruction of the 3 *Jac.* 1. *cap.* 5. it hath been holden, that if *E. T.* being the King's Ward of Lands holden of the King by Knights Service in Chief, die the King's Ward, and it is found that *A.* & *B.* are his Siſters and Heirs, both of full Age, and that *A.* in the Life-time of her Brother departed this Realm contrary to this Statute, and is a Nun profeſſed; the King may retain *A.*'s Moiety in his own Hands till ſhe, according to the 1 *Eliz. cap.* 1. take the Oath of Supremacy † required on ſuing out Livery; for the Words of the Statute 3 *Jac.* 1. *cap.* 5. are, *ſhall take no Benefit by Deſcent, &c.* not that the Party ſhould not take by Deſcent; and therefore the Eſtate does not veſt abſolutely in *B.* the Siſter and next Heir, but her Right is to the Rents and Profits during the Non-conformity of her Siſter, for which in Caſe of Common Lands ſhe might enter; but in this Caſe the King is intereſted, and is not obliged to give Livery to the Heir, till ſuch Time as the Oath of Supremacy be taken.

† *Vide* 5 Eliz. c. 1. ſ. 19. & 27 Eliz. c. 12.

Hob. 74. *per Hobart.*

So if ſuch an Heir, being beyond Sea, ſhould bargain and ſell his Lands to a Stranger, the Bargain in ſuch Caſe will prevent the next of Kin, and the Bargainee may take the Lands out of the Hands of the next of Kin, in caſe he had entered; for the Eſtate never veſted abſolutely in ſuch next of Kin; but in ſuch Caſe the King may refuſe to give Livery ſued out on ſuch Bargain in the Name of the Heir, except the Heir himſelf appears and takes the Oath of Supremacy in his proper Perſon.

Hill. 12 Ann. in C. B. and affirmed in the Houſe of Lords; *Thornby* ver. *Fleetwood, alias* the Dutcheſs of *Hamilton*'s Caſe. Stra. 318. Comyns 207. pl. 124. Andr. 104. 10 Mod. 113.

C. Lord *Gerard* in the Year 1660. ſettled the Eſtate in Queſtion to the Uſe of himſelf and the Heirs Male of his Body, Remainder to the Heirs Male of the Body of *Thomas* firſt Lord *Gerard*, Remainder to his own right Heirs; *Charles* Lord *Gerard*, upon the Death of *Digby* Lord *Gerard* (only Son of the ſaid *C.*) without Iſſue Male, entered, claiming the Eſtate as Heir Male of the Body of *Thomas* firſt Lord *Gerard*, by Virtue of the ſaid Limitation in the Settlement; and by Virtue of this Title enjoyed that Eſtate above twenty-two Years, and during the Time of his Enjoyment ſuffered ſeveral Recoveries, and ſettled the Eſtate upon his Marriage in 1689 and died without Iſſue in the Year 1707. leaving *Philip* his only Brother then ſurviving, who was Heir Male of the Body of *Thomas* firſt Lord *Gerard*; upon the Death of Lord *Charles*, the Dutcheſs of *Hamilton* claimed the Eſtate as right Heir of *C.* Lord *Gerard*, notwithſtanding the Eſtate-tail limited to the Heirs Male of the Body of *Thomas* Lord *Gerard* ſubſiſted in *Philip*, alledging, that Lord *Charles* and his Brother *Philip*, being ſent abroad and educated in a Popiſh Seminary, were made ſo utterly incapable of taking any Eſtate, that ſhe had the Right of Entry in her. It was inſiſted for her, that the 1 *Jac.* 1. *cap.* 4. *ſect.* 6. had ſo far diſabled Lord *Charles* to take the Eſtate by Deſcent that the Recovery ſuffered by him was void, and that the ſame Diſability being ſtill upon *Philip*, and there being no Perſon in Being who could take the Eſtate-tail, the Dutcheſs as Heir at Law muſt be intitled to take at preſent, as if the Eſtate were actually ſpent. But it was reſolved, that the Words of the Act being, that the Offender ſhall be diſabled as in reſpect of himſelf only, and not in reſpect of any of his Heirs or Poſterity, to inherit, purchaſe, *&c.* this qualifies and reſtrains the Diſability; ſo that the Act does not extend beyond the Perſon offending, nor beyond the Time of his Non conformity; ſo that the Act hath preſerved in the Offender an Ability to inherit, *&c.* for the Benefit of Poſterity; and this Act having made no Application of the Profits during the Diſability, and this being a Penalty inflicted for a Public Offence, the King is intitled to the Penalty; and to create in the Offender a total Diſability would be very inconvenient; for in the Caſe of an Inheritance, it would be difficult to know when or in what Manner the Heir ſhould take; it could not be in the Life of the Anceſtor,

for

for no Man can be Heir of a * Perſon living; and if there be a Son under no Diſability who cannot take, it would be merely by Conſtruction to carry the Eſtate over his Head for the Benefit of a Remainder-Man, who was not intended to take as long as there was any Iſſue of a prior Tenant in Tail; and an Heir can entitle himſelf only through his Anceſtors, and ſuch as are inheritable; that this is not like the Caſe of a Monk, for in Times of Popery he was civilly dead; the 3 *Jac.* 1. *cap.* 5. gives the Pernancy of the Profits in Caſes of Diſabilities to the next of Kin, that is not a Popiſh Recuſant; and *R. Orw.* was the next Proteſtant of Kin; the 3 *Car.* 1. *cap.* 2. does not repeal the 1 *Jac.* 1. *cap.* 4. but was made to explain, amend and inforce it; the 1 *Jac.* 1. *cap.* 4. was ſilent how the Penalties of that Act were to ariſe; the 3 *Car.* 1. *cap.* 2. has provided, that it ſhall be upon Conviction, and expreſly makes a Forfeiture for Life, and a Reſtitution in Caſe of Conformity, in which the former Act was ſilent; ſo that if the former Act were to be put in Execution, under the Explanation of 3 *Car.* 1. *cap.* 2. there being no Conviction in the Caſe, the Ducheſs could have no Title, but the Land on Conviction would be forfeited for Life, which muſt be to the King.

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3. Of buying or ſelling Popiſh Books.

By the 3 *Jac.* 1. *cap.* 5. *ſect.* 25. it is enacted, "That no Perſon ſhall "bring from beyond the Seas, nor ſhall print, buy or ſell any Popiſh Pri- "mers, Ladies Pſalters, Manuals, Roſaries, Popiſh Catechiſms, Miſſals, "Breviaries, Portals, Legends and Lives of Saints, containing ſuperſtitious "Matter, printed or written in any Language whatſoever, nor any other "ſuperſtitious Books printed or written in the *Engliſh* Tongue, on Pain of "forfeiting forty Shillings for every Book, *&c.* and the Books to be burnt."

4. Of keeping School.

By 11 & 12 *W.* 3. *cap.* 4. *ſect.* 3. it is enacted, "That if any Pa- "piſt, or Perſon making Profeſſion of the Popiſh Religion, ſhall be con- "vict of keeping School, or taking upon themſelves the Education or "Government, or Boarding of Youth, in any Place within the Realm or "the Dominions thereunto belonging, they ſhall be adjudged to perpetual "Impriſonment."

5. Of with-holding a competent Maintenance from a Proteſtant Child.

By the 11 & 12 *W.* 3. *cap.* 4. it it is enacted, "That if any Popiſh Pa- "rent, in order to compel a Proteſtant Child to a Change of Religion, ſhall "refuſe to allow ſuch Child a ſufficient Maintenance, ſuitable to the "Degree and Ability of ſuch Parent, and to the Age and Education of "ſuch Child, the Lord Chancellor upon Complaint may make ſuch Order "therein as ſhall be agreeable to the Intent of the ſaid Act."

6. Of the Diſability of thoſe profeſſing the Popiſh Religion to preſent to a Church.

By the 3 *Jac.* 1. *cap.* 5. *ſect.* 18, 19, 20, 21. Popiſh Recuſants convict are diſabled to preſent to a Church; and by the 1 *W.* & *M. cap.* 26. this Diſability is extended to Perſons refuſing to make the Declaration againſt

Precedents of a Title made under theſe Statutes, 2 Lutw. 1101. & *vide* 3 Lev. 332. Lutw. 1117.

*Page 791 * againſt Popery, mentioned in 30 *Car.* 2. *ſtat.* 2. and by the ſaid Statute 1 *W.* & *M. cap.* 26. *ſect.* 4. it is enacted, "That if the Truſtee, Mortgagee or Grantee of any Avoidance, whereof the Truſt ſhall be for any "Popiſh Recuſant convict, ſhall preſent without giving Notice in Writing "of the Avoidance to the Univerſity, &c. within three Months after the "Avoidence, he forfeits 500*l.*

And by the 12 *Ann. cap.* 14. this Diſability is extended to all Perſons making Profeſſion of the Popiſh Religion, to which Purpoſe it is enacted, "That every Papiſt or Perſon making Profeſſion of the Popiſh Religion, "&c. and every Mortgagee, Truſtee or Perſon any Ways intruſted by or "for ſuch Papiſt, &c. with or without Writing, ſhall be diſabled to preſent "to any Benefice, School or Hoſpital, &c. or to grant any Avoidance of "any Benefice, Prebend or Eccleſiaſtical Living, and that in all ſuch "Caſes the Univerſities ſhall preſent.

Alſo by Force of the ſaid Statute, "The Ordinary may tender the "Declaration againſt Tranſubſtantiation to any reputed Papiſt making a "Preſentation, and upon a Refuſal to take the ſame the Preſentation ſhall "be void; alſo the Ordinary may examine every Preſentee upon Oath, "whether the Perſon who preſented him be the true Patron, or only a "Truſtee; and the Court, wherein a *Quare impedit* ſhall be brought, "may in like Manner examine the Parties, and a Bill may be brought in any "Court of Equity to diſcover ſuch ſecret Truſts, &c. and the Anſwer of "ſuch Perſons, upon any ſuch Examination or Bill, ſhall be good Evidence "againſt ſuch Patron, in reſpect of ſuch a Preſentation, but not as to any "other Purpoſe."

Hawk. P. C. 32. In the Conſtruction of the 3 *Jac.* 1. *cap.* 5. the following Points, which are ſaid to be likewiſe applicable to the 1 *W.* & *M. cap.* 26. and 12 *Ann. cap.* 14. have been holden.

10 Co. 57. b. That where a Preſentment is *pro hac vice* veſted in the Univerſity, by reaſon of the Patron's being a Popiſh Recuſant at the Time when the Church became void, it ſhall not be deveſted again by his Conforming himſelf to the Church.

Cawley 230. That ſuch a Patron is only diſabled to preſent, and that he continues Patron as to all other Purpoſes, and therefore that he ſhall confirm the Leaſes of the Incumbent, &c.

Jon. 19, 20. That ſuch a Perſon, by being diſabled to grant an Avoidance, is no Way hindred from granting the Advowſon itſelf in Fee, or for Life or Years, *bona fide* and for good Conſideration.

Hob. 126. Winch 7, 11. Moor 372. Jon. 20. That if an Advowſon or Avoidance belonging to ſuch a Perſon come into the King's Hands by Reaſon of an Outlawry or Conviction of Recuſancy, &c. the King, and not the Univerſity, ſhall preſent.

On the Statute 12 *Ann. cap.* 14. it was reſolved by my Lord Chancellor *Talbot*, in the Caſe of Mr. *Brett*, who was preſented by the Univerſity of *Oxford* to a Living belonging to Mr. *Fitzherbert* of *Swinerton* in *Staffordſhire*, that a Bill founded on this Statute cannot be for Relief, but only for a Diſcovery.

By the 11 *Geo.* 2. *cap.* 17. reciting the 3 *Jac.* 1. *cap.* 5. and 1 *W.* & *M. cap.* 26. and that whereas for the better Diſcovery of all ſecret Truſts and fraudulent Conveyances made by Papiſts, or Perſons making Profeſſion of the Popiſh Religion, of their Advowſons and Right of Preſentation, Nomination and Donation to any Benefices or Eccleſiaſtical Livings, ſeveral Proviſions were made by the Act 12 *Ann. cap.* 14. which have been fraudulently evaded by Perſons obtaining from ſuch Papiſts, without a full and valuable Conſideration, Grants of ſuch Advowſons, and Right of Preſentation, Nomination and Donation, upon Confidence only that ſuch Grantees will, at the Requeſt of ſuch Papiſts, preſent to ſuch Benefices or Eccleſiaſtical Livings Clerks nominated by ſuch Papiſts, who have been preſented accordingly, contrary to the true Intent and Meaning of the ſaid Act, and to the

* the great Hurt of the Proteſtant Intereſt of this Kingdom; it is therefore * Page 792
enacted, "That every Grant to be made from and after the ſixth Day
"of *May* 1738, of any Advowſon or Right of Preſentation, Collation,
"Nomination or Donation of or to any Benefice, Prebend or Eccleſiaſti-
"cal Living, School, Hoſpital or Donative, and every Grant of any
"Avoidance thereof by any Papiſt, or Perſon making Profeſſion of the
"Popiſh Religion, or any Mortgagee, Truſtee, or Perſon any Ways in-
"truſted directly or indirectly, mediately or immediately, by or for any
"ſuch Papiſt, or Perſon making Profeſſion of the Popiſh Religion, whether
"ſuch Truſt be declared in Writing or not, ſhall be null and void; unleſs
"ſuch Grant ſhall be made *bona fide*, and for a full and valuable Conſi-
"deration to and for a Proteſtant Purchaſer, and merely and only for the
"Benefit of a Proteſtant; and that every ſuch Grantee, or Perſon claiming
"under any ſuch Grant, ſhall be deemed to be a Truſtee for a Papiſt, or
"Perſon profeſſing the Popiſh Religion, as aforeſaid, within the true Intent
"and Meaning of the ſaid Act; and that all ſuch Grantees, or Perſons
"claiming under ſuch Grants, and their Preſentees, ſhall be compelled to
"make ſuch Diſcovery relating to ſuch Grants and Preſentations made
"thereupon, and by ſuch Methods as in and by the ſaid Act 12 *Ann. cap.*
"14. are directed in the Caſe of Truſtees of Papiſts, or Perſons profeſſing
"the Popiſh Religion, and that every Deviſe to be made from and after
"the ſaid ſixth of *May* by any Papiſt, or Perſon profeſſing the Popiſh Re-
"ligion, of any ſuch Advowſon or Right of Preſentation, Collation, No-
"mination or Donation, or any ſuch Avoidance, with Intent to ſecure the
"Benefit thereof to the Heirs or Family of ſuch Papiſt or Perſon pro-
"feſſing the Popiſh Religion, ſhall be null and void, and that all ſuch
"Deviſees and their Preſentees ſhall in like Manner, and by ſuch Me-
"thods, be compelled to diſcover whether, to the beſt of their Knowledge
"and Belief, ſuch Deviſes were not made with the ſaid Intent."

7. Of their Diſability to purchaſe.

The Statutes relating to Eſtates conveyed by or to Papiſts, and the Diſ-
abilities they are under to take by Purchaſe, *&c.* are the 11 & 12 *W.* 3.
cap. 4. 3 *Geo.* 1. *cap.* 18. and 11 *Geo.* 2. *cap.* 17.

By the 11 & 12 *W.* 3. *cap.* 4. it is enacted, "That from and after the 11 & 12 W.
"29th Day of *September*, which ſhall be in the Year of our Lord 1700, 3. c. 4.
"if any Perſon educated in the Popiſh Religion, or profeſſing the ſame,
"ſhall not, within ſix Months after he or ſhe ſhall attain the Age of eigh-
"teen Years, take the Oaths of Allegiance and Supremacy, and alſo ſub-
"ſcribe the Declaration ſet down and expreſſed in an Act of Parlia-
"ment made 30 *Car.* 2. *ſtat.* 2. intitled, *An Act for the more effectual pre-*
"*ſerving the King's Perſon and Government, by diſabling Papiſts from ſitting*
"*in either Houſe of Parliament*, to be by him or her made, repeated or ſub-
"ſcribed in the Courts of Chancery or King's Bench, or Quarter-Seſſions
"of the County where ſuch Perſon ſhall reſide; every ſuch Perſon ſhall
"in reſpect of him or herſelf only, and not to or in reſpect of any
"of his or her Heirs or Poſterity, be diſabled or made incapable to in-
"herit or take by Deſcent, Deviſe or Limitation in Poſſeſſion, Reverſion
"or Remainder, any Lands, Tenements or Hereditaments within the
"Kingdom of *England*, Dominion of *Wales*, or Town of *Berwick* upon
"*Tweed*; and that during the Life of ſuch Perſon, or until he or ſhe do
"take the ſaid Oaths, and make, repeat and ſubſcribe the ſaid Decla-
"ration in Manner as aforeſaid, the next of his or her Kindred, which
"ſhall be a Proteſtant, ſhall have and enjoy the ſaid Lands, Tenements
"and Hereditaments, without being accountable for the Profits by him

*Page 793 "or her received during ſuch Enjoyment thereof, as aforeſaid; but in Caſe "of any wilful Waſte committed on the ſaid Lands, Tenements or Here- "ditaments, by the Perſon ſo having or enjoying the ſame, or any other, "by his or her Licence or Authority, the Party diſabled, his or her Exe- "cutors and Adminiſtrators, ſhall and may recover treble Damages for the "ſame againſt the Perſon committing ſuch Waſte, his or her Executors "or Adminiſtrators, by Action of Debt in any of his Majeſty's Courts of "Record at *Weſtminſter*; and that from and after the 10th Day of *April* "1700, every Papiſt, or Perſon making Profeſſion of the Popiſh Religion, "ſhall be diſabled and is hereby made incapable to purchaſe, either in his "or her own Name, or in the Name of any other Perſon or Perſons to his "or her Uſe, or in Truſt for him or her, any Manors, Lands, Profits out "of Lands, Tenements, Rents, Terms or Hereditaments, within the King- "dom of *England*, Dominion of *Wales* and Town of *Berwick* upon *Tweed*; "and that all and ſingular Eſtates, Terms, and any other Intereſts or Pro- "fits whatſoever out of Lands, from and after the ſaid 10th Day of *April*, "to be made, ſuffered or done, to or for the Uſe or Behoof of any ſuch Per- "ſon or Perſons, or upon any Truſt or Confidence mediately or immedi "ately, to or for the Benefit or Relief of any ſuch Perſon or Perſons, ſhall "be utterly void and of none Effect, to all Intents, Conſtructions and "Purpoſes whatſoever.

By the 3 *Geo.* 1. *cap.* 18. reciting, that ſome Doubts have ariſen upon the (*a*) Act therein recited, as alſo upon one other Act made and paſſed in the Parliament held in the 11 & 12 *W.* 3. *cap.* 4. intituled, "*An Act for the fur- "ther preventing the Growth of Popery*," and upon another Act made in the 1 *Jac.* 1. *cap.* 4. for the due Execution of the Statutes againſt Jeſuits, Semina- ry Prieſts, Recuſants, and other Acts made againſt Papiſts and Popiſh Re- cuſants touching the Sale of the Real Eſtates or Perſons profeſſing the Po- piſh Religion, or incurring the Diſabilities and Incapacities in the ſaid Acts mentioned, it is enacted, "That no Sale for a full and valuable Conſide- "ration of any Manors, Meſſuages, Lands, Tenements or Hereditaments, "or of any Intereſt therein by any Perſon or Perſons, being reputed Own- "er or Owners, or in the Poſſeſſion or Receipt of the Rents or Profits there- "of heretofore made, or hereafter to be made, to or for any Proteſtant Pur- "chaſer and Purchaſers, and merely and only for the Benefit of Proteſtants, "ſhall be avoided or impeached for or by Reaſon or upon Pretence of any "of the Diſabilities or Incapacities in the ſaid Acts or any of them con- "tained, incurred, or ſuppoſed to be incurred, by any of the Perſons mak- "ing or joining in ſuch Sale, or by any other Perſon or Perſons, from "or through whom the Title to ſuch Manors, &c. is or ſhall be derived, or "ſuppoſed to be derived, unleſs before ſuch Sale the Perſon intitled to "take Advantage of ſuch Diſability or Incapacity ſhall have recovered "ſuch Manors, Meſſuages, Lands, Tenements and Hereditaments, by "Reaſon of ſuch Diſability or Incapacity, and have entered ſuch Claim in "open Court at the General Seſſions of the Peace for the County, City, "Riding or Diviſion, wherein ſuch Manors, Meſſuages, Lands, Tenements "or Hereditaments lie or ariſe, and *bona fide*, and with due Diligence, pur- "ſued his Remedy in a proper Courſe of Juſtice for the Recovery thereof.

"Provided nevertheleſs, that whereas it was amongſt other Things en- "acted, by the ſaid 11 & 12 *W.* 3. *cap.* 4. that from and after the tenth Day "of *April*, which ſhould be in the Year 1700, every Papiſt, or Perſon "making Profeſſion of the Popiſh Religion, ſhould be diſabled, and was "thereby made incapable to purchaſe, either in his or her own Name, or "in the Name of any other Perſon or Perſons to his or her Uſe, or in Truſt "for him or her, any Manors, Lands, Profits out of Lands, Tenements, "Rents, Terms or Hereditaments, within the Kingdom of *England*, Do- "minion of *Wales* and Town of *Berwick* upon *Tweed*; and that all and "ſingular Eſtates, Terms, and any other Intereſts or Profits whatſoever "our

3 Geo. 1. c. 18.

(*a*) *Viz.* An Act paſt in the Seſſions before intituled, *An Act to oblige Papiſts to regiſter their Names and Real Eſtates.*

" * out of Lands, from and after the ſaid 10th Day of *April* to be made, * Page 794
" ſuffered or done, to or for the Uſe or Behoof of any ſuch Perſon or Per-
" ſons, or upon any Truſt or Confidence mediately or immediately to or
" for the Benefit or Relief of any ſuch Perſon or Perſons, ſhould be utter-
" ly void and of no Effect, to all Intents, Conſtructions and Purpoſes
" whatſoever: It is hereby declared and enacted, that the ſaid recited Part
" of the ſaid Act of Parliament ſhall not be hereby altered or repealed,
" but the ſame ſhall be and remain in full Force as if this Act had never
" been made.

And it is further enacted by the Authority aforeſaid, " That from and
" after the 29th of *September* 1717, no Manner of Lands, Tenements, He-
" reditaments, or any Intereſt therein, or Rent or Profit thereout, ſhall
" paſs, alter or change from any Papiſt, or Perſon profeſſing the Popiſh
" Religion, by any Deed or Will, except ſuch Deed within ſix Months
" after the Date, and ſuch Will within ſix Months after the Death of the
" Teſtator, be inrolled in one of the King's Courts of Record at *Weſtminſter*,
" or elſe within the ſame County or Counties wherein the Manors, Lands
" and Tenements lie, by the *Cuſtos Rotulorum* and two Juſtices of the Peace
" and the Clerk of the Peace of the ſame County or Counties, or two of
" them at the leaſt, whereof the Clerk of the Peace to be one.

The 11 *Geo.* 2. *cap.* 17. reciting that " Whereas Perſons profeſſing or
" educated in the Popiſh Religion are by divers Acts of Parliament ſub-
" jected to ſeveral Diſabilities and Incapacities, which may affect Perſons
" conforming from the Popiſh to the Proteſtant Religion, and whereas
" many Perſons have already conformed to the Proteſtant Religion, and
" are willing to ſubmit to his Majeſty's Government in as full and ample
" Manner as any other of his Majeſty's Subjects, and others are likely ſo to
" do, it is enacted, That all and every Perſon or Perſons, being reputed
" Owner or Owners, or in Poſſeſſion or Receipt of the Rents and Profits
" of any Manors, Meſſuages, Lands, Tenements or Hereditaments, or of
" any Intereſt therein, who having been or reputed to be a Papiſt or Pa-
" piſts, or educated in the Popiſh Religion, hath or have conformed to, or
" hereafter ſhall conform to and profeſs the Proteſtant Religion, and hath
" or have taken or ſhall take the Oaths of Allegiance, Supremacy and Ab-
" juration, and alſo ſubſcribed or ſhall ſubſcribe the Declaration ſet down
" and expreſſed in an Act of Parliament made the 30th *Car.* 2. *ſtat.* 2. in-
" tituled, *An Act for the more effectual preſerving the King's Perſon and Go-*
" *vernment, by diſabling Papiſts from ſitting in either Houſe of Parliament*, to be
" by him, her, or them, repeated and ſubſcribed in the Courts of Chancery
" or King's Bench, or Quarter-Seſſions of the County where ſuch Perſon
" or Perſons ſhall reſide, (all which ſhall be recorded in one of his Ma-
" jeſty's Courts of Record at *Weſtminſter*, or ſuch Quarter-Seſſions as afore-
" ſaid,) and all and every Perſon and Perſons conforming and performing
" the Requiſites as aforeſaid, for their own Benefit, or for the Benefit of
" any other Proteſtant or Proteſtants, and not for the Benefit of any Papiſt
" or Papiſts, ſhall hold, poſſeſs and enjoy all ſuch Manors, Meſſuages,
" Lands, Tenements and Hereditaments, freed and diſcharged of and
" from the Diſabilities and Incapacites in the ſaid Acts or any of them
" contained, incurred or ſuppoſed to be incurred by ſuch Perſon or Per-
" ſons ſo reputed Owner or Owners, or in Poſſeſſion or Receipt of the
" Rents and Profits as aforeſaid, or by any other Perſon or Perſons by,
" from or through whom the Title to ſuch Manors, Meſſuages, Lands,
" Tenements or Hereditaments, or any Intereſt therein, was or ſhall be
" derived or ſuppoſed to be derived for ſuch Eſtate, Right, Title or
" Intereſt, as he, ſhe, or they had or would have, if no ſuch Diſabi-
" lity or Incapacity had been incurred; unleſs the Perſon or Perſons in-
" titled to take Advantage of ſuch Diſability, Incapacity, or Defect of
" Title, hath or have actually and *bona fide* recovered, or ſhall hereafter

" recover

*Page 795 " * recover ſuch Manors, Meſſuages, Lands, Tenements and Hereditaments, " by Judgment or Decree in ſome Action or Suit already commenced, or " hereafter to be commenced, ſix Kalendar Months at leaſt before the mak- " ing of ſuch Record, and to be proſecuted with due Diligence.

" Provided nevertheleſs that this Act, or any Thing herein contained, " ſhall not take away or prejudice the Right of any Perſon or Perſons in- " titled to take Advantage of ſuch Diſability or Incapacity, who now is or " are in the actual Poſſeſſion of, or ſhall have, precedent to the making of " ſuch Record, been in quiet Poſſeſſion of any ſuch Manors, Meſſuages, " Lands, Tenements or Hereditaments, by the Space of two Kalendar " Months.

" Provided always, and it is further enacted, that if any ſuch Perſon or " Perſons, ſo conforming as aforeſaid, ſhall after ſuch Conformity return " to or again profeſs the Popiſh Religion, every ſuch Perſon and Perſons " ſhall for ever afterwards be diſabled from, and be incapable of, having " or enjoying any Benefit, Privilege or Advantage of this Act, and ſhall " from thenceforth be liable to the ſame Diſabilities, Incapacities and For- " feitures, as if he, ſhe, or they had not taken the ſaid Oaths and ſubſcrib- " ed the Declaration as aforeſaid.

" Provided always, that nothing in this Act contained ſhall extend to " take away or prejudice the Right of any Perſon intitled to any Remain- " der or Reverſion in any ſuch Manors, Meſſuages, Lands, Tenements or " Hereditaments, in caſe ſuch Perſon ſhall purſue his or her ſaid Right " by ſome Action or Suit, to be commenced within the Space of twelve " Kalendar Months next after the precedent Eſtate or Eſtates, on which " ſuch Remainder or Reverſion depends and is expectant, ſhall be deter- " mined; or within twelve Kalendar Months from and after the 29th of " *September* 1738, if ſuch precedent Eſtate or Eſtates be already determin- " ed by the Death or Deaths of any Perſon or Perſons whoſe Deaths have " been concealed from or not known to the Perſon intitled to ſuch Re- " mainder or Reverſion, by Reaſon of their having been buried beyond the " Seas, or in a private and clandeſtine Manner at Home, and ſhall proſecute " ſuch Action or Suit with due Diligence."

On the firſt of theſe Statutes there have been the following Caſes and Reſolutions.

Roper ver. *Radclyffe*, *Hil.* 1713. *in Canc.* 9 Mod. 181.

John Roper, Eſq; being ſeiſed in Fee of ſeveral Manors, Lands, &c. by Indentures of Leaſe and Releaſe, bearing Date reſpectively the 17th and 18th of *January* 1708, granted and conveyed the ſame to *William Conſtable*, *Richard Snow* and *Daniel Hickman*, and their Heirs, in Truſt to ſell the ſame, and out of the Purchaſe-Money and Rents till Sale to pay a Debt of 4000*l.* due to *E.* and *H. W.* by Mortgage of the Premiſſes, with Intereſt, and after Satisfaction thereof, then in Truſt for Payment of the Debts mentioned in the Schedule annexed to the Indenture of Releaſe; and the Overplus of the Money ſo to be raiſed, to be paid as the ſaid *John Roper* by any atteſted Writing or by his Will ſhould appoint; and for Want of ſuch Appointment, in Truſt for the Benefit of the ſaid *John Roper* and his Heirs. The 5th of *March* 1708, the ſaid *John Roper* made his Will, and after reciting the ſaid Leaſe and Releaſe, and the Power reſerved to him over the Surplus of the ſaid Eſtate, he bequeathed ſeveral pecuniary Legacies to his Relations, and the Reſidue of all his Real and Perſonal Eſtate he gave to *William Conſtable* and *Thomas Radclyffe*, and to *Robert Hewitt* and *Daniel Hickman*, and to their Heirs and Aſſigns for ever, and appointed them joint Executors; the 1ſt of *April* 1709, he added a Codicil to his Will, and thereby gave the further ſeveral Legacies therein mentioned, and all the Remainder, whether in Lands or Perſonal Eſtate, he gave to his Executors Mr. *Radclyffe* and Mr. *Conſtable*. The ſaid *John Roper* died ſoon after; and Mr. *Radclyffe* and Mr. *Conſtable* brought their Bill in Chancery againſt *Edward Roper*, Eſquire, the Heir at Law of the ſaid *John Roper*, and alſo againſt *Hickman*, *Hewett*, *Snow* and others, to have the Truſt-Eſtate ſold,

• and for an Account of the Profits, and after the Debts and Legacies paid, • Page 796
to have the Surplus Money arising by Sale equally divided between the Plaintiffs, according to the said Codicil. The said *Edward Roper* by his Answer insisted, that as Heir at Law to the Testator he was intitled to all such Real Estate as was undisposed of by him, and that Mr. *Radclyffe* and Mr. *Constable* were then and at the Testator's Decease Papists, and as such, by 11 & 12 *W.* 3. *cap.* 4. were incapable of purchasing any Manors, Lands, Profits out of Lands, &c. The said *Hewett* and *Hickman* by their Answer insisted, that the Real Estate devised by the said Will ought to be considered as the Remaining Part of the Testator's Lands, (after a sufficient Part sold for Payment of Debts and Legacies,) and not as a Personal Estate, and that so much only ought to be sold as would be sufficient to pay the Debts; and that in case Mr. *Radclyffe* and Mr. *Constable* were incapable of taking them, they as Protestants claimed the said Real Estate, as being the only Devisees capable to take the same; they also insisted, that the Codicil, with Reference to the Devise of the Remainder of the Testator's Lands, did not controul the Devise thereof mentioned in the Will; for that if the Plaintiffs were incapable to take the Lands as Purchasers by the Devise, they were to be esteemed as Persons not *in esse*, and that the Codicil as to the Lands was void; but if the Plaintiffs were capable, yet such Devise did not give the Remainder of the Premisses to them but for their Lives, and that the Reversion in Fee belonged to them the said *Hewett* and *Hickman*; and they brought a Cross-Bill insisting thereby on the same Matters; and the Legatees brought a Bill for Payment of their Legacies. The twenty-seventh of *June* 1712, the said Causes came on to be heard before the Lord Chancellor *Harcourt*, who desired to have the Assistance of the Judges; and a Case was made and argued before my Lord Chancellor *Parker*, *Trevor* Chief Justice of *C. B.* Justice *Powel* and the Master of the Rolls, and after Time taken to consider of the Case, my Lord Chancellor, *Trevor* C. J. the Master of the Rolls and Justice *Powel* were of Opinion, that the Devise of the Surplus of the Purchase-Money (after Debts and Legacies paid) to Mr. *Radclyffe* and Mr. *Constable* was good, notwithstanding the said disabling Act; the Surplus Money being a personal Interest in them, and not made void either by the Words or Intention of that Statute; and as to *Hewett* and *Hickman*, my Lord Chancellor was of Opinion, that the first Codicil was a Revocation of the Will, as to the Residue of the Real and Personal Estate. Mr. *Roper* appealed to the House of Lords, and it was there ordered, efore the Appeal was determined, that the Estate should be sold and all Debts and Legacies paid; which was accordingly done; where afterwards the Lords reversed the Decree, principally for this Reason, that (*a*) if the Devise of the Residue to the Plaintiffs was good, they would in Equity be intitled to pay off the antecedent Debts and Legacies, and when that was done, keep the Estate, which would be a Means of evading the Statute, and enabling a Papist to take an Estate contrary to the Intention of it. It was also resolved in this Case, that a Devise is a Purchase within the Meaning of the Act.

(*a*) But it seems, that where Lands are devised to or vested in Trustees, to be sold for Payment of particular Sums to several People, some of whom happen to be Papists, that this Act does not prevent such Papists from taking the particular Sums or Legacies intended for them; becaufe they cannot insist upon paying off the other Incumbrances and holding the Estate, as a Person can do to whom the Residue of the Purchase-Money is devised.

The Earl of *Derwentwater* was Tenant in Tail, with Remainder in Fee to himself, and intending to marry Sir *John Webb*'s Daughter, he, by Advice of Counsel, suffered a Common Recovery without declaring

Lord *Derwentwater*'s Case, upon an Appeal to the Lords Delegates from the Judgment of the Commissioners for forfeited Estates. Hil. 6 Geo. 1. 9 Mod. 172.

any

* Page 797 * any Uſes, it being intended, that he ſhould thereby become Tenant in Fee, and be enabled to make a proper Settlement; accordingly by Indentures of Leaſe and Releaſe he ſettled his Eſtate to the Uſe of himſelf for Life; Remainder to Truſtees for preſerving contingent Uſes; Remainder in Tail ſucceſſively to the firſt and other Sons of the intended Marriage, with Remainders over; the Marriage took Effect, and there was Iſſue a Son and a Daughter; the ſaid Earl was attainted of High Treaſon on Account of the *Preſton* Rebellion, and was executed; and by an Act made thereupon, all the forfeiting Perſons Lands were veſted in Commiſſioners for the Uſe of the Public; and it was expreſly provided, that where the forfeiting Perſon was ſeiſed of an Eſtate-tail at the Time of the Forfeitures, the ſame ſhould be veſted in the Commiſſioners as an abſolute Fee diſcharged of all Remainders and Reverſions. The Commiſſioners of Forfeitures, on a Claim exhibited before them in the Name of the ſaid Earl's Son, determined that the whole Eſtate was in them on this Foundation, that the Earl continued Tenant in Tail notwithſtanding the Recovery, and conſequently nothing more than an Eſtate for his own Life paſt by the Leaſe and Releaſe; and the Reaſon they went upon was, that if by ſuffering a Common Recovery he could turn his Eſtate-tail into a Fee, then he would gain a new Eſtate by Purchaſe, which they apprehended he, being a Papiſt, was diſabled to do by the Statute 11 & 12 *W.* 3. *cap.* 4. but the Majority of the Judges, upon an Appeal from the Decree of the Commiſſioners, were of a contrary Opinion, and held, that this was only a new Modelling of the Eſtate, and not a Purchaſe or Acquiſition within the Act; and that the Earl was capable of taking a new Fee at leaſt for the Benefit of his Heirs and Poſterity, and that he was capable of ſettling the ſame by Leaſe and Releaſe; and therefore allowed of the Son's Claim.

It was likewiſe reſolved, by the Delegates appointed to hear Appeals from the Determinations of the Commiſſioners for the Eſtates forfeited in the Year 1716, that a Papiſt may be a Truſtee for a Proteſtant, notwithſtanding the Statute 11 & 12 *W.* 3. *cap.* 4.

Hill ver. *Filkins*, Trin. 11 Geo. 1. 2 Wil. Rep. 9.

Anne Stephenſon had two Grandchildren, one the Plaintiff *Hill*, the other *Frances* the Wife of the Defendant *Filkins*, who was educated by her in the Popiſh Religion; the Grandmother by her Will made in the Year 1716, deviſed the Lands in Queſtion to Truſtees, in Truſt to be ſold for the Payment of her Debts and Legacies, and the Reſidue of the Money ariſing by ſuch Sale ſhe deviſed to her ſaid Grand-daughter *Frances*, when ſhe ſhould attain her Age of twenty-one Years, or be married with the Conſent of the ſaid Truſtees, and ſoon after died. The ſaid *Frances*, at the Age of fifteen, was married to *Filkins* according to the Ceremony and Uſage of the Church of *Rome*, and a Week afterwards by a Miniſter of the Church of *England*; at the Age of eighteen ſhe conformed according to the Directions of the Statute; it was held that ſhe was within the firſt Clauſe, and that a Deviſe to a Papiſt under the Age of eighteen is good, if he conforms within ſix Months after he comes to that Age; and the Age of eighteen was a proper Period for them to make their Election, whether they would conform or not; and the Bill exhibted by the Proteſtant Heir was diſmiſſed with Coſts.

Carrick ver. *Errington*. Trin. 9 Geo. 1. *in Canc'*. Moſeley 8. 2 Wil. Rep. 361. pl. 104. 9 Mod. 33. 2 Eq. Abr. 623. pl. 13, 624. fol. 20, 625. pl. 21, 22, 23.

J. S. a Papiſt made a Settlement of his Eſtate to Truſtees, to the Uſe of the Truſtees and their Heirs, in Truſt for *A.* for Life; Remainder to the ſaid Truſtees to preſerve contingent Remainders; Remainder to the firſt and every other Son of *A.* and for Default of ſuch Iſſue, then in Truſt for *B.* and his Iſſue; *A.* was a Papiſt and *B.* a Proteſtant; *B.* exhibited his Bill in Chancery, ſuggeſting that *A.* was a Papiſt and had no Son, and that therefore the Truſtees might account to him for the Rents and Profits; he alſo made the Heir at Law Defendant; and on hearing this Cauſe before the Lord *Macclesfield*, and afterwards by the Lord *King*, they both held, that though the Truſt to *A.* was void, he being a Papiſt,

yet

• yet that notwithſtnnding, the legal Eſtate was ſtill in the Truſtees, becauſe they were Truſtees not only for the Papiſt, but alſo for *B.* the Proteſtant, and for the Sons of *A.* who were yet unborn; and as they were Truſtees to preſerve contingent Remainders for ſuch Sons who might be Proteſtants, they thought that the Eſtate ſhould remain in the Truſtees for that Purpoſe; and they held that the Heir at Law was intitled to receive the Profits during the Life of *A.* as a Truſt undiſpoſed, but that *B.* the Remainder-Man could have no Right till the Death of *A.* without a Son capable of taking; and this Decree was affirmed in the Houſe of Lords. • Page 798

The Caſe upon a Special Verdict in Ejectment was: *Thomas Dorrel* had one Brother and four Siſters, and being ſeiſed in Fee by Will 4 *Decemb'* 1703, deviſed the Lands in Queſtion to Truſtees, to the Uſe of them and their Heirs, in Truſt for his firſt and every other Son in Tail Male, and for Want of ſuch Iſſue, Remainder to his Brother *Arthur* for Life, Remainder to his firſt and every other Son in Tail Male; and for Want of ſuch Iſſue, that then the Truſtees ſhall ſtand and be ſeiſed for the ſole and proper Uſe and Benefit of ſuch eldeſt and firſt Son lawfully begotten or to be begotten of *John Dorrel*, and ſhall not be Heir at Law and Inheritor to the ſaid *John Dorrel*, and the Heirs of his Body; and for Default of ſuch Iſſue by him, Remainder to the third, fourth and fifth, and every other Son of the ſaid *John Dorrel*, and the Heirs of their reſpective Bodies. The Truſtees, by a Clauſe in the Will, were impowered, by the Rents and Profits of the Eſtate, or by Mortgage and Sale, to raiſe ſo much Money as would ſatisfy the Teſtator's Debts: *Thomas* and *Arthur* both died without Iſſue, *John Dorrel* is living and has ſeven Sons; *George* the Defendant is the ſecond Son; all the Sons of *John* are Papiſts, and educated in the Popiſh Religion, except his younger Son, who is too young to be ſaid, as yet, to be of any Religion; *George Dorrel* was under eighteen Years of Age when the Limitation by the Deviſe fell upon him, but is now above eighteen Years, and has not taken the Oaths directed by 11 & 12 *W.* 3. *cap.* 4. and is married, and has now two Sons very young, for whom, as well as for his Wife, he has made a Settlement of theſe Lands; the four Siſters of *Thomas Dorrel* are Leſſors of the Plaintiff, as Heirs at Law; and the Queſtion is, whether *George* the Son of *Arthur*, or the Heirs at Law, be intitled to the Lands. For the Plaintiffs the Heirs at Law it was urged, 1*ſt*, That *George* is a Papiſt, and that Papiſts who ſhall refuſe, above ſix Months after they arrive at the Age of eighteen, to take the Oaths of Allegiance, &c. are by the ſaid Statute expreſly diſabled from purchaſing; and therefore as a Deviſe is a Purchaſe, and ſo held *Co. Lit.* 18. and by the Lords, in the Caſe of *Roper* and *Ratclyffe*, conſequently *George Dorrel* takes nothing by it. 2*dly*, That the Deviſe was void for Uncertainty, being to ſuch eldeſt and firſt Son of *J. D.* as ſhall not be Heir at Law to him; but as no one can ſay who will be Heir to *J. D.* ſo it is impoſſible to ſay who will not, for *Nemo eſt hæres viventis*; and he who is to be Heir is not to take, ſo that none but a Son who will not be Heir can take; for both Deſcriptions muſt coincide. *Hob.* 29. *Hardwicke*, Ch. J. in breaking the Caſe ſaid, two Objections have been made to the Defendant's Title; 1ſt, That the Limitation, under which he claims, is void for the Uncertainty of the Deſcription. 2*dly*, That ſuppoſing the Deſcription to be certain enough, yet by 11 & 12 *W.* 3. *cap.* 4. the Defendant is diſabled from taking the Eſtate, as being a Papiſt; there ſeems at preſent to be a good deal of Weight in the firſt Objection, and yet it may poſſibly be reduced to a Certainty, and if ſo, may be made good; and it ſeems natural to imagine, that by the Words of the Will the Teſtator intended the ſecond Son of *John Dorrel* ſhould take, and the rather, as the Teſtator has made the next Limitation to the third, fourth, and fifth Sons, &c. of the ſaid *John Dorrel*; but if the ſecond Son cannot take, yet if the third, &c. Sons are well deſcribed,

Marwood ver. *Dorrel*, Hil. 8 Geo. 2. in *B. R.* Barnard. K. B. 229.

Page 799 described, the Daughters of *Thomas* cannot recover; and at present they seem to be certainly described. As to the second Objection I think my self bound by the Determination of the House of Lords in the Case of *Roper* and *Ratclyffe*, that the Word *Purchase* extends to a Devise, and therefore that a Papist is incapable of taking an Estate by Will; but yet, be the Defendant's Title as it will, the Plaintiff must recover on his own Strength, and not on the Weakness of the Defendant's Title; and my greatest Doubt is this, the Devise here is to Trustees to the Use of them and their Heirs, *&c.* I think this would clearly be a Devise to the Use of the Trustees, tho' the Clause of raising Money by Rents and Profits was omitted; so here is a Devise to Trustees, in Trust not only for the second Son of *John Dorrel*, but for all other his Sons now living, one of which is not found to be a Papist; it hath been said indeed, that this Devise being for the Benefit of Papists, the Trust it self is void; but the Question is, if the intire Trust should not be for the Benefit of Papists, in the present Case, the youngest Son of *John Dorrel* may be able to take for ought appears to the contrary; and therefore I think that this latter Part of the Trust being lawful will support the legal Estate in the Trustees; and here he put the Case *supra* of *Carrick* ver. *Errington*, and said, that, according to the Resolution in this Case, the Lands in Question cannot be in the Heirs at Law, but in the Trustees; because here is a Trust for a Son of *John Dorrel*, who was not a Papist, as well as for other Children yet unborn; so that the Plaintiffs have no Title to recover in this Action, but have mistaken their Remedy; for if they have any, it seems to be by Bill in Equity against the Trustees for an Account of the Profits; and it is certain, in the above-mentioned Case, that the Estate could not vest in the Remainder-man, because he being then in by Purchase, it could never be afterwards devested for the Benefit of such Child as *A.* should happen to have; but he said, that he did not give this as his absolute Opinion, but only to point out the Difficulties which stuck with the Court: It was adjourned, and no farther Proceedings were had therein.

Pelham ver. *Fletcher*. Mich. 1729. A Mortgage was made to a Papist, who assigned to a Protestant for a full Consideration; an Ejectment was brought against the Assignee by a subsequent Mortgagee, who recovered by reason of the Disability of the first Mortgagee; all this appeared upon a Bill brought in Chancery; and my Lord Chancellor was of Opinion, that a Mortgage to a Papist is void; but in this Case the Assignment to the Protestant, and the Trial in Ejectment, were both before the 3 *Geo.* 1. *cap.* 18. which, were it otherwise, would it seems have made an Alteration.

On Lord *Dover's* Will. In a Case which came on before my Lord *King* in the Court of Chancery, it appeared that my Lord *Dover* was possessed of a long Term for Years, and made his Will, and his Lady who was a Papist Executrix thereof; it was resolved by my Lord Chancellor, that notwithstanding the disabling Act 11 & 12 *W.* 3. *cap.* 4. the Term vested absolutely in her, and that this was not a Purchase within that Act; and he said, that a Papist may be Tenant in Dower, or by the Curtesy; because in all these Cases it is by Operation of Law, and not by any Act of the Party, that the Estate comes to him.

Mallom ver. *Bringloe*, Pasch. 1783. in C. B. It hath been adjudged, that a Papist may devise to a Protestant; in which Case it was agreed, that where an Ancestor dies seised of an Estate of Inheritance, it descends upon and vests in his Heir, (though a Papist) for the Benefit of his Heirs, and that the next Protestant a-kin has only a Right to the Perception of the Profits during the Non-conformity of the Heir.

Smith ver. *Read*, Trin. 12 Geo. 2. Upon the Marriage of Mr. *Paine* with one Mrs. *Gage*, Lands in the County of *Surrey* were settled and conveyed to the Use of the Husband and Wife for their Lives, and the Life of the Survivor of them; then to the Use of the first and every other Son in Tail, Remainder to the right

right Heirs of the Husband; the Marriage took Effect, but Mr. *Paine* the Husband died in the Life-time of Mrs. *Paine*, without leaving Issue, having first devised all his Lands to his Wife and her Heirs. In 1730, Mrs. *Paine* the Wife devised all her Real Estate to the Defendant, subject to a few Legacies mentioned in her Will, but lived and died a Papist; but that being difficult to prove at Law, the Plaintiff Mr. *Smith* who had married *Eliz. Paine*, Heir at Law to Mr. *Paine*, he and his Wife filed their Bill against the Defendant to set aside the Marriage-Settlement and Will of Mr. *Paine* the Husband, under which Mrs. *Paine* claimed; and in particular prayed, that the Defendant might discover whether Mrs. *Paine* the Wife, under whose Will he claimed, was a Papist or not. To which the Defendant pleaded the Statute of 11 & 12 *W.* 3. *cap.* 4. Upon arguing this Plea it was insisted upon for the Defendant, that it was a standing Rule in this Court, that no Person was bound to discover what might subject him to the Penalty of an Act of Parliament; that the Statute of 11 & 12 *W.* 3. *cap.* 4. was a penal Law, and the Party, who would take Advantage of such Law, would never be assisted in a Court of Equity, which never assists a Forfeiture; he who would claim any Thing forfeited, must make out the Forfeiture himself; for no Person shall be obliged to discover a Fact that would be a Forfeiture of his own Estate. If a Copyholder commits Waste, it is a Forfeiture of his Estate to the Lord of the Manor; but if the Lord of the Manor comes into this Court for a Discovery, whether the Copyholder has been guilty of Waste or not, the Copyholder is not bound to answer; for no Law in the World obliges a Man to accuse himself; if an Estate is given to a Woman *durante viduitate*, she is not bound to discover whether she is married or not; because the Discovery of that Fact might be the Loss of her Estate. That Disabilities and Forfeitures were of the same Nature; that a total Incapacity or Disability to hold at all, (which is the Case of Papists) was certainly as much a Penalty, as a Forfeiture of an Estate which the Party before was capable of holding; that as Mrs. *Paine* would not have been obliged in her Life-time to discover whether she was a Papist or not, the Defendant who claims under her ought not to be obliged to discover it. On the other Hand it was insisted by the Counsel for the Plaintiff, that it was not their Business to examine, whether the Acts of Parliament made against Papists were hard Laws or not, they were Laws, and that was sufficient for their Purpose; that this was not the Case of a Forfeiture, but it was to discover a Fact, which if true, the Estate was never in Mrs. *Paine*, because the Act of Parliament makes all Papists absolutely incapable of being Purchasers; if she was a Papist, the Estate never vested in her; and as she was not capable of holding it, she could not give it away to the Defendant, therefore could never forfeit the Estate; for no Person can be said to forfeit an Estate he never had. An Alien is incapable of holding Lands at Common Law, yet he is obliged to discover whether he is an Alien or not; and his Discovery of that Fact, whether he is so or not, can never be a Forfeiture of his Estate, because he never had a Right to it; so in Case of a Bastard who is *nullius filius*, and incapable of claiming Lands by Descent; he shall discover whether he is so or not, for the same Reason; so a Person claiming under a Bankrupt, whose Goods are vested in the Assignees of the Commission of Bankruptcy for the Benefit of Creditors, must discover whether the Person, under whom he claims, was a Bankrupt or not at the Time of the Conveyance: That all these Cases depend upon the same Reason, and were no Forfeitures, because the Estates were never in them; so if Mrs. *Paine* was a Papist, she was incapable of having the Estate herself, and could not give it away; and therefore the Defendant could never forfeit it, because the Estate was never in him. But my Lord *Hardwicke* was of Opinion, that the Defendant was not obliged to discover whether Mrs. *Paine* was a Papist or not; that there is no Rule better esta-

* Page 800

blished

*Page 801 * bliſhed in this Court, than that a Man ſhall not be obliged to anſwer to what may ſubject him to the Penalty of an Act of Parliament; no Perſon can doubt whether this Act is not a Penal Law, and whether the Clauſes relating to Papiſts are not Diſabilities or Incapacities, impoſed by way of Penalty upon all Perſons exerciſing that Religion. It is objected, that this is not the Caſe of a Forfeiture, becauſe the Eſtate was never veſted, and therefore can never be deveſted; yet it all falls under the ſame Reaſon; and an Incapacity or Diſability to hold at all by Act of Parliament, is certainly as much a Penalty as the Forfeiture of an Eſtate by a Perſon who had a Right to enjoy it before the Forfeiture. That if a Bill is brought againſt the Perſon for a Diſcovery, whether he is a Papiſt or not, he is not bound to diſcover; and where is the Difference between him and the Perſon claiming under him? Here is a Diſability impoſed by Parliament, by way of Penalty, upon a particular Set of Men upon the Account of their Religion, the Diſcovery of that Fact ſubjects them to a Penalty; and this is not like the Caſe of an Alien or Baſtard, who are incapable by the general Laws of the Land to inherit; beſides, what ſways with me much, is the great Inconvenience that would follow, ſhould this Plea be diſallowed; we ſhould have nothing in this Court but Bills of Diſcovery, whether ſuch and ſuch Perſons were Papiſts or not, and no Body knows what Confuſion would follow; therefore the Plea muſt be allowed.

PARDON.

(A) By whom to be granted. 802.
(B) In what Caſes and for what Offences it may be granted. 802.
(C) Where a Pardon is grantable of common Right. 804.
(D) Of the Validity of a Pardon; and herein by what Words Treaſon, Murder, Felony, and other Offences may be pardoned; and herein of Pardons by Implication, and where the King ſhall be ſaid to be deceived in his Grant thereof. 805.
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And herein,

1. In what Manner a general Pardon by Parliament is to be taken Advantage of. 808.
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(H) The Effects and Consequences of a Pardon, and to what the Party shall be restored. 809.

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THE Power of pardoning Offences is inseparably incident to the Crown; and this High Prerogative the King is intrusted with upon a special Confidence, that he will spare those only whose Case, could it be foreseen, the Law itself may be presumed willing to have excepted out of its general Rules, which the Wisdom of Man cannot possibly make so perfect as to suit every particular Case. Show. 284.

But it seems, that anciently the Right of pardoning Offences within certain Districts was claimed by the Lords of Marches and others, who had *Jura Regalia* by ancient Grants from the Crown, or by Prescription. But now by the 27 *H.* 8. *cap.* 24. *sect.* 1. it is enacted, "That no Person or "Persons, of what Estate or Degree soever they be, shall have Power to "pardon or remit any Treasons or Felonies whatsoever, nor any Accessaries "to the same, nor any Outlawries for such Offences, whether committed "in *England* or *Wales*, or the Marches of the same, but that the King "shall have the whole and sole Power and Authority thereof united and "knit to the Imperial Crown of this Realm, as of good Right and Equity "it appertaineth." Co. Lit. 114. 3 Inst. 233

(B) In what Cases and for what Offences it may be granted.

IT is laid down in general, that the King may pardon any Offence whatever, whether against the Common or Statute Law, so far as the Public is concerned in it, after it is over, and consequently may prevent a popular Action on a Statute, by pardoning the Offence before the Suit is commenced; but it seems, that he cannot wholly pardon a Public Nusance while it continues such, because such Pardon would take away the only Means of compelling a Redress of it; yet it is said, that such a Pardon will save the Party from any Fine to the Time of the Pardon. Plow. 487. Keilw. 134. 12 Co. 29, 30. 3 Inst. 237. Vaugh. 333.

But it seems agreed, that the King can by no previous Licence, Pardon or Dispensation, make an Offence dispunishable which is *Malum in se*; as being either against the Law of Nature, or so far against the Public Good as to be indictable at Common Law; and that a Grant of this Kind, tending to incourage the doing of Evil, which is the chief End of Government to prevent, is plainly against Reason and the common Good, and therefore void. Dav. 75. 5 Co. 35. 12 Co. 29.

And hence it hath been insisted, that the King's Grant to the Bishop of *Salisbury* and his Successors, having the Custody of a Prison, that they shall be quiet from all Escapes, which hath been (*a*) adjudged to be a good Grant, is not Law; as being but a single Instance, and contrary to this Rule; because a Grant of this Kind, tending to make a Goaler less diligent in his Duty, by taking off the legal Punishment of his Negligence, is plainly against the common Good. 2 Hawk. P. C. 389. (*a*) 3. H. 7. 15. pl. 30.

But where a Thing in its own Nature lawful, is made unlawful by Parliament, as the Carrying Bell-metal, &c. out of the Realm, Importing Merchandizes 2 Hawk P.C. 389, 390. and several Authorities there cited.

chandizes in foreign Ships, Selling Wines beyond a certain Price, or without a Licence, Multiplying Gold, &c. Coining Money of a baſe Allay, &c. it was formerly taken as a general Rule, that the King might diſpenſe with it, as to a particular Time or Place, or Perſon, ſo far as the Public was
* Page 803 * concerned in it; unleſs ſuch Diſpenſation could not but be attended with an Inconvenience, as the Introducing a Monopoly; or Fruſtrating the End for which the Law was made; as the Licenſing a particular Perſon to import foreign Cards or Wines, &c. in which Caſes it was commonly taken to be void; alſo, where a Statute gives a particular Intereſt or Right of Action to the Party grieved, as the Statutes of Mortmain, thoſe againſt Maintenance, Forcible Entries, Carrying Diſtreſſes out of the Hundred, Eſcapes, &c. it has been always agreed, that no Charter from the King can bar the Right of the Party grounded on ſuch Statute; alſo where a Statute is expreſs, that the King's Charter againſt the Purport of it, though with the Clauſe of *Non obſtante*, ſhall be void; it ſeems to have been always generally agreed, that regularly no ſuch Clauſe could diſpenſe with it.

2 Hawk. P. C. 391. Alſo it ſeems to be agreed, that no Diſpenſation of any Statute except the Statutes of Mortmain, was of any Force, without a Clauſe of *Non obſtante*; neither is ſuch Clauſe of any Effect at this Day; for it is declared and enacted by 1 *W. & M. ſeſſ.* 2. *cap.* 2. that no Diſpenſation by *Non obſtante* of or to any Statute, or to any Part thereof, be allowed; but that the ſame ſhall be held void, except a Diſpenſation be allowed in ſuch Statute; but it is provided, that no Charter, Grant or Pardon, granted before 23d of *October* 1699 ſhall be any Ways invalidated by that Act, but that the ſame ſhall be and remain of the ſame Force, and no other, as if the ſaid Act had never been made.

Plow. 487. 2 Rol. Abr. 178. Cro. Car. 199. Keilw. 134. The King can by no Charter whatſoever bar any Right of Entry or Action, or any legal Intereſt or Benefit before veſted in the Subject; and therefore it ſeems clear, that he cannot bar any Action on a Statute by the Party grieved, nor even a popular Action commenced before his Pardon, nor a Recognizance for the Peace before it is forfeited.

2 Hawk. P. C. 392. Neither can the King pardon an Appeal, except only where it is carried on at his Suit, after a Nonſuit; and therefore if a Perſon attainted, on an Appeal carried on at the Suit of the Party, get the King's Pardon, he muſt ſue a *Scire facias* againſt the Appellant before the Pardon ſhall be allowed.

2 Hawk. P. C. 392. And if the Appellant appear on the *Scire facias*, he may pray Execution notwithſtanding the Pardon; but if the Sheriff return a *Scire facias*, or two *Nihils*, and the Appellant appear not on Demand; or if he return the Appellant dead, the Appellee ſhall be diſcharged; but ſome have holden, that in this laſt Caſe a *Scire facias* ſhall go againſt the Heirs of the Deceaſed.

Hawk. P. C. 392. But there is no Need of any *Scire facias* againſt the Lord by Eſcheat, becauſe the Pardon no Way tends to reverſe the Attainder whereon the Title of Eſcheat is founded.

Hawk P. C. 393. If ſeveral Perſons be outlawed on an Appeal, and one gets his Pardon allowed on the Non-appearance of the Appellant, on a *Scire facias*, it ſeems that the Reſt can take no Advantage thereof, but muſt ſue their *Scire facias*, &c. in the ſame Manner as if there had been no ſuch Default.

But for this *vide* 2 Hawk. P. C. 393. It hath been ſtrongly holden, that the King may pardon the Burning of the Hand on a Conviction of Manſlaughter on an Appeal, as being no Part of the Judgment at the Suit of the Party, but a collateral and exemplary Puniſhment inflicted by Statute, and intended only by way of Satisfaction to the Public Juſtice, like the finding of Sureties by one convicted on the Statute againſt Treſpaſſers in Parks.

5 Co. 51. Latch 190. Cro. Eliz. 684. Hob. 81. Cro. Jac. 335 2 Hawk. P. C. 394. A Pardon will not only diſcharge any Suit in the Spiritual Court *ex officio*, but alſo any Suit in ſuch Court *ad inſtantiam partis pro reformatione morum*, or *ſalute animæ*, as for Defamation or laying violent Hands on a Clerk, &c. and if the Time, to which the Pardon has Relation, be prior to the Award of the Coſts to the Party, or as it is generally holden,

if

if it be ſubſequent to the Award, but prior to the Taxation, it ſhall diſcharge them, but not if it be ſubſequent to the Taxation; and the ſame Rule holds as to Coſts taxed to the Party grieved on a Contempt in a Court of Equity; but *quære* as to Coſts taxed by the Prothonotary on an Attachment; for they are not given by the Court of Courſe, but the Offender ſubmits only to pay them by way of Compoſition. * Page 804

If a Perſon be impriſoned on an *Excommunicato capiendo* for Non-payment of Coſts, and the King pardons all Contemps, it is ſaid, that he ſhall be diſcharged without any *Scire facias* againſt the Party, and that the Party muſt begin a-new to compel a Payment of the Coſts; becauſe the Impriſonment was grounded on the Contempt, which is wholly pardoned. Jon. 227. 2 Rol. Abr. 178. Cro. Jac 159. 8 Co. 68, 69.

But no Pardon will diſcharge a Suit in the Spiritual Court, any more than in a Temporal, for a Matter of Intereſt or Property in the Plaintiff; as for Tithes, Legacies, Matrimonial † Contracts and ſuch like; alſo it is agreed, that after Coſts are taxed in a Suit in ſuch Court at the Proſecution of the Party, whether for a Matter of private Intereſt, or *pro reformatione morum*, or *pro ſalute animæ*, or for Defamation, *&c.* they ſhall not be diſcharged by a ſubſequent Pardon. 5 Co. 51. Latch 190. Cro. Car. 46-7.

† There can not now be any Suit in the Eccleſiaſtical Courts, to compel Marriage by Reaſon of any Contract, *&c.* 26 Geo. 2. c. 33. ſ. 13.

If the Offence be pardoned after Coſts taxed, and then the Defendant appeal, and the Superior Court give new Coſts for or againſt him, ſuch Coſts ſhall not be avoided; becauſe the Coſts in the firſt Suit being taxed before the Pardon, and therefore not avoided by it, the Appeal was proper for determining whether they were well given or not, and conſequently Coſts were as properly given on ſuch Appeal as in any other Caſe; but if the Offence be pardoned, pending an Appeal, and the Pardon relate to a Time precedent to the Award of the Coſts, and then the Appellant deſert his Appeal, and the Court award Coſts againſt him in reſpect of ſuch Deſertion, it ſeems that he may have a Prohibition; becauſe the Pardon, having diſcharged the Coſts of the firſt Suit, made the Appeal to be of no Purpoſe. 2 Rol. Abr. 304. Noy 85. Latch 155.

By the 12 & 13 *W.* 3. *cap.* 2. *ſect.* 3. "No Pardon under the Great Seal "ſhall be pleaded to an Impeachment by the Commons in Parliament."

(C) Where a Pardon is grantable of common Right.

BY the Statute of *Glouceſter*, *cap.* 9. it is enacted, "That if it be found "by the Country, that a Perſon tried for the Death of a Man did it in "his Defence, or by Misfortune, then, by the Report of the Juſtices to "the King, the King ſhall take him to his Grace, if it pleaſe him." 2 Inſt. 316.

But it ſeems to be ſettled at this Day agreeably to the antient Common Law, in Affirmance whereof this Statute was made, that in ſuch a Caſe, or where one indicted of *Homicide ſe defendendo* confeſſes the Indictment, if the Party cauſe the Record to come into Chancery, the Chancellor will of Courſe make him a Pardon without ſpeaking to the King, and that by ſuch Pardon the Forfeiture of Goods may be ſaved; for theſe Words, *if it ſhall pleaſe the King*, ſhall be taken as ſpoken only by way of Reverence to him, and not intended to make ſuch a Pardon diſcretionary. But if the Party be found to have fled, it is made a *Quære*, if the Pardon ſave the Forfeiture for the Flight; for that is not grounded on the Homicide, but on the Contempt of the Law. 2 Hawk P. C. 380, 381.

If

3 Inſt. 129. 2 Hawk. P. C. 200. 2 Hal. Hiſt. P. C. 233.

If an Approver convict all the Appellees, whether by Battle or Verdict, the King *ex merito juſtitiæ* ought to pardon him as to his Life, and alſo give him his Wages from the Time of the Appeal to the Time of the Conviction.

* Page 805

*By the 4 & 5 *W. & M. cap.* 8. it is enacted, "That if any Perſon or "Perſons out of Priſon ſhall commit any Robbery, and afterwards diſcover "two or more who then had or afterwards ſhall commit any Robbery, ſo "as two or more of them ſhall be convicted, any ſuch Diſcoverer ſhall be "intitled to a Pardon for all Robberies committed before the Diſcovery, "which alſo ſhall bar an Appeal.

And by the 6 & 7 *W & M. cap.* 17. it is enacted, "That if any Perſon "or Perſons out of Priſon ſhall be guilty of clipping, coining, counter-"feiting, waſhing, filing or otherwiſe diminiſhing the Coin of this Realm, "and afterwards diſcover two or more who then had or afterwards ſhall "commit any of the ſaid Crimes, ſo as two or more of them ſhall be con-"victed, any ſuch Diſcoverer ſhall be intitled to a Pardon for all his Crimes "committed before the Diſcovery."

By the 10 & 11 *W.* 3. *cap.* 23. (which excludes Clergy from thoſe who ſhall in any Shop, Ware-houſe, Coach-houſe or Stable, privately ſteal any Goods, *&c.* of the Value of 5 *s.* though ſuch Shop, *&c.* be not broken open, and though no Perſon be therein, or ſhall aſſiſt, hire or command any Perſon to commit ſuch Offence,) "If any Perſon or Perſons ſhall commit "any Burglary, Houſe-breaking or Felony, in ſtealing of any Horſe or "Horſes, or any Money, Wares or Goods from whom Clergy is by that "Act taken away, and being out of Priſon ſhall diſcover two or more, "who then had or after ſhall commit any ſuch Felony, and ſhall be con-"victed thereof, or cauſe to be diſcovered and apprehended two or more, "who ſhall be convicted as aforeſaid, every ſuch Diſcoverer ſhall be intitled "to a Pardon for the Felonies aforeſaid committed before ſuch Diſcovery, "*&c.*

And by the 5 *Ann. cap.* 31. it is enacted, "That every Perſon who ſhall "be guilty of Burglary, or of the felonious Breaking and Entering a Houſe "in the Day-time, and after ſhall diſcover two who ſhall have committed "ſuch Felony, ſo as they be convict, *&c.* ſhall have 40 *l.* and a Pardon "of all Felonies, except Murder, *&c.*"

(D) Of the Validity of a Pardon; and herein by what Words Treaſon, Murder, Felony and other Offences, may be pardoned; and herein of Pardons by Implication, and where the King ſhall be ſaid to be deceived in his Grant thereof.

Yelv. 43, 47. Cro. Jac. 18, 34, 548. 2 Rol. Abr. 188. Dyer 352. pl. 26. Raym. 13. Sid. 41.

IT is laid down as a general Rule, that wherever it appears by the Recital of the Pardon, that the King was miſ-informed, or not rightly apprized both of the Heinouſneſs of the Crime, and alſo how far the Party ſtands convicted upon Record, the Pardon is void, upon a Preſumption that it was gained from the King by Impoſition.

3 Inſt. 238.

And

And upon this Ground it ſeems agreed, that if a Man attainted of Felony get a Pardon, which doth not mention the Attainder, the Pardon will be ineffectual; alſo it hath been holden, that the Pardon of a Perſon convicted by Verdict of Felony is void, unleſs it recite the Indictment and Conviction; alſo it hath been queſtioned, if the Pardon of a Perſon barely indicted of Felony be good, without mentioning the Indictment; but it hath been adjudged, that ſuch a Defect is ſalved by the Words *ſive indictatus ſive non.* 2 Hawk. P. C. 382-3. * Page 806

It hath been holden, that antiently a Pardon of all Felonies included all Treaſons as well as Felonies; and it ſeems to be taken for granted in many Books, that ſuch a general Pardon is even at this Day pleadable to any Felony, except Murder, Rape, and Piracy; and that the only Reaſon why it may not alſo be pleaded to Murder and Rape is, becauſe 13 *R.* 2. (*ſtat.* 2. *cap.* 1. & 16 *R.* 2. *cap.* 6.) requires an expreſs Mention of them; and that the only Reaſon why it is not pleadable to Piracy is, becauſe it is a Felony by the Civil Law only. 2 Hawk. P. C. 383-4. Hal. Hiſt. P. C. 466. 2 Hale's Hiſt. P. C. 45.

By the 27 *E.* 3. *cap.* 2. it is enacted, "That in every Pardon of Felony "granted at any Man's Suggeſtion, the Suggeſtion and the Name of him "that makes it ſhall be compriſed; and if it be found untrue, the Charter "ſhall be diſallowed; and the Juſtices, before whom the Charter ſhall be "alledged, ſhall inquire of the ſame Suggeſtion, and, if they find it untrue, "ſhall diſallow the Charter."

No Pardon of Felony ſhall be carried beyond the expreſs Purport of it; and therefore if the King, reciting an Attainder of Robbery, pardon the Execution, he thereby neither pardons the Felony it ſelf, nor any other Conſequence of it beſides the Execution. 6 Co. 13. 2 Hawk. P. C. 384.

It is enacted by 2 *E.* 3. *cap.* 2. *That Charters of Pardon of Manſlaughters ſhall not be granted but where the King may do it by his Oath, that is to ſay, where a Man ſlayeth another in his own Defence, or by Misfortune*; neither is there any Precedent in the Regiſter of the Pardon of any other Homicide, but ſuch as is done either in Self-defence or by Miſ-adventure, or by Infants, or Madmen; and from hence ſome have diſputed the King's Power of pardoning any other Homicide; but this is contrary not only to the general Tenor of the Books, but alſo to the plain Purport of 13 *Rich.* 2 *ſtat.* 2. *cap.* 1. which reciting that Treaſons, Murders and Rapes, had been frequently committed, becauſe Pardons had been eaſily granted in ſuch Caſes, enacteth, "That no Pardon ſhall be allowed for Murder, or for the Death of a Man "ſlain by Await, Aſſault or Malice prepenſed, Treaſon or Rape of a Wo-"man, unleſs the ſame Murder, &c. be ſpecified in the ſame Charter; "and if the Charter of the Death of a Man be alledged before any Juſtices, "in which it is not ſpecified that the Party was murdered or ſlain by Await, "Aſſault or Malice prepenſed, the ſame Juſtices ſhall inquire by a good "Inqueſt of the *Viſne* where the Dead was ſlain, if he were murdered or "ſlain by Await, &c. and if they find that he was murdered or ſlain by "Await, &c. the Charter ſhall be diſallowed." 2 Hawk. P. C. 385-6. and ſeveral Authorities there cited.

It hath been formerly often adjudged, that Murder might be pardoned under the general Deſcription of a felonious Killing, with a Clauſe of *Non obſtinte*, but by 1 *W.* & *M. ſeſſ.* 2. *cap.* 2. it is declared, *That no Diſpenſat on by* Non obſtante *of or to any Statute ſhall be allowed.* Sid. 366. Show. 283. Keling 24. 3 Mod. 37.

But Pardons of Manſlaughter remain as they were at Common Law; and therefore the Pardon of the felonious Killing of *J. S.* may be pleaded to an Indictment of Manſlaughter in killing him; but where ſuch a Pardon is pleaded to a Coroner's Inqueſt of Manſlaughter, the Court may refuſe to allow it, till the Fact be found Manſlaughter by a Jury directed by a higher Court. 2 Keb. 363, 415. Keling 24. 2 Jon. 56.

If a general Act expreſly pardon Petit Treaſons, and except Murders, it cannot be avoided by indicting a Perſon guilty of Petit Treaſon for Murder only, omitting the Word *Proditorie*; for the leſs Offence being included in the Dyer 50. pl. 4. 235. pl. 19. 6 Co. 13.

the greater is pardoned by the Pardon of it; and therefore such an Exception of Murder is to be intended of such Murder only as is specially so called, and doth not amount to Petit Treason.

Lev. 8, 120. Sid. 150. Keb. 66, 548. Page 807 * Neither doth the Exception of Murder in a general Act of Pardon of all Felonies extend to a *Felo de se*; for though his Offence be in Strictness Murder; yet in common Speech, according to which Statutes are commonly expounded, it is generally understood as a distinct Offence, the Word *Murder* seeming *prima facie* to import the Murder of another.

Plow. 401. *Cole*'s Case. Hal. Hist. P. C. 426. Dyer 99. pl. 65. † If the Felony has its Commencement before the Pardon takes place, but not its Completion, the Pardon shall operate in Favour of the Prisoner, as it would have done had the Felony been compleat before the Pardon. This is the true Sense of the Doctrine in *Cole*'s Case. *Nicholas*'s Case 1748. Fost. 64.—But if a Man gives a Stroke, or Poison, (which, till Death ensues upon it, is only a Misdemeanor) and a Pardon is granted of all Misdemeanors, &c. but not of Murder or Poisoning, and afterwards the Party dies, the Felony is not pardoned. *Id.* It is said, that a general Act of Pardon of all Felonies, Misdemeanors and other Things done before such a Day, pardons a Homicide from a Wound before the Day, whereof the Party died not till after; because the Stroke being pardoned, the Effects of it are consequently pardoned †.

Lev. 106. Sid. 211. 2 Mod. 52. It is said, that a Pardon of all Misprisions, Trespasses, Offences and Contempts, will pardon a Contempt in making a false Return, and a Striking in *Westminster-Hall*, and Barratry, and even a *Præmunire*; also it is laid down in general, that it will pardon any Crime which is not Capital.

2 Hal. Hist. P. C. 252. cited from Dyer 308. a. If *A.* be indicted of Piracy, and refusing to plead hath Judgment of *Paine fort & dure*, and by the General Pardon Piracies are excepted, but the Judgment of *Paine fort & dure* is pardoned by the general Words of all Contempts; *quære* whether he may be arraigned for any other Piracy; but by the better Opinion, he may be arraigned of any other Piracy committed before that Award.

(E) Whether a Pardon may be conditional.

Co. Lit. 274. b. 2 Hawk. P. C. 394. IT seems agreed, that the King may extend his Mercy on what Terms he pleases, and consequently may annex to his Pardon any Condition that he thinks fit, whether precedent or subsequent, on the Performance whereof the Validity of the Pardon will depend.

Moor pl. 662. Also it hath been held, that in every Pardon for a Capital Offence, where the Party was obliged to give Security, there is a Condition in Law annexed to such Pardon, so that if he forfeits such Recognizance, his Pardon becomes void, and he may be taken and executed on the first Judgment ‡.

‡ Persons pardoned of Felony may be bound to their good Behaviour for seven Years. 5 W. & M. c. 13. which *vide post*, 809.

(F) Who may take Advantage of a Pardon, and to whom it shall be said to extend.

Cro. Eliz. 30, 31. Dyer 34. pl. 21. NOtwithstanding all Felonies are several, yet the Felony of one Man may be so far dependant on that of another, that the Pardon of the one will necessarily enure to the Benefit of the other; as where the Principal is allowed his Pardon before his Conviction, in which Case the Accessary

ſary may by a neceſſary Conſequence take Benefit of it; becauſe he cannot be arraigned till the Principal is convicted. 2 Hawk. P. C. 387.

Where a Man is bound to the King as Surety for another's Debt, it is clear, that the Diſcharge of the Principal is a Diſcharge of the Surety; but where a Man is bound to the King for another's Performance of a future Act, the Diſcharging of the other from ſuch future Act will not diſcharge the Surety; but *quære* if both had been bound, and the Subject no Way intereſted in the Matter. 2 Hawk. P. C. 387.

The Pardon of *A. B.* and *C.* of all Felonies by them done, without adding or any of them, is void; for it ſuppoſes them jointly guilty, and extends to none but joint Felonies, whereas all Felony is ſeveral in each Offender, and cannot be joint. Dyer 34. pl. 21. 2 Hawk. P. C. 388.

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*(G) In what Manner a Pardon is to be taken Advantage of: And herein, * Page 808

1. In what Manner a general Pardon by Parliament is to be taken Advantage of.

HEREIN we muſt firſt obſerve a Difference between a Pardon by Parliament and that under the Great Seal; that as to a Pardon by (*a*) Parliament, the ſame cannot be waived, becauſe no one by his Admittance can give the Court a Power to puniſh him, where it judiciouſly appears there is no Law to do it; but a Man may waive a Pardon under the Great Seal, by pleading other Matter, without taking any Notice of it. 2 Hawk. P. C. 396.

(*a*) That a Coronation Pardon cannot be taken Advantage of, unleſs it be taken out and pleaded under the Great Seal. Keb. 707.

If the Body of a General Act of Pardon either except divers Perſons by Name, or except all who come under a general Deſcription, as all who adhered to *J. S.* the Court is not bound (neither ought it, as ſome ſay,) to give any one the Advantage of it; unleſs he plead it, and ſhew, in the firſt Caſe, that he is not one of the Perſons excepted, and in the other, that he is not included in ſuch Deſcription; neither will it be ſafe for him, if he be of the ſame Name with one of thoſe excepted by Name, to aver, that he is not one of the Perſons excepted by Name, without adding, that he is a different Perſon from ſuch other of the ſame Name. But if the Body of the Statute except one Perſon only, or if it be general as to all, and afterwards ſome be excepted in the Proviſoes, it may be pleaded, as ſome ſay, without any Averment that he who pleads it is not one of the Perſons excepted, *&c.* and the Exceptions ought to be ſhewn on the other Side. 2 Hawk. P. C. 396-7. and ſeveral Authorities there cited.

Alſo where a General Act of Pardon excepts certain Kinds of Crimes, there is no need to aver, that the Crime whereof a Perſon is indicted is not one of ſuch excepted Crimes, but the Court ought judicially to take Notice whether it be excepted or not. Noy 100. *Black* ver. *Allen.* Cro. Car. 449.

Alſo where ſuch a Statute excepts only one particular Perſon, it hath been ſaid, that there is no need of an Averment that a Perſon indicted is not ſuch Perſon, but that the Court is to take Notice whether he be or not †. Moor 620. Cro. Eliz. 125. 2 Jon. 26.

† An Act of Grace does not diſcharge the Forfeiture of Twenty-five Pounds to the City of *London*, for acting as a Broker without Licence. *Ludlam* v. *Lopez.* M. 9 Geo. Stra. 529.—An Act of Grace does not extend to Penalties given between the Informer and the Poor of the Pariſh. *Howell* v. *James.* T. 21 Geo. 2. Stra. 1272.

2. In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.

Cro. Eliz. 153. The Party, as hath been obſerved, muſt inſiſt on the Benefit of this Kind of Pardon; and therefore it hath been held to be Error, to allow a Man the Benefit of a Pardon under the Great Seal, unleſs he plead it.

2 Hawk. P. C. 397. He who pleads ſuch a Pardon ought to produce it (a) *Sub pede ſigilli*; becauſe it is preſumed to be in his Cuſtody, and the Property of it belongs to him; yet if a Man plead ſuch Pardon without producing it, it ſeems, that the Court may indulge him a farther Day to put in a better Plea.

(a) That it is ſufficient to plead and ſhew the Exemplification of the Pardon, &c. becauſe ſuch Exemplification is expreſly within the 13 Eliz. c. 6. 5 Co. 53. Carth. 138. cited.

3 Inſt. 240. Keilw. 58. Rol. Rep. 368. Dyer 34. If there be a Variance between the Pardon and Record of Conviction, &c. yet if there be no Repugnancy to intend that the ſame Perſon is meant in both, it may be ſupplied by a proper Averment; as if he be called *J. S.* Gentleman in the one, and *J. S.* Yeoman in the other; or *B.* the Father in the one, and *B.* the Son of *W.* in the other; or if the * Stroke which cauſeth the Death of *J. S.* &c. be ſuppoſed to have been given on the ſecond of *Auguſt* in the one, and on the third in the other; alſo if ſuch variant Pardon be pleaded without ſuch Averment, the Court may give the Party a farther Day to perfect his Plea.

* Page 809

2 Hawk. P. C. 398. It ſeems that ſuch Pardon cannot be pleaded after the General Iſſue, unleſs it be of a Date ſubſequent to the Pleading of it; becauſe the making Defence, without taking any Notice of the Pardon, ſeems to amount to a Waiver of it; and *quære* if a Pardon can be pleaded at the ſame Time with the General Iſſue.

2 Hawk. P. C. 398. The Party is not bound to lay the Streſs of his Caſe on any particular Clauſe of the Pardon, but may take Advantage of the Whole.

2 Hawk. P. C. 398. After an Amerciament in the King's Bench is eſtreated into the Exchequer, and the Party hath inſiſted on a Pardon there, and being denied any Benefit of it, he may be brought by *Habeas Corpus cum cauſa* to the King's Bench, becauſe the Record remains there, and pleads his Pardon; and if it be adjudged ſufficient, have a *Superſedeas* to the Barons.

Plow. 502. Sid. 41. Raym. 13. Carth. 121. While the Statute 10 *E.* 3. *cap.* 2. ſtood in Force, no Pardon of (b) Felony could be allowed, without a Writ of Allowance, teſtifying that the Party had found Sureties according to that Statute; but this is now repealed by 5 & 6 *W.* 3. *cap.* 13. which provides, "That the Juſtices, before whom a Pardon of Felony ſhall be pleaded, may in Diſcretion remand or commit the Party to Priſon till he ſhall enter into a Recognizance, with two ſufficient Sureties, for the good Behaviour for any Time not exceeding ſeven Years; provided that, if ſuch Perſon be an Infant or Feme Covert, it ſhall be ſufficient to find two Sureties, who ſhall enter into a Recognizance for his or her being of the good Behaviour as aforeſaid †.

(b) But there never was any Neceſſity for ſuch Writ upon a Pardon of Treaſon. Cro. Eliz. 514. Noy 31.

† There has not been any Inſtance ſince this Stat. (as it is ſaid) of the Court's requiring Recognizance for the good Behaviour of a Perſon pardoned for Murder. *Rex* v. *Chetwynd.* H. 17 Geo. 2. Stra. 1203.

2 Jon. 56. Sid. 452. Keilw. 25. The Judges may inſiſt on the uſual Fee of Gloves to themſelves and Officers, before they allow a Pardon.

3 Inſt. 29. Where a Priſoner hath a Pardon to plead, and any Difficulty ariſe thereon, the Court will of Courſe aſſign him Counſel ‡.

‡ On a Pardon for a Miſdemeanor, the Defendant ſhall not be put to the Bar, nor plead it on his Knees. *Rex* v. *Hales.* M. 2 Geo. 2. Stra. 816.——Defendant in an Information for Maihem ſhall have the Benefit of an Act of Grace, though he did not inſiſt on it at his Trial; but ſhall pay Proſecutor full Coſts. *Rex* v. *Haines.* P. 21 Geo. 2. 1 Wilſ. 214.

(H) The Effects and Conſequences of a Pardon, and to what the Party ſhall be reſtored.

IT ſeems agreed, that a Pardon of Treaſon or Felony, even after an Attainder, ſo far clears the Party from the Infamy and all other Conſequences thereof, that he may have an Action againſt any who ſhall afterwards call him Traitor or Felon, for the Pardon makes him as it were a new Man. Hob. 67, 81. Moor 863. Rol. Abr. 87. Raym. 23.

Alſo a Pardon reſtores a Man to his Credit, ſo as to enable him to be a Witneſs; but yet his Credit muſt be left to the Jury. 2 Hal. Hiſt. 278. & *vide* Tit. *Evidence*.

And it hath been admitted, that the King's Pardon of the Burning of the Hand on a Conviction of Manſlaughter hath the ſame Effect, as to this Purpoſe, as the Burning would have had, which is agreed to reſtore the Party to his Credit. 2 Hawk. P. C. 395.

But it hath been adjudged, that a Pardon is of no Manner of Force, as to this Purpoſe, till it have paſſed the Great Seal. 2 Hawk. P. C. 395.

It is ſaid, that the Pardon of a Felony will not make an Arreſt for it by one who did not know of the Pardon unlawful; becauſe ſuch Arreſts, being for the Public Good, are to be favoured, and therefore ſhall not be actionable by Reaſon of ſuch a Pardon, as ſcandalous Words ſhall be, becauſe they deſerve no Favour. Hob. 67, 82.

* If a Man be convicted or deprived, or otherwiſe puniſhed for an Offence during a Seſſion of Parliament, and at the ſame Seſſion an Act paſſeth which pardons the Offence, it ſeems agreed, that the Conviction or Deprivation, &c. are *ipſo facto* avoided; becauſe the Act taking Effect from the firſt Day of the Seſſion, it now appears, that the Offence was pardoned at the Time of the Conviction, &c. Alſo it hath been adjudged, that where an Act of Parliament expreſly pardons ſuch and ſuch Crimes from a certain Day before the Seſſions, it thereby avoids all Convictions and Deprivations, and Awards of Coſts and Amerciaments, &c. for ſuch Crimes, whether ſuch Convictions, &c. were before or after the Seſſion; becauſe it appears to be the Intent of the Parliament that ſuch Crimes ſhall no Way be puniſhed, which cannot take Effect, if ſuch Convictions, &c. continue in Force. * Page 810 2 Hawk. P. C. 395.

But as no Pardon from the King ſhall deveſt any Intereſt veſted in the Subject †; ſo neither ſhall it, without Words of Reſtitution, even deveſt any Thing from the King; yet a Pardon prior to a Conviction ſhall prevent all Forfeitures of Lands or Goods. Lev. 8, 120. 2 Mod. 53. Saund. 362. 3 Mod. 101. † *Vide ante* 808. n.

It hath been adjudged, that the Releaſe of all Judgments and Executions in a general Pardon extends to Debts due to the King by Aſſignment or Forfeiture; and that it doth not reſtore them to him who aſſigned or forfeited them, but extinguiſhes them in the Hands of the Debtor. Sid. 167. Saund. 362. Lev. 120.

It ſeems agreed, that notwithſtanding the King's Pardon to a Simoniſt coming into Church contrary to the Purport of 31 *Eliz. cap.* 6. or to an Officer coming into his Office by a corrupt Bargain contrary to the Purport of 5 & 6 *E.* 6. *cap.* 16. may ſave ſuch Clerk or Officer from any Criminal Proſecution in reſpect of the corrupt Bargain; yet ſhall it not enable the Clerk to hold the Church, nor the Officer to retain the Office, becauſe they are abſolutely diſabled by Statute. Owen 87. Hetl. 104. Co. Lit. 120. 3 Bulſt. 90, 91. 3 Inſt. 154.

A Reſtitution of Blood, in its true Nature and Extent, can only be by Act of Parliament; and therefore if a Man attainted be pardoned by Act of Parliament, he is totally reſtored and inheritable to all Perſons; but if he Co. Lit. 8. Hal. Hiſt. P. C. 358.

he be pardoned by Charter, he may thenceforth purchaſe Lands, but cannot inherit his former Relations; for the King's Charter cannot alter or take away the Right of others, or reſtore the Relations that was loſt.

Noy 170. Co. Lit. 391. Hal. Hiſt. P. C. 358. If a Man be attainted, and after pardoned by Charter, the Children born before ſuch Pardon ſhall not inherit; but if they fail, the Children born after ſuch Pardon may inherit him; for the Pardon makes him capable of new Relations as well as of new Purchaſes, though all the old legal Benefits and Relations are loſt.

Hal. Hiſt. P. C. 358. Reſtitutions by Parliament are of two Kinds; one a Reſtitution only in Blood, which only removes the Corruption thereof, but reſtores not to the Party attaint, or his Heirs, the Manors or Honours loſt by the Attainder, unleſs it ſpecially extend to it; the other is a general Reſtitution, not only in Blood, but to the Lands, *&c.* of the Party attaint.

Hal. Hiſt. P. C. 358. A Reſtitution in Blood may be ſpecial and qualified; but generally a Reſtitution in Blood, is conſtrued liberally and extenſively.

3 Inſt. 233. Hal. Hiſt. P. C. 358-9. *A.* hath iſſue *B.* a Son, and is attaint of Treaſon and dies, *B.* purchaſeth Lands in Fee-ſimple, *B.* by Parliament is reſtored only in Blood, and enabled as well as Heir to *A.* as to all other Collateral and Lineal Anceſtors, provided it ſhall not reſtore *B.* to any of the Lands of *A.* forfeited by the Attainder; *B.* dies without Iſſue; it was ruled, that the Lands of *B.* ſhall deſcend to the Siſters of *A.* as Aunts and Collateral Heirs of *B.* *1ſt*, Becauſe the Corruption of Blood by the Attainder is removed by the Reſtitution. *2dly*, Although the Words of the Act of Reſtitution be to reſtore *B.* only as Heir to *A.* *&c.* yet this doth not only remove the Corruption, and reſtore him and his Lineal Heirs in Blood, but alſo his Collateral Heirs, and removes that Impediment which would have hindered the Deſcent to them.

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*PAUPER.

(A) Of the Right to ſue in forma Pauperis, and the Manner of Admittance. 811.

(B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to ſue in forma Pauperis. 812.

(C) In what Caſes to be ſo admitted. 813.

(D) In what Caſes to be diſpaupered and to pay Coſts. 813.

(A) Of the Right to ſue in forma Pauperis, and the Manner of Admittance.

BY the 11 *Hen.* 7. *cap.* 12. it is enacted in the Words following, "Prayen the Commons in this preſent Parliament aſſembled, "that where the King our Sovereign Lord, of his moſt gracious "Diſpoſition, willeth and intendeth indifferent Juſtice to be had and "miniſtered according to his Common Laws to all his true Subjects, as well "to the Poor as Rich, which poor Subjects be not of Ability nor Power to "ſue according to the Laws of this Land, for the Redreſs of Injuries "and Wrongs to them daily done, as well concerning their Perſons and "their Inheritance as other Cauſes; for Remedy whereof, in the Behalf of "the Poor Perſons of this Land not able to ſue for their Remedy after the "Courſe of the Common Law, be it ordained and enacted, that every "poor Perſon or Perſons, which have or hereafter ſhall have Cauſe of Ac-"tion or Actions againſt any Perſon or Perſons within this Realm, ſhall "have by the Diſcretion of the Chancellor of this Realm for the Time "being, Writ or Writs original and Writs of *Subpœna*, according to the "Nature of their Cauſes, therefore nothing paying to your Highneſs for "the Seals of the ſame, nor to any Perſon for the Writing of the ſame "Writs to be hereafter ſued; and that the ſaid Chancellor for the Time "being ſhall aſſign ſuch of the Clerks, who ſhall do and uſe the Making "and Writing of the ſame Writs, to write the ſame ready to be ſealed; "and alſo learned Counſel and Attornies for the ſame, without any Re-"ward taking therefore; and after the ſaid Writ or Writs be returned, if "it be before the King in his Bench, the Juſtices there ſhall aſſign to the "ſame poor Perſon or Perſons Counſel learned, by their Diſcretions, which "ſhall give their Counſel, nothing taking for the ſame; and likewiſe the "Juſtices ſhall appoint Attorney and Attornies for the ſame poor Perſon "or Perſons, and all other Officers requiſite and neceſſary to be had for "the Speed of the ſaid Suits to be had and made, which ſhall do their Du-"ties without any Reward for their Counſels, Help and Buſineſs in the "ſame; and the ſame Law and Order ſhall be obſerved and kept of all "ſuch Suits to be made afore the King's Juſtice of his Common Place and "Barons of his Exchequer, and all other Juſtices in the Court of Record "where any ſuch Suit ſhall be."

* Before a Perſon is admitted to ſue *in forma Pauperis*, he muſt have a Counſel's Hand to his Petition, certifying the Judge to whom the Petition is directed, that he conceives the Petitioner hath good Cauſe of Action; he muſt alſo annex an Affidavit to his Petition, that he is not worth 5 *l.* all his Debts paid, except wearing Apparel and his Right to the Matter in Queſtion. * Page 812 Lil. Reg. 633.

On a Motion to diſpauper a Perſon who was Plaintiff in an Action becauſe he hath a Living of 40 *l. per Annum*; *Turton* and *Gould* Juſtices were againſt it, becauſe he ſwore he was in Debt more than it was worth; but *Holt* C. J. differed from them; for his being indebted, or his Eſtate being mortgaged, is no Reaſon, it is enough that he has a conſiderable Eſtate in Poſſeſſion. 2 Salk. 507. pl. 2.

A Perſon admitted to ſue *in forma Pauperis* can only ſue in that Cauſe for which he is admitted; ſo that if any other Cauſe ariſes, he muſt ſue *de novo* to be admitted, *& ſic toties quoties*. Lil. Reg. 633.

(B) Whe-

(B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to ſue, in forma Pauperis.

IT ſeems that, after the Statutes which introduced Coſts, neither Plaintiffs nor Defendants could ſue or defend *in forma Pauperis*; for that would be a Means of depriving the other Party of the Coſts given him by Statute; and as the above-mentioned Statute 11 *H.* 7. *cap.* 12. enables Perſons only to ſue as Paupers; and as the Statute 23 *H.* 8. *cap.* 15. hereafter ſets forth, excepts only Plaintiffs who are Paupers from paying of Coſts, it ſeems that a Defendant cannot be admitted in a Civil Action to defend as a Pauper. But it hath been (*a*) adjudged, that a Perſon may be admitted to defend an Indictment *in forma Pauperis* for a Miſdemeanor, ſuch as a Conſpiracy, keeping a diſorderly Houſe, &c. for in ſuch Proceedings there being no Coſts, the Judges have a diſcretionary Power of admitting or refuſing them by the Common Law.

(*a*) Paſch 9. Geo. 2. *The King* ver. *Wright.* 2 Stra. 1041.

Alſo by the 2 *Geo.* 2. *cap.* 28. *ſ.* 8. it is enacted, "That in caſe any "Perſon, arreſted and impriſoned by Virtue of any Writ of *Capias* or In"formation relating to the Cuſtoms, ſhall make Affidavit before the "Judge or Judges of ſuch Court where ſuch Action or Information ſhall "be brought, or before any other Perſon commiſſioned by ſuch Court to "take Affidavits, that he is not worth, over and above his wearing Ap"parel, the Sum of 5*l.* (which Affidavit the ſaid Judge or Judges of ſuch "Court, and ſuch Perſon ſo commiſſioned, is and are hereby authoriſed "and required to take) and ſuch Perſon ſhall thereupon petition ſuch Court "to be admitted to defend himſelf againſt ſuch Action or Information *in* "*forma Pauperis*, that then the Judges of ſuch Court ſhall according to "their Diſcretions admit ſuch Perſon to defend himſelf againſt ſuch Ac"tion or Information in the ſame Manner, and with the ſame Privileges, "as the Judges of ſuch Court are by Law directed and authoriſed to ad"mit poor Subjects to commence Actions for the Recovery of their Right; "and for that End and Purpoſe it ſhall be lawful for the Judges of ſuch "Courts to aſſign Council learned in the Law, and to appoint an Attor"ney and Clerk of ſuch Court to adviſe and carry on any legal Defence "that ſuch Perſon can make againſt ſuch Action or Information; which "ſaid Counſel, Attorney and Clerk ſo aſſigned and appointed, is and are "hereby required to give his and their Advice and Aſſiſtance to ſuch Per"ſon, and to do their Duties, without Fee or Reward."

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*(C) In what Caſes to be ſo admitted.

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Lil. Reg. 633 *per Wild.*

IT is ſaid, that none ought to be admitted to ſue *in forma Pauperis* in an Action on the Caſe for Words.

Mod. 268. *per North.*

Alſo it is ſaid, That a Perſon who ſues *in forma Pauperis* ought not to have a new Trial granted him; becauſe having had once the Benefit of the King's Juſtice he ought to acquieſce in it †.

† *Sed qu.* If this is not diſcretionary in the Court, and more eſpecially if the Plaintiff will conſent to pay the Coſts?

Mod. 268. *per North.* 8 Mod. 344. 11 Mod. 84.

And it is ſaid, that Paupers ought not to be admitted to remove Cauſes out of Inferior Courts but ought to ſatisfy themſelves with the Juriſdiction within which their Actions properly lie.

pl. 3. *Barnes's Notes* C. P. 231. Stra. 420. Forteſc. 319. 2 Stra. 878. Barnard. K. B. 375. 2 Stra. 891, 983, 1121.

(D) In

(D) In what Caſes to be diſpaupered and to pay Coſts.

BY the Orders of the Courts, if the Party admitted to ſue *in forma Pauperis* give any Fee or Reward to his Counſel or Attorney, or make any Contract or Agreement with them, he ſhall from thenceforth be diſpaupered, and not be afterwards admitted again in that Suit to proſecute *in forma Pauperis*. *Ord. Cur.* 94.

Alſo, if it ſhall be made appear to the Court, that any Perſon proſecuting *in forma Pauperis* hath ſold or contracted for the Benefit of the Suit, or any Part thereof, while the ſame depends, ſuch Cauſe ſhall be from thenceforth totally diſmiſſed the Court. *Ord. Cur.* 95.

It is ſaid, that if a Pauper gives Notice of Trial, and does not proceed, he ſhall be diſpaupered. 2 Salk. 506. pl. 1.

In the Statute 23 *H.* 8. *cap.* 15. there is a Proviſion, "That whoever "ſues *in forma Pauperis* ſhall (*a*) not pay Coſts, but ſhall ſuffer ſuch "other Puniſhment as the Judge of the Court ſhall think fit."

(*a*) Though Lands deſcend to him after Cauſe tried, yet ſhall not pay Coſts. Mod. Rep. *in Law & Eq.* 344.

But notwithſtanding this Statute, if he be diſpaupered or nonſuited, the (*b*) uſual Practice is to tax the Coſts, and for Non-payment to order him to be whipped. 2 Salk. 506. pl. 1. Style 386.

(*b*) But tho' the uſual Courſe in ſuch Caſes is to tax the Coſts, and if not paid to whip the Plaintiff, yet upon Conſideration of the Circumſtances of the Caſe, it is in the Diſcretion of the Court to ſpare both. Sid. 261. And *per Holt* C. J. on Motion to whip a Pauper who had been nonſuited, there is no Officer for that Purpoſe, nor did he ever know it done. 2 Salk. 506. pl. 1.

A. brought a Bill *in forma Pauperis*, to which the Defendant put in a Plea and Demurrer, which were both over-ruled; and it was inſiſted upon, that he ſhould have no Coſts, being at none; but my Lord *Somers*, after long Debate and Inquiry of all the antient Counſel and Clerks, who agreed that he ſhould have Coſts, ordered him his Coſts (*c*) like other Suitors; for though he is at no Coſts, or but ſmall Coſts, yet the Counſel and Clerks do not give their Labour to the Defendant, but to the Pauper. Abr. Eq. 125.

(*c*) But *vide* Preced. Chan. 219. where a Pauper having a Decree to recover with Coſts, it was held on Motion *per Curiam* to be unreaſonable, that any one ſhould have more Coſts than he was out of Pocket; and thereupon ordered the Plaintiff and his Solicitor to make Oath before the Maſter, and what they ſwore they had paid, or were to pay, was to be allowed, but no farther ‡.

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‡ Coſts cannot be given againſt a Pauper Leſſor of the Plaintiff, for not going on to Trial; if vexatious, he may be diſpaupered. *Nokes* v. *Watts*. Fort. 319.——But if Coſts are taxed, he ſhall pay them before he try the Cauſe. S. C. Stra. 420.——Pauper ſhall not pay Coſts, though diſpaupered; if taken on Execution for Coſts, he ſhall be diſcharged on Motion. *Solomon* v. *Aynel* 11 Geo. Fort. 320.——If Pauper is nonſuited on a Slip of the Attorney, notwithſtanding which Defendent might have gone into the Merits, the Court will not ſtay Proceedings in another Action till he pays the Coſts of the former. *Winer* v. *Slow*. M. 4 Geo. 2. Stra. 878.——If Pauper is nonſuited, brings a ſecond Action, and recovers, Coſts of the firſt ſhall not be deducted out of the Recovery in the ſecond. *Butler* v. *Inneys*. H. 4 Geo. 2. Stra. 891.——If Pauper gives ſeveral Notices, and does not go on to Trial, the Court will not reſtrain him from going on to Trial till he has paid Coſts of former Notices, but they will make an Order to diſpauper him *niſi*. *Taylor* v. *Low*. T. 7 Geo. 2. Stra. 983.——Defendant on an Indictment may be admitted *in forma Pauperis*. *Rex* v. *Wright*. P. 9 Geo. 2. Stra. 1041. *Ca. B. R. Temp.* Hardw. 211, 253. In an Action he cannot. Barnes 328.——If Defendant in Ejectment obtains Trial at Bar, on conſenting to pay Bar-coſts, and to receive *Niſi Prius* Coſts, and then Leſſor is admitted *in forma Pauperis*, and has a Verdict againſt him; yet he ſhall not pay Coſts before he brings another Ejectment. *Brittain* v. *Greenville*. M. 13 Geo. 2. Stra. 1121.——Admiſſion *in forma Pauperis* in Chancery, is not binding on the Officers of *B. R.* ſo that on an Iſſue out

*PERJURY.

Hawk. P. C. 172. PERJURY by the Common Law is defined a wilful falſe Oath by one who, being lawfully required to depoſe the Truth in any Proceeding in a Court of Juſtice, ſwears abſolutely in a Matter of ſome Conſequence to the Point in Queſtion, whether he be believed or not.

Rol. Abr. 41, 57. Yelv. 72. Cro. Jac. 158. 2 Keb. 399. 3 Mod. 122. Subornation of Perjury by the Common Law is an Offence in procuring a Man to take a falſe Oath amounting to Perjury, who actually takes ſuch Oath; but is ſeems clear, that if the Perſon, incited to take ſuch an Oath, do not actually take it, the Perſon by whom he was ſo incited is not guilty of Subornation of Perjury; yet it is certain, that he is liable to be puniſhed, not only by Fine, but alſo by infamous Corporal Puniſhment.

Hawk. P. C. 177. Fitzgib. 56. See 8 Mod. 286. 12 Mod. 139. Fitzgib. 262, 266. Ld. Raym. 887, 889, 1039, 1221, 1305. Stra. 70. Barnard. K. B. 11. Stra. 442.

For the better underſtanding the Nature of Perjury, we ſhall conſider,

(A) **What it is by the Common Law, and how reſtrained and puniſhed.** 814.
(B) **How reſtrained and puniſhed by Statute.** 815.

(A) What it is by the Common Law, and how reſtrained and puniſhed.

5 Mod. 350. 1*ſt*, IT is neceſſary, to conſtitute the Offence Perjury, that the falſe Oath be taken wilfully, *viz.* with ſome Degree of Deliberation, and not merely owing to Surpriſe or Inadvertency, or a Miſtake of a true State of the Queſtion.

Hawk. P. C. 173. and ſeveral Authorities there cited. 2*dly*, The Oath muſt be taken either in a Judicial Proceeding, or in ſome other Public Proceeding of the like Nature, wherein the King's Honour or Intereſt are concerned; as before Commiſſioners appointed by the King to inquire of the Forfeitures of his Tenants, or of defective Titles wanting the Supply of the King's Patents; but it is not material whether the Court, in which a falſe Oath is taken, be a Court of Record or not, or whether it be a Court of Common Law or a Court of Equity, or Civil Law, *&c.* or whether

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out of Chancery to be tried in *B. R.* the Party muſt be admitted again. *Gibſon* v. *M'Carty.* T. 9 Geo. 2. *Ca. B. R. Temp.* Hardw. 311.——The Court may admit Perſons to ſue *in forma Pauperis* at any Time. *Langley* v. *Blackerby.* H. 12 Geo. 2. Andr. 306.——A Perſon convicted of Perjury, and outlawed for Forgery, may be admitted to plead the King's Pardon *in forma Pauperis.* *Rex* v. *Morgan.* M. 18 Geo. 2. Stra. 1215.——Defendant on an Attachment for a Contempt, is not admitted to defend *in forma Pauperis.* *Rex* ver. *Pearſon.* T. 33 & 34 Geo. 2. 2 Bur. 1039.——Plaintiffs are not admitted to ſue *in forma Pauperis,* unleſs Counſel certifies, that there is ſome Foundation for ſuing; nor Proſecutors to proſecute, unleſs ſome ſpecial Ground is laid for the Motion, *Rex* v. *Clarke.* H. 2 Geo. 3. 3 Bur. 1308.

whether the Oath be taken in the Face of the Court, or out of it before Perſons authoriſed to examine a Matter depending in it; as before the Sheriff on a Writ of Inquiry, *&c.* or whether it be taken in Relation to the Merits of a Cauſe or in a collateral Matter; as where one, who offers himſelf to be Bail for another, ſwears that his Subſtance is greater than it is, *&c.* but neither a falſe Oath in a mere private Matter, as in making a Bargain, *&c.* nor the Breach of a promiſſory Oath, whether public or private, are puniſhable as Perjury.

3*dly*, The Oath ought to be taken before Perſons lawfully authoriſed to adminiſter it; for if it be taken before Perſons acting merely in a pri- Hawk. P. C. 173-4.
* vate Capacity, or before Perſons pretending to a Legal Authority of ad- * Page 815
miniſtring ſuch Oath, but having in Truth no ſuch Authority, it is not puniſhable as Perjury; yet a falſe Oath taken before Commiſſioners, whoſe Commiſſion at the Time is in Strictneſs determined by the Demiſe of the King, is Perjury, if taken before ſuch Time as the Commiſſioners had Notice of ſuch Demiſe; for it would be of the utmoſt ill Conſequence in ſuch Caſe to make their Proceedings wholly void.

4*thly*, The Oath ought to be taken by a Perſon ſworn to depoſe the Truth; and therefore a falſe Verdict comes not under the Notion of a Per- Hawk. P. C. 174.
jury, becauſe the Jurors ſwear not to depoſe the Truth, but only to judge truly of the Depoſitions of others; but a Man may be as well perjured by an Oath in his own Cauſe, as in an Anſwer in Chancery, or in an Anſwer to Interrogatories concerning a Contempt, or in an Affidavit, *&c.* as by an Oath taken by him as Witneſs in another Cauſe.

5*thly*, It is not material, whether the Thing ſworn be in itſelf true or falſe, where the Perſon who ſwears it in Truth knows nothing of it, Hawk. P. C. 175.

6*thly*, The Oath muſt be taken abſolutely and directly; and therefore if a Man only ſwears as he thinks, remembers or believes, he cannot be guilty of Perjury. Hawk. P. C. 175.

7*thly*, The Thing ſworn ought to be ſome Way material; for if it be wholly foreign from the Purpoſe, or altogether immaterial, and neither any Way pertinent to the Matter in Queſtion, nor tending to aggravate or extenuate the Damages, nor likely to induce the Jury to give the readier Credit to the ſubſtantial Part of the Evidence, it cannot amount to Perjury, becauſe it is wholly idle and inſignificant; as where a Witneſs introduces his Evidence, with an impertinent Preamble of a Story concerning previous Facts, no Way relating to what is material, and is guilty of a Falſity as to ſuch Facts; but it ſeems a reaſonable Opinion, that a Witneſs may be guilty of Perjury in Reſpect to a falſe Oath concerning a mere Circumſtance, if ſuch Oath have a plain Tendency to corroborate the more material Part of the Evidence; as if in Treſpaſs for ſpoiling the Plaintiff's Cloſe with the Defendant's Sheep, a Witneſs ſwears that he ſaw ſuch a Number of the Defendant's Sheep in the Cloſe; and being aſked how he knew them to be the Defendant's, ſwears that he knew them by ſuch a Mark, which he knew to be the Defendant's, where in Truth the Defendant never uſed any ſuch Mark. Hawk. P. C. 175.

8*thly*, It does not ſeem material, whether the falſe Oath were credited or not, or whether the Party, in whoſe Prejudice it was taken, were in the Event any ways damaged by it; for the Proſecution is not grounded on the Damage to the Party, but on the Abuſe of Public Juſtice. Hawk. P. C. 177.

(B) How reſtrained and puniſhed by Statute.

BY the 5 *Eliz. cap.* 9. it is enacted, "That whoever ſhall unlawfully "and corruptly procure any Witneſs or Witneſſes by Letters, Re- "wards, Promiſes, or by any other ſiniſter and unlawful Labour or Means "whatſoever,

" whatſoever, to commit any wilful and corrupt Perjury in any Matter or " Cauſe whatſoever depending in Suit or Variance by any Writ, Action, " Bill, Complaint or Information in any wiſe concerning any Lands, Te- " nements or Hereditaments, or Goods, Chattels, Debts or Damages in " any of the King's Courts of Chancery, *Whitehall*, or elſewhere, within " any of the King's Dominions of *England* or *Wales*, or the Marches of " the ſame, where any Perſon or Perſons ſhall have Authority by Virtue
• Page 816 " • of the King's Commiſſion, Patent or Writ, to hold Plea of Land, or to " examine, hear or determine any Title of Lands, or any Matter or Wit- " neſſes concerning the Title, Right or Intereſt of any Lands or Tenements, " or Hereditaments, or in any of the King's Courts of Record, or in any " Leet, View of Frankpledge or Law, Antient Demeſne Court, Hundred- " Court, Court-Baron, or in the Court or Courts of the Stannary in the " Counties of *Devon* or *Cornwall*; or ſhall unlawfully and corruptly pro- " cure or ſuborn any Witneſs or Witneſſes, who ſhall be ſworn to teſtify " *in perpetuam rei memoriam*, ſhall for ſuch Offence, being thereof " lawfully convicted or attainted, forfeit the Sum of 40 *l.* And if any " ſuch Offender, ſo being convicted or attainted, ſhall not have any Goods " or Chattles, Lands or Tenements, to the Value of 40 *l.* that then every " ſuch Perſon ſhall ſuffer Impriſonment by the Space of one Half Year, " without Bail or Mainpriſe, and ſtand upon the Pillory, the Space of one " whole Hour in ſome Market-Town next adjoining to the Place where the " Offence was committed, in open Market there, or in the Market-Town " itſelf where the Offence was committed.

And *Sect.* 5. it is further enacted, " That no Perſon, being ſo convicted " or attainted, ſhall from thenceforth be received as a Witneſs in any Court " of Record in any of the King's Dominions of *England*, *Wales*, or the " Marches of the ſame, till ſuch Judgment againſt him ſhall be reverſed " by Attaint, or otherwiſe, and that upon every ſuch Reverſal the Party " grieved ſhall recover Damages againſt the Party who did procure the " ſaid Judgment ſo reverſed to be firſt given.

And *Sect.* 6. it is further enacted, " That if any Perſon or Perſons ſhall " either by the Subornation, unlawful Procurement, ſiniſter Perſwaſion, " or Means of any other, or by their own Act, Conſent or Agreement, " wilfully and corruptly commit any Manner of wilful Perjury by his or " their Depoſition in any of the Courts before-mentioned, or being exa- " mined *in perpetuam rei memoriam*, that then every ſuch Offender being " duly convicted or attainted ſhall forfeit 20 *l.* and have Impriſonment by " the Space of ſix Months, without Bail or Mainpriſe, and the Oath of " ſuch Offender ſhall not from thenceforth be received in any Court of Re- " cord in *England* or *Wales*, until ſuch Judgment ſhall be reverſed, *&c.* " on which Reverſal the Party grieved ſhall recover Damages in the Man- " ner before-mentioned.

And *Sect.* 7. it is farther enacted, " That if ſuch Offender ſhall not have " Goods or Chattels to the Value of 20 *l.* that then ſuch Perſon ſhall be ſet " on the Pillory in ſome Market-Place within the Shire, City or Borough " where the Offence ſhall be committed by the Sheriff or his Miniſters, if " it ſhall fortune to be without any City or Town Corporate; and if it " happen to be within any ſuch City or Town Corporate, then by the " Head Officer of ſuch City, *&c.* where he ſhall have both Ears nailed."

And *Sect.* 8 & 9. it is farther enacted, " That one Moiety of the ſaid " Forfeitures ſhall be to the King, and the other Moiety to ſuch Perſon " as ſhall be grieved, hindered or moleſted by Reaſon of any of the Of- " fences before-mentioned, that will ſue for the ſame, *&c.* and that as " well the Judge and Judges of every ſuch of the ſaid Courts where any " ſuch Suit ſhall be, and whereupon any ſuch Perjury ſhall be committed, " as alſo the Juſtices of Aſſiſe and Gaol-Delivery, and Juſtices of Peace at " their Quarter-Seſſions both within the Liberties and without, may in- " quire of, hear and determine all Offences againſt the ſaid Act. But

But it is provided *Sect.* 11. "That the ſaid Act ſhall no way extend to "any Spiritual or Eccleſiaſtical Court, but that every ſuch Offender, as "ſhall offend in Term as aforeſaid, ſhall be puniſhed by ſuch uſual and "ordinary Laws as are uſed in the ſaid Courts.

"* Provided alſo *Sect.* 13. that the ſaid Statute ſhall not reſtrain the "Authority of any Judge having (*a*) abſolute Power to puniſh Perjury "before the making thereof, but that every ſuch Judge may proceed in "the Puniſhment of all Offences puniſhable before the making of the ſaid "Statute, in ſuch wiſe as they might have done and uſed to do to all Pur-"poſes, ſo that they ſet not on the Offender leſs Puniſhment than is con-"tained in the ſaid Act."

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(*a*) And there the Court of King's Bench, *&c.* proceeding upon an Indictment or Information of Perjury, or Subornation of Perjury at Common Law, may not only ſet a diſcretionary Fine on the Offender, but alſo condemn him to the Pillory, without making any Inquiry concerning the Value of his Lands or Goods. Hawk. P. C. 178.

In the Conſtruction of this Statute the following Opinions have been holden:

That every Indictment or Action on this Statute muſt exactly purſue the Words of it; and therefore if it alledge, that the Defendant depoſed ſuch a Matter *falſo & deceptive*, or *falſo & corrupte*, or *falſo & voluntarie*, without ſaying *voluntarie & corrupte*, it is not good, though it conclude, that *ſic Voluntarium & corruptum commiſit perjurium contra formam Statuti, &c.* Alſo it is (*b*) ſaid to be neceſſary expreſly to ſhew, that the Defendant was ſworn; and that it is not ſufficient to ſay, that *tacto per ſe ſacro Evangelio depoſuit.*

Cro. Eliz. 147. Hetl. 12. Savil. 43. 2 Leon. 211. 3 Leon. 230. Show. 190. Holt. 534. pl. 1. Skin. 403. pl. 39.

(*b*) Cro. Eliz. 105.

But there is no Need to ſhew, whether the Party took the falſe Oath through the Subornation of another, or of his own Act, though the Words of the Statute are, *If Perſons by Subornation, &c. or their own Act, &c. ſhall commit wilful Perjury*; for there being no Medium between the Branches of this Diſtinction, they ſeem to be put in *ex abundanti*, and to expreſs no more than the Law would have implied, and therefore operate nothing.

3 Bulſt. 147.

It hath been adjudged, that a Man cannot be guilty of Perjury within this Statute, in any Caſe wherein he may not poſſibly be guilty of Subornation of Perjury within it; for it is reaſonable to give the whole Statute the ſame Conſtruction; neither can it be well intended, that the Makers of the Statute meant to extend its (*c*) Purview farther as to Perjury, which they ſeem to eſteem the leſſer Crime, than to Subornation of Perjury, which they ſeem to eſteem the greater; and therefore ſince the Clauſe concerning Subornation of Perjury mentioning only Matters depending by Writ, Bill, Plaint or Information, concerning Hereditaments, Goods, Debts or Damages, *&c.* extends not to Perjury on an Indictment or Criminal Information; the Clauſe concerning Perjury, though penned in more general Words, has been adjudged to come under the like Reſtriction: Alſo ſince the Clauſe concerning Subornation of Perjury relates only to Perjury by Witneſſes, that concerning Perjury ſhall extend only to the like Perjury; and therefore not to Perjury in an Anſwer in Chancery; or in Swearing the Peace againſt a Man; or in a Preſentment by a Homager in a Court-Baron; or in a Wager of Law, or in Swearing before Commiſſioners of Inquiry of the King's Title to Lands; and, by the Opinions of ſome, a falſe Affidavit againſt a Man in a Court of Juſtice is not within the Statute; but if ſuch Affidavit be by a third Perſon, and relate to a Cauſe depending in Suit before the Court, and either of the Parties in Variance be grieved, hindered or moleſted, in Reſpect of ſuch Cauſe, by Reaſon of the Perjury, it may ſtrongly be argued that it is within the Purview of the Statute; alſo it ſeems

5 Co. 99. Cro. Jac. 120. 3 Inſt. 164. 2 Leon. 201. Yelv. 120. Cro. Eliz. 148. 2 Rol. Abr. 77.

(*c*) See Obſerv. on Stat. 71.

the

the better Opinion, that a falſe Oath before the Sheriff on a Writ of Inquiry of Damages is within the Statute.

Hawk P. C. 181. and ſeveral Authorities there cited.

It hath been collected from the Clauſe which gives an Action to the Party grieved, that no falſe Oath is within the Statute, which doth not give ſome Perſon a juſt Cauſe of Complaint; and therefore, that if the Thing ſworn be true, though it be not known by him that ſwears it to be ſo, the Oath is not within the Statute, becauſe it gives no juſt Cauſe of Complaint to the other Party, who would take advantage of another's Want of Evidence to prove the Truth; alſo from the ſame Ground no falſe Oath can be within the Statute, unleſs the Party againſt whom it was ſworn ſuffered ſome Diſadvantage by it; and therefore in every Proſecution on the Statute, you muſt ſet forth † the Record wherein you ſuppoſe the Perjury to have been committed, and muſt prove at the Trial, that there is ſuch a Record, either by actually producing it, or an atteſted Copy; alſo in the Pleadings you muſt not only ſet forth the Point wherein the falſe Oath was taken, but muſt alſo ſhew how it conduced to the Proof or Diſproof of the Matter in Queſtion; and if an Action on the Statute be brought by more than one, you muſt ſhew how the Perjury was prejudicial to each of the Plaintiffs; but it ſeems that a Perjury, which tends only to aggravate or extenuate the Damages, is as much within the Statute as a Perjury that goes directly to the Point in Iſſue; and a Perjury, in a Cauſe wherein an erroneous Judgment is given, is a good Ground of a Proſecution upon the Statute till the Judgment be reverſed ‡.

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† *Vide* below n.

‡ On Perjury in an Anſwer in Chancery, it is not neceſſary to prove the *Identity* of the Perſon who ſwore it, nor that any Perſon ſwore it; it is ſufficient if his Hand-writing be proved, and that the Maſter proves that the *Jurat* was ſubſcribed by him, (the Maſter) as being ſworn before him. *Rex* v. *Morris*. T. 1 Geo. 3. 2 Bur. 1189.

2 Hal. Hiſt. P. C. 191-2.

If Perjury be committed, that is within this Statute, but concludes not *contra formam Statuti*; yet it is a good Indictment at Common Law, but not to bring him within the Corporal Puniſhment of the Statute.

By the 2 *Geo.* 2. *cap.* 25. *ſect.* 2. the more effectually to deter Perſons from committing wilful and corrupt Perjury, or Subornation of Perjury, it is enacted, "That, beſides the Puniſhment already to be inflicted by Law "for ſo great Crimes, it ſhall and may be lawful for the Court or Judge "before whom any Perſon ſhall be convicted of wilful and corrupt Perjury, "or Subornation of Perjury, according to the Laws now in Being, to order "ſuch Perſon to be ſent to ſome Houſe of Correction within the ſame "County, for a Time not exceeding ſeven Years, there to be kept to hard "Labour during all the ſaid Time, or otherwiſe to be tranſported to ſome "of his Majeſty's Plantations beyond the Seas, for a Term not exceeding "ſeven Years, as the Court ſhall think moſt proper; and therefore Judg"ment ſhall be given, that the Perſon convicted ſhall be committed or "tranſported accordingly, over and beſides ſuch Puniſhment as ſhall be ad"judged to be inflicted on ſuch Perſon agreeable to the Laws now in being; "and if Tranſportation be directed, the ſame ſhall be executed in ſuch "Manner as is or ſhall be provided by Law for the Tranſportation of "Felons; and if any Perſon ſo committed or tranſported ſhall voluntarily "eſcape or break Priſon, or return from Tranſportation before the Expi"ration of the Time for which he ſhall be ordered to be tranſported, as "aforeſaid, ſuch Perſon being lawfully convicted ſhall ſuffer Death as a "Felon without Benefit of Clergy, and ſhall be tried for ſuch Felony in the "County where he ſo eſcaped, or where he ſhall be apprehended ‖.

‖ By 23 Geo. 2. c. 11.

In Information or Indictment, it is ſufficient to ſet forth the Subſtance of the Offence, and before what Court or Perſon, with Averment of the Authority to adminiſter the Oath, and Averment to falſify the Matter wherein Perjury is aſſigned, without ſetting forth the Proceedings or the Authority.——So for Subornation.—Juſtices of Aſſize may order a Witneſs to be proſecuted, and aſſign Counſel; and the Proſecution ſhall be without Tax, Duty, or Fee.

*PIRACY.

PIRACIES and Depredations at Sea are Capital Offences, by the Civil Law; alſo Piracy is ſaid to have been puniſhable at Common Law, before the 25 *E.* 3. *ſtat.* 5. *cap.* 2. as Petit Treaſon, if committed by a Subject, and as Felony if committed by a Foreigner; but it ſeems agreed, that after that Statute, by which all Treaſon is confined to the Particulars therein ſet down, it was cognizable only by the Civil Law. Staunf. P. C. 10. 3 Inſt. 112. 2 Hal. Hiſt. P. C. 369, 370. Hawk. P. C. 98.

But this proving very inconvenient, becauſe by that Law no Offender ſhall have Judgment of Death without his own Confeſſion, or direct Proof by Eye-Witneſſes, it was enacted by 28 *H.* 8. *cap.* 15. "That all Felonies and Robberies, *&c.* upon the Sea, or in any Haven, River, Creek "or Place where the Admiral or Admirals have or pretend to have Power, "Authority or Juriſdiction, ſhall be inquired, tried, heard, determined "and judged in ſuch Shires and Places in the Realm as ſhall be limited by "the King's Commiſſion or Commiſſions to be directed for the ſame, in "like Form and Condition as if any ſuch Offence or Offences had been "committed or done in or upon the Land; and ſuch Commiſſions ſhall be "had under the King's Great Seal, directed to the Admiral or Admirals, "or to his or their Lieutenant Deputy and Deputies, and to three or four "ſuch other ſubſtantial Perſons as ſhall be named or appointed by the Lord "Chancellor of *England* for the Time being, from Time to Time and as "oft as Need ſhall require, to hear and determine ſuch Offences after the "common Courſe of the Laws of this Land uſed for Felonies, and Robberies, *&c.* done and committed upon the Land within this Realm.

And it is farther enacted by the ſaid Statute, "That if any Perſon or "Perſons happen to be indicted for any ſuch Offence done or hereafter "to be done upon the Seas, or in any other Place above limited, that then "ſuch Order, Proceſs, Judgment and Execution ſhall be uſed, had, done "and made to and againſt every ſuch Perſon and Perſons, ſo being indicted, "as againſt Felons, *&c.* for any Felony, *&c.* upon the Land, by the "Laws of the Land is accuſtomed.

And it is further enacted by the ſaid Statute, "That ſuch as ſhall be "convict of any ſuch Offence by Verdict, Confeſſion, or Proceſs by Authority of any ſuch Commiſſion, ſhall have and ſuffer ſuch Pains of Death, "Loſſes of Lands, Goods and Chattels, as if they had been attainted and "convicted of ſuch Offence done upon the Land, and alſo that they ſhall "be excluded from the Benefit of the Clergy."

In the Conſtruction of this Act the following Opinions have been holden:

That it does not alter the Nature of the Offence, ſo as to make that, which was before a Felony only by the Civil Law, now become Felony by the Common Law; for the Offence muſt ſtill be alledged as done upon the Sea, and is no way cognizable by the Common Law, but only by Virtue of this Statute; which, by ordaining that in ſome Reſpects it ſhall have the like Trial and Puniſhment as are uſed for Felony at Common Law, ſhall not be carried ſo far as to make it alſo agree with it in other Particulars which are not mentioned; and from hence (*a*) it follows that this Offence remains as before, of a ſpecial Nature, and that it ſhall not be included in a General Pardon of all Felonies. 3 Inſt. 112. 2 Hal. Hiſt. P. C. 370. (*a*) Moor 759 3 Inſt. 112. Co. Lit. 391. 2 Hal. Hiſt. P. C. 370.

From

*Page 820 3 Inſt. 112. Hawk. P. C. 99.

* From the ſame Ground alſo it follows, That no Perſons ſhall in reſpect of this Statute be conſtrued to be or puniſhed as Acceſſories to Piracy before or after, as they might have been, if it had been made a Felony by the Statute, whereby all thoſe would incidentally have been made Acceſſories in the like Caſes in which they would have been Acceſſories to a Felony at Common Law; and from hence it follows, that Acceſſories to Piracy being neither expreſly named in the Statute, nor by Conſtruction included in it, remain as they were before, and were triable by the Civil Law, if their Offence were committed on the Sea; but if on the Land, by no Law, until 11 & 12 *W.* 3. *cap.* 7. for 2 & 3 *E.* 6. *cap.* 24. which provides againſt Acceſſories in one County to a Felony in another, extends not to Acceſſories to an Offence committed in no County, but on the Sea; but by the ſaid Statute of 11 & 12 *W.* 3. *cap.* 7. they are triable in like Manner as the Principals are by the Statute of 28 *H.* 8. *cap.* 15.

3 Inſt. 112. Hawk. P. C. 99.

From the ſame Ground alſo it follows, that an Attainder for this Offence corrupts not the Blood, in as much as the Statute only ſays, that the Offender ſhall ſuffer ſuch Pains of Death, &c. as if he were attainted of a Felony at Common Law, but ſays not that the Blood ſhall be corrupted.

3 Inſt. 114. Dyer 241. pl. 49, 308, pl. 73.

Yet it has been reſolved, that an Offender ſtanding Mute on an Arraignment, by Force of this Statute, ſhall have Judgment of *Paine fort & dure*; for the Words of the Statute are, *That a Commiſſion ſhall be directed*, &c. *to hear and determine ſuch Offences after the common Courſe of the Laws of the Land.*

3 Inſt. 112. Rol. Rep. 175. Hawk. P. C. 100.

It has been holden, that the Indictment for this Offence muſt alledge the Fact to be done on the Sea, and muſt have both the Words *Felonice* and *Piratice*; and that no Offence is puniſhable by Virtue of this Act as Piracy, which would not have been Felony if done on the Land, and conſequently that the Taking of an Enemy's Ship by an Enemy is not within the Statute.

Moor 756. Rol. Rep. 175. Hawk. P. C. 100.

It is agreed, that this Statute extends not to Offences done in Creeks or Ports within the Body of a County, becauſe they are and always were cognizable by the Common Law.

11 & 12 W. 3. c. 7. Made perpetual by 6 Geo. c. 19. ſ. 3.

By the 11 & 12 *W.* 3. *cap.* 7. it is enacted, "That all Piracies, Felonies "and Robberies committed in or upon the Sea, or in any Place where the "Admiral has Juriſdiction, may be tried and determined at Sea, or upon "the Land in any of his Majeſty's Iſlands or Plantations, &c. to be ap"pointed by the King's Commiſſion under the Great Seal or the Seal of "the Admiralty, directed to any of the Admirals, &c. and ſuch Perſons "and Officers by Name or for the Time being, as his Majeſty ſhall think "fit, who ſhall have Power jointly or ſeverally, by Warrant under Hand "and Seal of any of them, to commit any Perſon againſt whom Informa"tion of any ſuch Offences ſhall be given upon Oath, and to call a Court "of Admiralty, which ſhall conſiſt of ſeven Perſons at the leaſt, and ſhall "proceed in the Trial of the ſaid Offenders according to ſuch Directions "as are ſet forth at large in the ſaid Statute.

And it is farther enacted by the ſaid Statute; *Sect.* 8. "That if "any of his Majeſty's natural-born Subjects or Denizens of this King"dom ſhall commit any Piracy or Robbery, or any Act of Hoſtility, "againſt other his Majeſty's Subjects upon the Sea, under Colour of any "Commiſſion from any Foreign Prince or State, or Pretence of Autho"rity from any Perſon whatſoever, ſuch Offender and Offenders, and "every of them, ſhall be deemed, adjudged and taken to be Pirates, Fe"lons and Robbers, and they and every of them, being duly convicted there"of according to this Act, or the aforeſaid Act of 28 *H.* 8. *cap.* 15. ſhall "have and ſuffer ſuch Pains of Death, Loſs of Lands, Goods and Chattels, "as Pirates, Felons and Robbers upon the Seas ought to have and ſuffer.

And

* And it is further enacted by the said Statute, "That if any Commander * Page 821
"or Master of any Ship, or any Seaman or Mariner, shall in any Place,
"where the Admiral hath Jurisdiction, betray his Trust and turn Pirate,
"Enemy or Rebel, and piratically and feloniously run away with his or
"their Ship or Ships, or any Barge, Boat, Ordnance, Ammunition, Goods
"or Merchandize, or yield them up voluntarily to any Pirate, or bring
"any seducing Message from any Pirate, Enemy or Rebel, or consult,
"combine or confederate with, or attempt or endeavour to corrupt any
"Commander, Master, Officer or Mariner, to yield up or run away with
"any Ship, Goods or Merchandize, or turn Pirate, or go over with Pirates,
"or if any Person shall lay violent Hands on his Commander, whereby to
"hinder him from fighting in Defence of his Ship and Goods committed
"to his Trust, or that shall confine his Master, or make, or endeavour
"to make, a Revolt in his Ship, shall be adjudged to be a Pirate, Felon
"and Robber, and being convicted thereof according to the Directions of
"this Act, shall have and suffer Pains of Death, Loss of Lands, Goods
"and Chattles, as Pirates, Felons and Robbers upon the Seas ought to
"have and suffer.

And it is farther enacted by the said Statute, "That all and every Person
"and Persons whatsoever, who shall either on the Land or upon the Seas
"wittingly and knowingly set forth any Pirate, or aid and assist, or main-
"tain, procure, command, counsel or advise any Person or Persons what-
"soever to do or commit any Piracies or Robberies upon the Seas, and
"such Person and Persons shall thereupon do or commit any such Piracy
"or Robbery, then all and every such Person or Persons whatsoever so as
"aforesaid setting forth any Pirate, or aiding or assisting, maintaining
"procuring, commanding, counselling or advising the same, either on the
"Land or upon the Sea, shall be adjudged to be Accessory to such Pira-
"cy and Robbery done and committed. *And farther*, that after any Pi-
"racy or Robbery is or shall be committed by any Pirate or Robber what-
"soever, every Person or Persons, who, knowing that such Pirate or Rob-
"ber has done or committed such Piracy and Robbery, shall, upon the
"Land or upon the Sea, receive, entertain or conceal any such Pirate or
"Robber, or receive or take into his Custody any Ship, Vessel, Goods or
"Chattels which have been by any such Pirate or Robber piratically and
"feloniously taken, shall be by this Statute likewise adjudged to be Acces-
"sory to such Piracy and Robbery, and that all such Accessories to such
"Piracies and Robberies shall be inquired of, heard and determined, and
"adjudged according to the common Course of the Law, according to
"the said Statute of 28 *H.* 8. *cap.* 15 as the Principals of such Piracies
"and Robberies may be, and no otherwise, and being thereupon attainted
"shall suffer such Pains of Death, Loss of Lands, Goods and Chattels, and
"in like Manner as the Principals of such Piracies, Robberies and Felonies
"ought to suffer according to the said Statute of 28 *H.* 8. *cap.* 15. which
"is declared to be in full Force; any Thing in this Act to the contrary
"notwithstanding.

And by 4 *Geo.* 1. *cap.* 11. "All Persons, who shall commit any Offence 4 Geo. 1. c.
"for which they ought to be adjudged Pirates, Felons or Robbers, by 11.
"11 and 12 *W.* 3. *cap.* 7. may be tried and judged for every such Offence,
"according to the Form of 28 *H.* 8. *cap.* 15. and shall be excluded from
"their Clergy.

By the 8 *Geo.* 1. *cap.* 24. for the more effectual Suppressing of Piracy, 8 Geo. 1. c.
"it is declared and enacted, "That if any Commander or Master of any 24.
"Ship or Vessel, or any other Person or Persons, shall any wise trade Made perpe-
"with any Pirate by Truck, Barter, Exchange, or in any other Manner, tual by 2 Geo.
2. c. 28. s. 7. and by

18 Geo. 2. c. 30. Persons committing Hostilities, or aiding Enemies at Sea, may be tried as Pirates. And see 32 Geo. 2. c. 25. for preventing Piracies and Robberies by Crews of private Ships of War.

" or ſhall furniſh any Pirate, Felon or Robber upon the Seas with any Am-
" munition, Proviſion or Stores of any Kind, or ſhall fit out any Ship or
*Page 822 " * Veſſel knowingly, and with a Deſign to trade with or ſupply, or cor-
" reſpond with any Pirate, Felon or Robber upon the Seas; or if any Per-
" ſon or Perſons ſhall any ways conſult, combine, confederate or corre-
" ſpond with any Pirate, Felon or Robber on the Seas, knowing them to
" be guilty of any ſuch Piracy, Felony or Robbery; ſuch Offender and Of-
" fenders, and every of them, ſhall in each and every of the ſaid Caſes be
" deemed, adjudged and taken to be guilty of Piracy, Felony and Rob-
" bery, and he and they ſhall and may be inquired of, tried, heard and ad-
" judged of and for all or any of the Matters aforeſaid, according to the Sta-
" tute made 28 *H.* 8. *cap.* 15. for Pirates, and the Statute made 11 & 12
" *W.* 3. *cap.* 7. and he and they, being convicted of all or any of the Mat-
" ters aforeſaid, ſhall ſuffer ſuch Pains of Death, Loſs of Lands, Goods
" and Chattels, as Pirates, Felons and Robbers upon the Seas ought to
" ſuffer; and in caſe any Perſon or Perſons belonging to any Ship or Veſſel
" whatſoever, upon meeting any Merchant Ship or Veſſel on the High
" Seas, or in any Port, Haven or Creek whatſoever, ſhall forcibly board or
" enter into ſuch Ship or Veſſel, and though they do not ſeize and carry
" off ſuch Ship or Veſſel, ſhall throw over-board or deſtroy any Part of the
" Goods or Merchandizes belonging to ſuch Ship or Veſſel, the Perſon
" and Perſons, who ſhall be guilty thereof, ſhall in all Reſpects be deemed
" and puniſhed as Pirates as aforeſaid.

And *Sect.* 2. it is farther enacted, " That every Ship or Veſſel, which
" ſhall be fitted out with a Deſign to trade with, or ſupply or correſpond
" with any Pirate, and all and every Goods and Merchandizes put on
" Board the ſame for any Intent or Purpoſe to trade with any Pirate, Fe-
" lon or Robber on the Seas, ſhall be *ipſo facto* forfeited; one Moiety
" thereof to the Uſe of the King's Majeſty, his Heirs and Succeſſors, the
" other Moiety to the Perſon or Perſons who ſhall firſt make Diſcovery,
" and give Information of ſuch Intent or Deſign; and ſuch Perſon or Per-
" ſons, who ſhall firſt make ſuch Diſcovery, ſhall and may ſue for and
" recover the ſaid Ship or Veſſel, and all and every the Goods and Mer-
" chandizes on board the ſame, in the High Court of Admiralty.

And *Sect.* 3. " Whereas there are ſome Defects in Laws for bringing
" Perſons who are Acceſſories to Piracy and Robbery upon the Seas to
" condign Puniſhment, if the Principal who committed ſuch Piracy and
" Robbery is not or cannot be apprehended and brought to Juſtice; be it
" therefore enacted, That all and every Perſon and Perſons whatſoever,
" who by the ſaid Statute made 11 & 12 *W.* 3. *cap.* 7. are declared to be
" Acceſſory or Acceſſories to any Piracy or Robbery therein mentioned,
" are hereby declared and ſhall be deemed and taken to be principal Pi-
" rates, Felons and Robbers, and ſhall and may be inquired of, heard,
" determined and adjudged in the ſame Manner, as Perſons guilty of
" Piracy and Robbery may and ought to be inquired of, tried, heard, de-
" termined and adjudged by the ſaid Statute 11 & 12 *W.* 3. *cap.* 7. and
" being thereupon attainted and convicted ſhall ſuffer ſuch Pains of Death,
" Loſs of Lands, Goods and Chattels, and in like Manner, as Pirates and
" Robbers ought by the ſaid Act to ſuffer.

And *Sect.* 4. it is farther enacted, " That all and every Offender or Of-
" fenders convicted of Piracy, Felony or Robbery, by Virtue of this Act,
" ſhall not be admitted to have the Benefit of Clergy, but be utterly ex-
" cluded of and from the ſame.

And *Sect.* 5. " To the End that a farther Encouragement may be given
" to all Seamen and Mariners to fight and defend their Ships from Pirates,
" it is farther enacted, " That in caſe any Seaman or Mariner on Board
" any Merchant Ship or Veſſel, or any other Ship or Veſſel, ſhall be
" maimed in Fight againſt any Pirate, every ſuch Seaman and Mariner,

" upon

" upon due Proof of his being maimed in ſuch Fight, ſhall not only have " and receive the Rewards already appointed by a Statute made the 22 & " 23 * *Car.* 2. *cap.* 11. intituled, *An Act to prevent the Delivering up of* *Page 823 " *Merchant Ships, and for the Increaſe of good and ſerviceable Seamen*, but " alſo ſhall be admitted into, and provided for in *Greenwich Hoſpital*, pre- " ferable to any other Seamen or Mariner, who is diſabled from Service or " getting a Livelihood merely by his Age.

And by *Sect.* 6. it is further enacted, " That in caſe any Commander, " Maſter or other Officer, or any Seamen or Mariner of any Merchant " Ship or Veſſel, which carries Guns and Arms, ſhall not, when they are " attacked by any Pirate, or by any Ship or Veſſel on which any ſuch Pi- " rate is on Board, fight and endeavour to defend themſelves and their " ſaid Ship or Veſſel from being taken by the ſaid Pirate, or ſhall utter " any Words to diſcourage the other Mariners from defending the Ship, " and by Reaſon thereof the ſaid Ship or Veſſel ſhall fall into the Hands " of ſuch Pirate, then and in every ſuch Caſe, every ſuch Commander or " Maſter, or other Officer, and every Seaman or Mariner, who ſhall not " fight and endeavour to defend and ſave the ſaid Ship or Veſſel, or who " ſhall utter any ſuch Words as aforeſaid, ſhall loſe and forfeit all and " every Part of the Wages due to him and them reſpectively to the Owner " and Owners of the ſaid Ship or Veſſel, and ſhall not be permitted to " ſue for or recover the ſame, or any Part thereof, in any Court either of " Law or Equity, and as a further Pnniſhment ſhall ſuffer ſix Months Im- " priſonment.

And by *Sect.* 7. " For Prevention of Seamen or Mariners deſerting Mer- " chant Ships or Veſſels abroad in the Plantations, or in any other Parts " beyond the Seas, which is the chief Occaſion of their turning Pirates, and " of great Detriment to Trade and Navigation, and is chiefly occaſioned " by the Owner or Owners of Ships or Veſſels paying Wages to the Sea- " men or Mariners when abroad, it it enacted, That no Maſter or Owner of " any Merchant Ship or Veſſel ſhall pay or advance, or cauſe to be paid or " advanced to any Seaman or Mariner, during the Time he ſhall be in " Parts beyond the Seas, any Money or Effects upon Account of Wages, " exceeding one Moiety of the Wages which ſhall be due at the Time of " ſuch Payment, until ſuch Ship or Veſſel ſhall return to *Great Britain* or " *Ireland*, or the Plantations, or to ſome other of his Majeſty's Dominions " whereto they belong, and from whence they were firſt fitted out; and if " any ſuch Maſter or Owner of ſuch Merchant Ship or Veſſel ſhall pay or " advance, or cauſe to be paid or advanced any Wages to any Seaman or " Mariner above the ſaid Moiety, ſuch Maſter or Owner ſhall forfeit and " pay double the Money he ſhall ſo pay or advance, to be recovered in " the High Court of Admiralty by any Perſon who ſhall firſt diſcover and " inform for the ſame."

End of the THIRD VOLUME.